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# NOMINATION OF THURGOOD MARSHALL

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HEARINGS *July 16* P-16  
BEFORE THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
NINETIETH CONGRESS  
FIRST SESSION  
ON  
NOMINATION OF THURGOOD MARSHALL, OF NEW YORK,  
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT  
OF THE UNITED STATES

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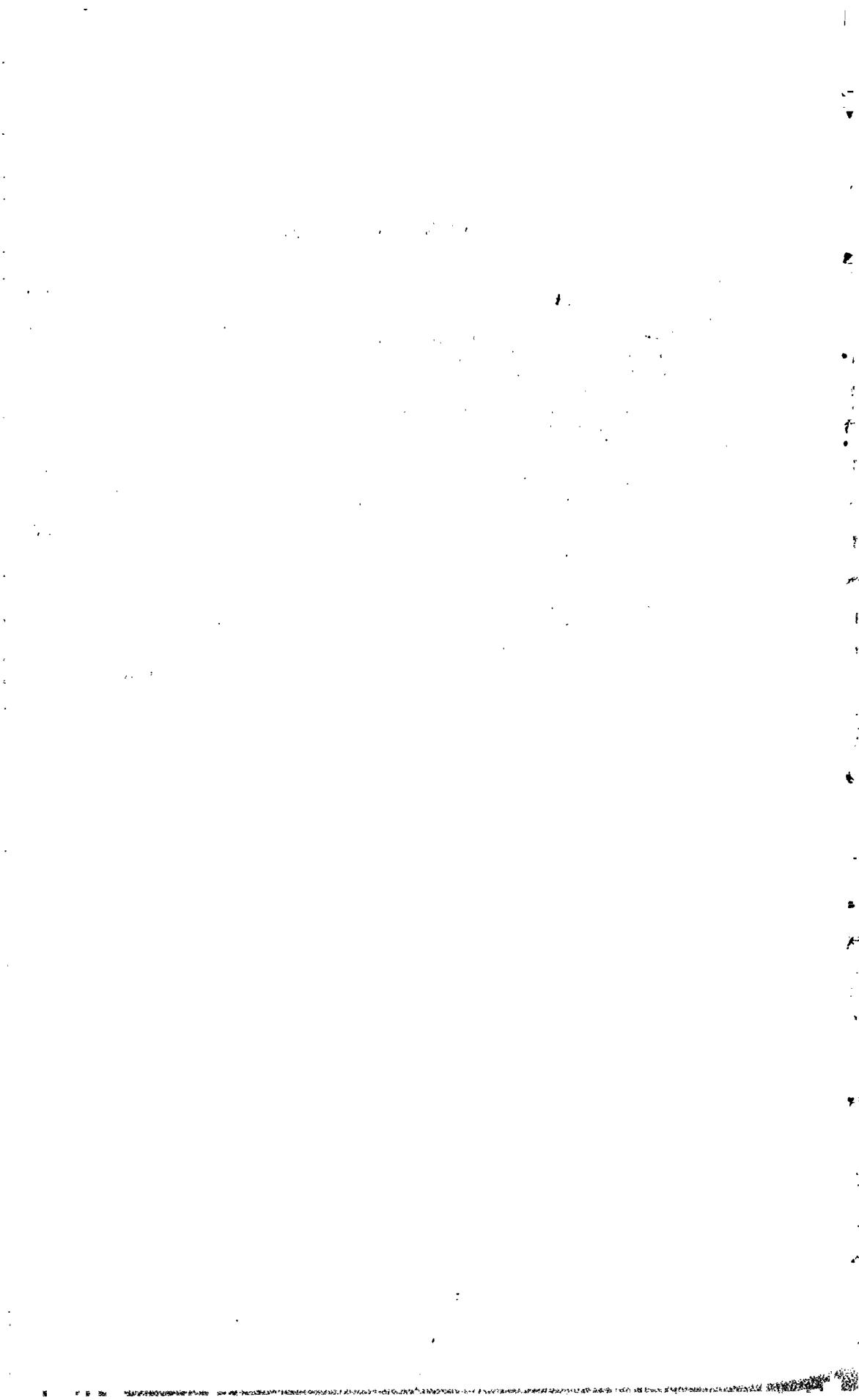
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# NOMINATION OF THURGOOD MARSHALL, OF NEW YORK, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

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THURSDAY, JULY 13, 1967

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The committee met, pursuant to call, at 11 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Hart, Kennedy, Bayh, Dirksen, Hruska, Fong, and Thurmond.

Also present: John H. Holloman, chief clerk.

The CHAIRMAN. This hearing has been scheduled for the purpose of considering the nomination of Thurgood Marshall to be an Associate Justice of the Supreme Court.

Notice of the hearing was published in the Congressional Record, July 10, 1967.

Senator Javits, by formal notification, approves the nomination.

Senator Kennedy, by formal notification, approves the nomination.

By letter dated July 10, 1967, the Standing Committee on Federal Judiciary of the American Bar Association, states it is of the view that the nominee is "highly acceptable from the viewpoint of professional qualification."

Senator Javits?

## STATEMENT OF HON. JACOB K. JAVITS, U.S. SENATOR FROM THE STATE OF NEW YORK

Senator JAVITS. Mr. Chairman, I have the honor, with my colleague Senator Kennedy, to appear before the committee in support of the nomination of the President of Thurgood Marshall of New York, now Solicitor General, to be an Associate Justice of the Supreme Court.

This is the third time, Mr. Chairman, that I have had the honor and been allowed by the Chair to appear to support an appointment of Judge Marshall. I had the honor of advocating his appointment as judge of the U.S. Circuit Court, Second Circuit, to be Solicitor General, and now to be a Justice of the Supreme Court.

He is one of the most distinguished lawyers in the land. He has fought very hard to vindicate every aspect of the Constitution, and with remarkable success, especially in the difficult fields in which it has developed since the early 1950's. And by now, Mr. Chairman, if there was anything hidden or clandestine in the life of Judge Marshall that should be revealed to the public gaze, it would have come out.

On the contrary, his every public experience has been most creditable to him and to the country, and he is acknowledged as one of our leading members of the bar.

I think it is a great thing for our Nation that the President has now named him to one of the highest offices in the land, the cherished dream of every lawyer, which he richly deserves, through a lifetime of dedication and the sharpening and acquisition of professional skill.

In addition, he represents a historic first for our Nation. It is a matter of great pride to me, in the course of my Senate service, to be able to commend him in every way, professionally and personally, as I have known Judge Marshall for probably two decades, to the committee and to the Senate for confirmation in this very high office.

Thank you, Mr. Chairman.

#### STATEMENT OF HON. ROBERT F. KENNEDY, U.S. SENATOR FROM THE STATE OF NEW YORK

Senator KENNEDY. Mr. Chairman, I am honored to join with my colleague, Senator Javits, in presenting Judge Marshall to the committee this morning.

In nominating Judge Marshall, President Johnson has selected for our highest court a man who brings with him not only a long and distinguished career of widely varied legal experience, but also a man whose work has symbolized and spearheaded the struggle of millions of Americans for equality before the law.

In his decades of work as counsel to the Legal Defense Fund of the NAACP, he was a familiar figure in the halls of the Supreme Court, arguing case after case of petitioners seeking vindication of their constitutional rights. He was counsel for the petitioner in the historic case of *Brown v. Board of Education*, and in a long list of other cases which are milestones in our recent constitutional history.

It was my privilege to work with Judge Marshall during my years as Attorney General of the United States, and to recommend him to President Kennedy for appointment to the U.S. Court of Appeals for the Second Circuit. He served with distinction on that court, in the tradition established before him by such distinguished judges as Learned Hand, Augustus Hand, Jerome Frank, Carroll Hincks, and Charles Clark.

Now, after serving as Solicitor General of the United States, Judge Marshall stands before this committee as the nominee to succeed the Honorable Tom C. Clark as Associate Justice of the United States. He brings with him a unique combination of experience as appellate judge and Supreme Court advocate for both private petitioners and the United States. In my judgment, therefore, he is immensely qualified for our Nation's highest court, and I urge the committee to report his nomination favorably.

I have known him for some period of time, and have the greatest respect for him, Mr. Chairman and members of the committee. I know what a fine judge he made, and I know what an outstanding job he did as Solicitor General of the United States. I know he is a man of integrity and a man of honesty, and a man of ability, and I commend him to the committee.

**STATEMENT OF THURGOOD MARSHALL, NOMINEE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES**

The CHAIRMAN. Are there any questions?

Judge Marshall, is this biography of yours correct?

Judge MARSHALL. Yes, sir.

The CHAIRMAN. That will be placed in the record at this point.  
(The biographical sketch of Judge Marshall follows:)

**THURGOOD MARSHALL**

Born: July 2, 1908, Baltimore, Md.

Education:

1925-30: Lincoln University, Lincoln University, Pa., A.B. degree.

1933: Howard University, Washington, D.C., LL.B. degree.

Bar: 1933: Maryland.

Experience:

1933-36: Private practice of law, Baltimore, Md.

1934-36: NAACP, counsel, Baltimore branch.

1936-38: NAACP, assistant special counsel.

1938-50: NAACP, special counsel in charge of legal cases.

1950-61: NAACP, director-counsel of Legal Defense & Educational Fund, Inc., New York City.

1951: Investigator of courts martial cases involving Negro soldiers in Japan and Korea.

January-February 1960: Consultant at Constitutional Conference on Kenya at London, England.

April 1961: Head of U.S. delegation at celebration of the independence of Sierra Leone, West Africa.

October 5, 1961: Recess appointment, U.S. circuit judge, second circuit.

October 14, 1962: Confirmed by Senate and appointed U.S. circuit judge for the second circuit.

August 11, 1965, to present: Solicitor General of the United States.

Marital status: Widower, married, 2 sons.

Office: U.S. Department of Justice.

Home: 64 G Street SW., Washington, D.C.

Senator McCLELLAN. Is the nominee going to submit any statement? Maybe he wishes to make a statement?

The CHAIRMAN. Do you wish to make a statement?

Judge MARSHALL. I don't wish to, Mr. Chairman and members of the committee, but I am perfectly willing to answer questions.

Senator McCLELLAN. Very well, you don't care to make any statement.

Mr. Chairman, I have a few questions that I wish to ask. They do not go to the legal ability or training or character of the nominee, but they do deal with a critical condition in this country today, and I would like to ascertain the philosophy of the nominee with respect to something that I believe is endangering our country. I will ask you a few questions that come within that category, Mr. Solicitor.

First, I would ask you if you do not agree with me that the mounting incidence of crime in this Nation has reached a critical stage.

Judge MARSHALL. I agree with you absolutely.

Senator McCLELLAN. Do you regard it as having reached proportions where it endangers or jeopardizes the internal security of our country?

Judge MARSHALL. I would say I am in general agreement with this one point, but I think I should make my position clear. I am as worried

as anybody about the mounting rate of crime, but I do not think it has yet reached the point where it cannot be dealt with and dealt with affirmatively.

The CHAIRMAN. How do you plan to deal with it?

Judge MARSHALL. I think there are quite a few ways, Mr. Chairman. No. 1, we have to work at the causes of these outbreaks of crime. No. 2, we have to build up our law enforcement machinery. Three, we have to improve on our scientific approaches to crime. Above all, we have to educate the public.

I remember, for example, the automobile thievery and all, which is caused so much by people leaving keys in cars, and things like that. I don't have any single solution for it, but I think it is something that deserves the attention of every American in the country, regardless of his position.

The CHAIRMAN. Senator McClellan.

Senator McCLELLAN. Now back to the line of questioning that I was pursuing. Is my understanding correct that as of now, you do not think that the crime rate in this country has reached proportions where it endangers and jeopardizes our internal security?

Judge MARSHALL. Endangers internal security. I would understand that to mean that there was going to be a revolution or something; and I certainly don't see that. I just don't understand your question.

Senator McCLELLAN. Well, I'll put it in other terms. Do you think it is reaching proportions where we will have a reign of lawlessness and chaos?

Judge MARSHALL. I would say that I have great faith in the ability of our country to meet any emergency, and I—

Senator McCLELLAN. I am not asking what the country can meet, Mr. Solicitor. I am trying to determine your attitude or sense, realization, of the danger confronting this country with respect to this enemy of our security.

Judge MARSHALL. I think it is a great danger. I also think it is a sufficient danger to require every arm of the Government to do everything that is constitutionally permissible to stop the increase, and indeed to cut it down.

Senator McCLELLAN. And that includes the Supreme Court.

Judge MARSHALL. No question about it.

Senator McCLELLAN. Now, if you say it has not yet, in your judgment, reached the proportions that I have suggested, do you agree with me that the trend is strongly in that direction, and unless reversed, unless halted and reversed, it will soon reach such proportions?

Judge MARSHALL. My trouble there, Senator, is that I don't have the facts that you have. I am just trying—

Senator McCLELLAN. I would think you would have more than I have.

Judge MARSHALL. Well, I am not in the prosecutorial side of the Government, so—

Senator McCLELLAN. Are you not very closely identified with the Justice Department, where all the facts are available?

Judge MARSHALL. But my particular job is not enforcement.

Senator McCLELLAN. You have not acquainted yourself with those facts, then?

Judge MARSHALL. I am now engaged in reading the last two volumes of the report of the Crime Commission. I have not even completed that yet, because I just have not had the time.

Senator McCLELLAN. Then, if I understand, you do agree that the national security could be or can be endangered by the amount of crime, of serious crime, that may be committed?

Judge MARSHALL. In the future, there is a possibility. But I have got faith in my Government. I know my Government will not let it happen.

Senator McCLELLAN. Well, I have seen a lot of things happen that I did not think would ever happen, too. But let us not talk about faith for the moment; let us talk about facts. I am hopeful, too; I have faith that we will do something about it. But I do not think the problem will evaporate and go away unless we do take those actions. That is why I wanted to try to see whether you and I agreed upon the imminence of the danger unless action is taken.

Judge MARSHALL. I agree with you on the imminence of the danger. I cannot agree with you as to the degree, because I don't have enough facts.

Senator McCLELLAN. You do not, then, challenge the degree?

Judge MARSHALL. No, sir.

Senator McCLELLAN. You just say you don't know. Am I correct?

Judge MARSHALL. Yes, sir.

Senator McCLELLAN. One other question, Mr. Solicitor, along this line. We have recommendations to the Congress—and I will be specific, so there will be no misunderstanding about the question, without going into the merits of the proposed legislation at the moment. But we have legislation pending that would permit the Department of Justice to use certain instrumentalities in the protection of national security. That is the term that is used, "national security." And I am speaking of electronic eavesdropping and wiretapping, as you know.

Now, it is recommended that we enact legislation to permit the use of that method, of that technique, by the Attorney General, in cases of national security. I make that as a premise for this question: Do you agree with me that crime has now reached or is about to reach the level of incidence where it is a threat to national security?

Judge MARSHALL. I would not be commenting at all on the legislation that is pending in Congress.

Senator McCLELLAN. I do not ask you whether we should pass the legislation.

Judge MARSHALL. Yes, sir.

Senator McCLELLAN. I only ask you whether, in your judgment—and you are going to be in a position of passing on these things. This is not a given case, but this is for my information, to ascertain your judgment with respect to the matter of national security, where the crime could endanger national security.

Do you believe the incidence of crime can reach the level where it would endanger national security—using that term as used in the recommendations of this legislation.

Judge MARSHALL. Well, No. 1, I said before that I don't have the facts that would lead me to say as to whether it has reached that stage or not. No. 2, if Congress makes a definite finding, then that finding

would be given the weight that is entitled to be given to any other congressional act of Congress. But whatever Congress or any other agency does to protect national security still must be done within the framework of the U.S. Constitution.

Senator McCLELLAN. Well, there is no definition in this proposed legislation as to what national security means. It is very loose. But I am assuming that taking it in its context as now, primarily the assumption is that it refers to external force or external enemies that may be involved in trying to undermine the security of this country.

But what I am thinking in terms of, Mr. Solicitor—and these are not for the purpose of being catch questions or anything like that. I know you are perhaps better informed than I am in this field. But I say to you frankly and without any reservation that I am alarmed at the crime increase in this country. If you will just take your pencil and make a little, simple calculation on the basis of the Department of Justice reports—I am talking about the FBI, the rise in incidence of crime in this country—and calculate it just like you would compound interest for the next 10 years, you will see that we are on the precipice of reaching a crime incidence rate in this country that would destroy our internal security, in my judgment.

I am trying to ascertain if you have any apprehensions along these lines and sense the danger that I do in this area. Because you are going to be in a position and have a responsibility on this court to do a great deal, in my judgment, toward law enforcement in this country.

Judge MARSHALL. I say in answer, Senator, that I am as alarmed, I am sure, as you are. But I am equally alarmed that whatever is to be done by governmental agencies to meet this situation has to be done within the framework of the U.S. Constitution. That is my only position.

Senator McCLELLAN. Nobody quarrels with that. But we have differences of opinion as to what the Constitution says and means. And you are going to be in a position where, as one man, you can say what the Constitution means and make it become the law of the land. Therefore, I am concerned about your philosophy. I have made mistakes in the past, I admit, in this area, by not inquiring further and deeper. But the time has come when I can no longer be silent and not inquire into the philosophy of those who are nominated to this high position. I want to know what their thinking is and what their attitude is. Because I cannot otherwise protect what I believe is necessary to preserve in our society, if we do not weight these factors.

Would you not agree that the government, whether local, state, or Federal, has an obligation to protect its citizens and to insure their safety in the conduct of their private affairs?

Judge MARSHALL. Certainly. I agree.

Senator McCLELLAN. We all agree on that, don't we?

Judge MARSHALL. Sure.

Senator McCLELLAN. Do you believe that society, in an effort to afford the fullest possible reach of individual rights, however idealistic, to all citizens, must sacrifice its security, its safety, and indeed its very well-being, in order to provide every conceivable so-called right to suspects in criminal cases?

Judge MARSHALL. The question was so long, Senator, that I think I—

**Senator McCLELLAN.** I will repeat it. Do you believe that society, in an effort to accord the fullest possible reach of individual rights, however idealistic, to all citizens, must sacrifice its security, its safety, and indeed its very well-being, in order to provide every conceivable so-called right to suspects in criminal cases?

**Judge MARSHALL.** No; I don't agree.

**Senator McCLELLAN.** Good. I hope that will have some influence with you, as you weigh some of these cases, comparable cases that have gone to the Supreme Court, where we have had 5-to-4 decisions, where one man could change what you talk about, the Constitution. It is one man's decision that often determines what the Constitution is. You recognize that, do you not?

**Judge MARSHALL.** I don't quite agree, Senator. The nine men meet in a conference, and there is considerable give and take in the conference room. And where the vote ends up by one, nobody knows how it started off.

**Senator McCLELLAN.** All right, we will say five, then. We will put it in the category of five, if that will give more comfort to you. Five men can say today what the Constitution is, notwithstanding all differences of opinion; is that not correct?

**Judge MARSHALL.** I would say technically that is correct.

**Senator McCLELLAN.** Technically and practically, so far as the effect of it: is that not true?

**Judge MARSHALL.** Well, the majority rule controls the vote of the Supreme Court, as it does in every other court.

**Senator McCLELLAN.** That is why I say one man on that Court in these cases could interpret the Constitution differently, could he not, and thus the vote of one man would have changed what is today called the law of the land in a number of these cases?

**Judge MARSHALL.** I would say that that has happened, could happen.

**Senator McCLELLAN.** Well, that is correct. What I have said is correct; is it not?

**Judge MARSHALL.** It goes without saying.

**Senator McCLELLAN.** It is an obvious fact; is it not?

**Judge MARSHALL.** I think so.

**Senator McCLELLAN.** Yes. Do you believe that an individual, in his role as an integral member of society, must perform sacrifice a portion of his individual rights for the collective security and safety of all?

**Judge MARSHALL.** I don't understand the question, sir.

**Senator McCLELLAN.** Well, are there circumstances where the individual must give up some rights in order to contribute to the security of all?

**Judge MARSHALL.** Well, there are instances of that type, as witness the soldiers.

**Senator McCLELLAN.** Well, we go out here and conscript our boys and send them to far lands to fight.

**Judge MARSHALL.** That is what I said.

**Senator McCLELLAN.** We do not ask them to do it voluntarily. Some of them do, many of them. Many of them have convictions about it. But we have the power and the Government exercises the power, in

order to have the security to keep our country secure and the freedoms that we have fought for and cherished, we conscript them against their will and send them across the seas to foreign lands to fight.

So, that is the most obvious example of where citizens are required sometimes not only to give up their rights but to give their lives for the security and welfare of all. Is that not true?

Judge MARSHALL. That is true.

Senator McCLELLAN. That is true.

Then, is it not necessary sometimes, in protecting our internal security, that we exact some obligation, some sacrifice of rights, so-called sometimes, and other times legal rights, on the part of citizens, on the part of individuals, in order to contribute to the security of all?

Judge MARSHALL. Not if it violates the Constitution.

Senator McCLELLAN. Well, the Constitution is what you are going to say it is.

Judge MARSHALL. No, sir. The Constitution is what is written.

Senator McCLELLAN. Yes, but it becomes what the Supreme Court says it is; does it not?

Judge MARSHALL. It does, after the Supreme Court has——

Senator McCLELLAN. Well, the Supreme Court changes its mind, does it not, on the question of the Constitution? And has it not done so, and does the record not so reflect?

Judge MARSHALL. Yes, the Supreme Court has many times reversed itself.

Senator McCLELLAN. Reversed itself on constitutional question, has it not?

Judge MARSHALL. I would say so, yes.

Senator McCLELLAN. Well, the Constitution has not changed. It is just like it was written when they made their first decision as when they made their last.

Judge MARSHALL. But I am sure, Senator, you will agree with me that in many cases, it depends on the way the case is presented, the briefs, the arguments, and then the independent research of each independent judge.

Senator McCLELLAN. Yes, but Mr. Solicitor, take all of that into account; the Constitution, the words, the spirit, the intent of it is right there as it was before they did their research and changed their minds; is that not true?

Judge MARSHALL. The words are exactly the same.

Senator McCLELLAN. That is right.

Judge MARSHALL. And the debates are the same.

Senator McCLELLAN. So do not say that the words are still as they were written, without any qualification. It is as it was written and as the Supreme Court as of today interprets it; is that not correct?

Judge MARSHALL. I think that is correct.

Senator McCLELLAN. That is correct, of course.

Now, I wanted to ask you about two or three specific things. You know a number of cases that we have had resulted in a 5-to-4 decision, dealing with criminal law and dealing with constitutional questions, where as I have tried to illustrate here, the decision of one man has become the law of the land and then become the Constitution as of the time. I am sure you are familiar with these cases, but I want to ask you:

Do you subscribe to the philosophy, as expressed by a majority of the Court in the *Miranda* case, that no matter how voluntary a confession or incriminating statement by a defendant might be, it must be excluded from evidence unless the prescribed warnings of that opinion were given?

Judge MARSHALL. Well, Senator, in the first place, I am familiar with that case because I argued one of the four cases, the *Westover* case, and on behalf of the U.S. Government I urged that the *Westover* case not be reversed, and that the confession be read. Respectfully, I cannot answer your question, because there are many cases pending in the Supreme Court right now on variations of the so-called *Miranda* rule, and I would suspect that in every State of the Union there are other cases on different variations of the *Miranda* rule that are on their way to the Supreme Court, and if I am confirmed, I would have to pass on those cases.

Senator McCLELLAN. I am sure you would.

Judge MARSHALL. I would not like to give my opinion—

Senator McCLELLAN. I will not ask you about any presently pending case here. This is a case that is history. It is the law of the land today. Now, we know that Supreme Court Justices change their minds. We also read daily about some liberal being appointed to the Court, or a conservative, or this appointment is going to change the balance in the Court, and so forth, or it will not change it; it will strengthen the liberal view or the conservative view, as the case may be.

I have a responsibility here, and I want to perform it conscientiously. I admit I have made mistakes in the past in this area. But I think it has become so critical that we who have this responsibility here of upholding confirmations need to have some idea, at least glimpse, some impression as to the trend of the thinking and the philosophy of the one who is to receive confirmation.

Judge MARSHALL. Well, in this case you have the best evidence you could get, which would be the brief that I filed in the *Westover* case, which not only gave the views of the U.S. Government. It gave my personal views.

Senator McCLELLAN. Then I take it you disagree with that philosophy of that opinion.

Judge MARSHALL. I am not saying whether I disagree with it or not, because I am going to be called to pass upon it. There is no question about it, Senator. These cases are coming to the Supreme Court.

Senator McCLELLAN. You say you do not disagree or cannot make any comment on any decision that has been made in the past?

Judge MARSHALL. I would say that on decisions that are certain to be reexamined in the Court, it would be improper for me to comment on them in advance.

Senator McCLELLAN. I am not talking about cases pending. Here is a decision that changed the law of the land, if I have any understanding of it at all. I do not agree with it. If you do agree with it, I would like you to say so. If you do not feel you can make any expression, that is up to you. I simply wanted to give you the opportunity.

Judge MARSHALL. I respectfully say, Senator, that I will have to rely on the brief that I filed.

Senator McCLELLAN. Well, I have not read your brief. But do you mean to convince me without your saying, or to inform me without your answering my question; is that what you mean?

Judge MARSHALL. No, Senator. I appreciate your difficulty, and I have one, too.

Senator McCLELLAN. I grant you that. We both have ont.

Judge MARSHALL. My difficulty is that from all of the hearings I have ever read about, it has been considered and recognized as improper for a nominee to a judgeship to comment on cases that he will have to pass upon.

Senator McCLELLAN. All right, I want to ask you about another one. The Chair wanted to ask you some questions now. I yield to the Chair.

The CHAIRMAN. Judge, I have a clipping from a paper, the Daily Texan for Sunday, March 19, 1967, in which you were interviewed, which reads in part as follows:

Turning to criminal procedure cases, Marshall spoke on *Escobedo v. Illinois* and *Miranda v. Arizona* litigation. The Court held in those cases that a person suspected of a crime has a right to counsel, confessions obtained in violation of the ruling cannot be used, and the suspect cannot be made to incriminate himself.

Criticism of these cases, especially by police officials—

Now, this is quoting you—

have no basis, Marshall said. He reported he had seen no studies indicating the rulings have adverse effects on investigation of crime.

Did you make that statement?

Judge MARSHALL. I think that is a reasonable statement. But you realize, Senator, Mr. Chairman, that was made at the University of Texas Law School.

The CHAIRMAN. That is right. You were interviewed by the dean of the university.

Judge MARSHALL. The University of Texas Law School.

The CHAIRMAN. That is right.

Judge MARSHALL. I was called down there to discuss these cases with them, and I was trying to give advice to these young students.

The CHAIRMAN. Well, you do have an opinion on the exact question which Senator McClellan has been asking you.

Judge MARSHALL. That view was as the Solicitor General of the United States talking to law students, trying to give them the benefit of my advice, not as a nominee for this position, not as Solocitor General, but as a man who knew some law.

The CHAIRMAN. Well, the proof of it is that you did agree with the *Miranda* case and the *Escobedo* case.

Judge MARSHALL. I don't think that I have ever said I disagreed with it. And as for the statement where I said it wasn't in disagreement among the people, the latest report of the Crime Commission does show that 65 percent of the people feel that the *Miranda* rule has not done any harm at all.

The CHAIRMAN. But you stated you would rely on the brief, the reasoning in your brief, you rested on that, when after all, your position was different from what it was in the brief that you filed.

Judge MARSHALL. I don't think it was different, sir. In the brief I filed, I said that the FBI for years had always given that ruling, the warning, and they had given the warning. And we will all agree that their performance has not been harmed by the giving of the warning. I said that in my brief, and that is just what I told them.

Senator KENNEDY. Would the Chairman yield?

The CHAIRMAN. Yes.

Senator McCLELLAN. Wait just one moment, gentlemen. I wanted to get through with my line of questioning. I am willing to yield, but I do not want to lose my rights here.

The CHAIRMAN. Go ahead.

Senator McCLELLAN. I am going to yield to the Senator from Massachusetts.

Senator KENNEDY. I appreciate that. This is just on your line of questioning.

Actually, Mr. Solicitor General, there would have been nothing improper for you to express an opinion down in Texas Law School, because you were not nominated to the Supreme Court at that time.

Judge MARSHALL. That was the position I took.

Senator KENNEDY. So, actually, now having received the nomination, then I assume that you have a different responsibility as far as commenting on these matters.

The CHAIRMAN. No; that is not what he said. His testimony was that his opinion was filed in the brief.

Senator KENNEDY. I am just commenting on this line of questions, on any opinion that he might have had prior to the time that he received the nomination; and as that is related to this line of inquiry, I think it is of some help to have that clarified.

Judge MARSHALL. Well, the answer to Senator Kennedy is that once the President announced the nomination, I have not made any statements to anybody about anything.

[Laughter from audience.]

Senator KENNEDY. But the point that I am driving at is that you have, as a nominee, a different responsibility, as I understand it, as to commenting on questions that might come up before the Court—

Judge MARSHALL. I agree with you, sir.

Senator KENNEDY. Then you would have had as the Solicitor General.

Judge MARSHALL. Senator, I think it is entirely different, because before I went on the bench in the second circuit, I doubt that there were any important opinions of the Supreme Court that I didn't comment on one way or the other. Once I became a judge of the court of appeals, I did not comment. When I became Solicitor General, on occasions, restricted for the most part to law schools, I thought I had the right and the duty to explain to law school students the answers to their questions when they wanted to know what the Supreme Court meant. But I don't think it is proper, as a nominee for the Supreme Court, to express my opinion. That is my position.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator McCLELLAN. May I continue with my questions?

The CHAIRMAN. Yes. I wanted to straighten out the record.

Senator McCLELLAN. I was trying to pursue a line of questioning here, to ascertain your personal views with respect to some of these

5-to-4 Court decisions about which I have serious doubt, and with some of which I completely disagree, because I think they have weakened the arm of law enforcement in this country, and I think they will contribute further to the trend that is almost now out of control, in the rising incidence of crime.

As I said a while ago—you speak of all the agencies of Government. I wanted to know if it included also the Supreme Court. Because there is more power in the Supreme Court today, within the Constitution as I interpret it, to contribute effectively toward law enforcement, than is presently being used and exercised by the Court. Therefore, I have wanted to ascertain whether those of us who are concerned about these Court decisions and the rise in crime and the trend of these Court decisions could have any hope of a change in the situation when you become an Associate Justice.

I do not ask you these questions for any other purpose than to try to meet a responsibility here before I again vote to confirm someone on that Court whose philosophy I think, if pursued without restraint and without being checked, would contribute to a menace that threatens our society.

Do you subscribe to the philosophy expressed in the majority *Miranda* opinion, that a voluntary confession or incriminating statement must be excluded from evidence, even though the defendant was thoroughly familiar with his constitutional rights to silence and to the assistance of counsel?

Judge MARSHALL. I would say again, I respectfully state to you, Senator, that that is certainly a case that is on its way to the Supreme Court right now.

Senator McCLELLAN. But it is already ruled on. This is the ruling of the Court.

Judge MARSHALL. But there are other cases. The *Miranda* case is not the end. The case itself says in three or four places in the opinion that they do not know what Congress intends to do, they do not know—

Senator McCLELLAN. I am not talking about legislation. I am asking you now about the Constitution. Do you think that the Constitution requires that that evidence be excluded?

Judge MARSHALL. I cannot comment on what is coming up to the Court.

Senator McCLELLAN. But this has already been there.

Judge MARSHALL. But there are hundreds of other ones on the way that are variations of this.

Senator McCLELLAN. Of course there are, but this is specific and has been done.

Judge MARSHALL. Well, Senator, I respectfully say that it would be improper for me to tell you and the committee or anybody else how I intend to vote.

Senator McCLELLAN. It is not improper, may I say, for me to weigh your reluctance to answer.

Judge MARSHALL. It certainly is not.

Senator McCLELLAN. Very well.

Judge MARSHALL. It certainly is not. You have a perfect right to try to find out—

Senator McCLELLAN. I will try to pursue one or two further questions.

Do you subscribe to the philosophy that the fifth amendment right to assistance of counsel requires that counsel be present before the police can interrogate the accused?

Judge MARSHALL. That is a part of the *Miranda* rule.

Senator McCLELLAN. Yes.

Judge MARSHALL. And as I say, I can't comment, because it is coming back up.

Senator McCLELLAN. I have to wonder, from your refusal to answer, if you mean the negative.

Judge MARSHALL. Well, that is up to you, sir. But I have never been dishonest in my life.

Senator McCLELLAN. I did not say that. But you lead me to wonder why I cannot get the answer.

Senator HART. Would the Senator yield?

Senator McCLELLAN. Yes.

Senator HART. I think this points up some of the dilemma here. You make the point that you have never been dishonest in your life. The dilemma is that as a lawyer, we are free to make an expression of whether a court opinion is good or bad. We may or may not have read the briefs and records, but that does not inhibit us. As a judge, you speak only after reading the briefs and records and listening to the argument, and that is all you say. You put it in writing, period.

Now, as a lawyer nominated to the Court, you are hung with this dilemma. You do not want to box yourself in by a statement here, because after you read the briefs and records and arguments, you may find that your intellectual training suggests that you might have been wrong here, that there is additional illumination developed as a result of the argument. Yet, you would be hung on exactly what you are saying, having told us that your impression as a lawyer is such and such about a case. If as a judge later you discover that if you had known now what you knew then, your answer would have been different, you are inhibited from reaching a right judgment as a judge because you are afraid somebody in this committee will confront you with your previous statement.

That is the dilemma I am afraid we are facing here.

Senator ERVIN. But this is a dilemma he could get out of very easily by saying, "I am wiser today than I was yesterday."

Judge MARSHALL. Well, Senator, from my experience on the second circuit, I know I have changed my mind about a case after I have reread the briefs, and then made my independent check. I have changed my mind. But once I put it on paper, that was it.

Senator McCLELLAN. If I may be permitted to proceed—I do not want to take all the time here, and I will forgo some of my questions. I have opened the issues here, and probably others will have questions along the same line, Mr. Solicitor. I do not want to monopolize the time here.

But while you are confronted with a dilemma, you do have the opportunity to change your mind and do something about it, once you get on the Court. We do not.

Judge MARSHALL. I appreciate that.

Senator McCLELLAN. You are there for life, until you choose to do something else. You can correct your mistake if you make one, if you

think you have made one. We cannot. That is why I have got to try to be certain if I can. And if you cannot answer these questions as to your own view, then of course I have to just assume—I accept your statement that you have never been dishonest here. No one thinks of such a thing. I only ask to get your honest viewpoint. That is what I seek, if I can get it. If you tell me you cannot give it or you are not going to give it, very well. But I would ask you another question along the same line.

Do you subscribe to the philosophy that the fifth amendment right to assistance of counsel requires that the counsel be present at a police lineup?

Judge MARSHALL. My answer would have to be the same. That is a part of the *Miranda* case.

Senator McCLELLAN. Well, I must say to you—I will not pursue it any further at the moment, but I must say to you that this leaves me without the necessary information I need affirmatively to consent to your appointment. I need it. You have the background, you have the training, and you have the ability. But I do not care who it is that comes before this committee hereafter for the Supreme Court; I am going to try to find out something about their philosophy and not take the chances I have taken in the past. I mean that. This is a fundamental principle and an issue here that I think I have a grave duty to perform.

I have asked these questions in all good faith. I thank you for your attention. I regret I have not been able to get an answer that would disclose to me your viewpoint on these vital issues.

Judge MARSHALL. I am very sorry, Senator.

Senator McCLELLAN. That is all, Mr. Chairman.

The CHAIRMAN. The committee is going to quit at 12 o'clock, because there will be a number of rollcall votes this afternoon.

Senator HART. Mr. Chairman?

The CHAIRMAN. Yes.

Senator HART. Lest I miss the next meeting, although I do not anticipate I would—

The CHAIRMAN. We will return in the morning.

Senator McCLELLAN. I cannot be here.

Senator HART. I would like to make just a very brief statement for the record, if I may. And this is like entering the verdict before the briefs and records have been read.

But it was my privilege, Mr. Chairman, to report favorably the nomination of Thurgood Marshall for the second circuit court. I think that his service own that court and his experience and performance as Solicitor General make it even more clear that the Senate will do itself honor, the Court will be graced, and the Nation benefited by his confirmation to the Supreme Court. I would regard it as a very happy day that I can report the nomination again.

Judge MARSHALL. Thank you, Senator.

Senator KENNEDY. Mr. Chairman?

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. I would like to make a brief statement as well.

When this committee meets later to vote on the confirmation of Mr. Thurgood Marshall as a Justice of the U.S. Supreme Court, it will indeed be a most historic occasion. History will be made not so much

because we will be recommending the confirmation of the first member of the Supreme Court who is a Negro, but because we will be recommending the confirmation of a man who is uniquely qualified and, one might say, perfectly prepared to become a Supreme Court Justice.

For the first time in history, we have a man who established a national reputation as a leading trial and appellate litigator, a man who established a distinguished record as a Federal appellate judge, and a man who has served as the Government's chief appellate litigator, in the Office of Solicitor General.

Mr. Chairman, I cannot think of any better preparation and qualification for the Supreme Court, and I do not know of any Supreme Court nominee whose record matched Thurgood Marshall's in these respects.

Judge Marshall is before us today because he is an outstanding lawyer, judge, and Solicitor General, not because he is a Negro; but we cannot ignore the fact of his race. His reaching the very highest pinnacle of achievement in his profession is a symbol of the progress we as a nation have achieved in assuring all of our citizens equality of opportunity. Yet, at the same time, his success highlights how far we still have to go.

Just yesterday, for example, in Boston, the NAACP announced its plans to file suit in 11 cities because Negro workers are still being denied access to employment opportunities in construction industries. Certainly one of the most important tasks of the 90th Congress will be to close the gap between these two disparate phenomena.

Mr. Chairman, I would like to add one final thought. Judge Marshall has undergone nomination hearings before this committee twice in the last five and a half years: on the first occasion, he was nominated to the Second Circuit; and on the second, he was nominated Solicitor General. In both of those hearings, this committee heard ample proof of his fitness for high legal office, and his record subsequently has only added to his qualifications. I therefore think we can move expeditiously ahead with his confirmation, and I want to congratulate both Judge Marshall and President Johnson on this fine appointment.

I would also, Mr. Chairman, like to introduce into the record a statement of Senator Dodd in support of the nomination of Mr. Marshall.

The CHAIRMAN. That will be granted.

(The statement of Senator Dodd is as follows:)

STATEMENT SUBMITTED BY SENATOR DODD, OF CONNECTICUT

Mr. Chairman, distinguished fellow colleagues on the Judiciary Committee, I consider Thurgood Marshall to be one of the really great and distinguished American men of this century.

In recent years, our Committee has been privileged to hear nominations to the Supreme Court of some of the country's finest lawyers and legal minds.

Thurgood Marshall's nomination is fully in keeping with this tradition of excellence.

Indeed, Thurgood Marshall is uniquely qualified for this high position.

He has served in public office with great distinction, as an appeals judge and as Solicitor General.

And he has been a towering figure in the landmark cases striking down discriminatory laws and practices, in the litigation and the decisions which lie at the very heart of American life and have brought us closer in our everyday life to those principles for which we stand.

Thurgood Marshall's record in law school foreshadowed his exemplary career in the law and in the public service.

His compassion, his advocacy, his concern with the human aspects—with the broad scope, rather than the trivia—of the law have helped write wonderful new chapters in American justice and jurisprudence.

The character and the career of Thurgood Marshall embody the best in American life and the best in American law.

His imprint on justice and jurisprudence, once he assumes his position on the Court, will without a doubt be as constructive and distinctive as that of his previous years of service to his fellow man.

Mr. Chairman and members of the Committee, I heartily and strongly recommend prompt approval of Thurgood Marshall's nomination to the Supreme Court.

SENATOR FONG. Mr. Chairman, I would like also to make a statement at this time.

THE CHAIRMAN. First, Senator Bayh?

SENATOR BAYH. Mr. Chairman and members of the committee; just let me say very quickly that I followed with a great deal of interest the penetrating interrogation or questioning, searching analysis, of my distinguished colleague from Arkansas, knowing very well that he has a loud voice in the Congress in this area of crime prevention. I must say that inasmuch as our subcommittee on constitutional amendments has meant some of us have been hearing testimony on this same area, I share his concern about crime, and indeed some of these very problems.

However, I must say that I differ slightly with my friend from Arkansas, inasmuch as I am also appreciative of the deep quandary described by Senator Kennedy and Senator Hart facing the nominee. Without at all being critical of my friend from Arkansas, let me say that my analysis of the background of the nominee and the record of his accomplishments persuades me that the President has been wise indeed, and the country would be well served by a man of his competence.

I appreciate the fact that he has been nominated, and I trust that he will have the opportunity for a long period of service on the highest court in the land.

JUDGE MARSHALL. Thank you, sir.

SENATOR FONG. Mr. Chairman and members of the committee, I have no questions to ask. I just want to make a statement.

Judge Marshall, I want to extend to you my warmest congratulations on your nomination to the position of Associate Justice of the U.S. Supreme Court. I believe this to be a great and a historic nomination. It is my conviction, Judge Marshall, that you were nominated primarily because you have shown that you are a distinguished and an excellent lawyer and jurist. The fact that you are a Negro who has been in the forefront of many of the most significant efforts to secure our ideas of equality and brotherhood to all Americans renders your nomination of a special pride for all Americans.

There is no question in my mind that you are eminently qualified for a seat on the high court; and to me, one of the manifestations of those high qualifications is the fact that you had the very fine sense to marry a charming young lady from my native State. I am sure that Cecilia Suyat Marshall has been a source of great strength and inspiration to you.

The name of Marshall is one of the most illustrious in the annals of American constitutional law. From the time of Chief Justice John Marshall to the time of Thurgood Marshall, this Nation has made tremendous strides to make a reality the ringing words of equality in our Declaration of Independence. I am convinced that upon confirmation, another Mr. Justice Marshall will serve with great distinction. I am delighted to strongly support your nomination, to wish you godspeed, and to extend to you and your family my "Aloha" as you undertake your responsibilities.

Judge MARSHALL. Thank you, sir.

Senator HRUSKA. Mr. Chairman, I add my congratulations to the nominee for the position of Associate Justice of the Supreme Court to which he will be confirmed soon, I hope.

I have approached this matter and will approach it on the basis of the qualifications demonstrated in the discharge of official duties which have from time to time been conferred upon this nominee. Certainly, from his standpoint as a practitioner before the Supreme Court, in his capacity as Circuit Judge, and more recently as Solicitor General, he has displayed a knowledge, ability, and competence as well as temperament which qualifies him for the position for which he has been nominated.

In common with other members of the Judiciary Committee, I have received many letters, some pro and some con. Often the proposition has been expressed that the nominee is far too liberal for the writer of the letter and is the basis for opposing his nomination. There has been contention from time to time that we should preserve on the Supreme Court some balance between the so-called liberals and the so-called conservatives.

I am not sure what those terms mean, since they are meaningless until a decision attaches to a particular case. In the Supreme Court, that scope will be great, that range will be wide. However, the nominating power lies with the President of the United States; and if it is his desire to appoint someone he considers liberal, that is his prerogative. If he wants to appoint someone he considers conservative, that is also his prerogative.

I do believe that we, as members of the Judiciary Committee, should inquire into the integrity, the competence, and the record of a man and, primarily on that basis, decide whether he is suitable for service on the Supreme Court. I have gone over the file of the hearings that were conducted when the nominee was considered for the circuit court, and later for Solicitor General. I have also studied his biographical data; and I have come to the conclusion that when the proper time arrives, I shall cast a vote in favor of his confirmation to be an Associate Justice of the U.S. Supreme Court.

Judge MARSHALL. Thank you, Senator.

Senator McCLELLAN. Mr. Chairman, I understood that the committee was going to recess at 12.

The CHAIRMAN. Yes.

Senator McCLELLAN. When did you propose to reconvene?

The CHAIRMAN. At 10:30 tomorrow morning.

Senator McCLELLAN. I wanted to say that I had some further questions along the same lines with respect to other cases. But I cannot be

here tomorrow. I am committed irrevocably—I assume that is a good word—to be before the Appropriations Committee to interrogate witnesses, and so I may forego the asking of these other questions, unless I can get back. I assume other members of the committee may explore generally in some measure in the same areas in which I was asking you these questions.

I am not trying to extend the record or prolong the interrogation. So if the record closes as it is now, I would assume that your answers to the others would be the same, that you do not want to answer on the other cases along the same line.

Judge MARSHALL. I think it would be much along the same line, Senator. Any I say it regretfully, but I think it is—

Senator McCLELLAN. I regret it, too, very much.

Judge MARSHALL. But I think it is in keeping with the position that other nominees to the Supreme Court have consistently taken.

Senator McCLELLAN. It may be in keeping with what I have done in the past, to my regret. I have made mistakes in the past on both sides of the issue. I can well see that now. But as I pointed out to you a while ago, I cannot correct mine. When you make a mistake in your judgment, you can correct it. But I cannot. I have to make this record final when I vote, and I must use my best judgment, acting from the most conscientious viewpoint as I try to serve my country.

That is all, Mr. Chairman.

Senator KENNEDY. Mr. Chairman, I am wondering if we could have included at some appropriate place in the record the briefs which Mr. Marshall has filed on criminal law, any speeches he has made on the subject, any articles he may have written, so that both the members of this committee and members of the Senate would have as complete a background and knowledge of his opinion as possible.

The CHAIRMAN. Do you want to supply those?

Senator KENNEDY. Yes, I will.

(The material referred to was subsequently supplied by Senator Hart for Senator Kennedy during the continuation of the hearing on Friday, July 14, 1967.)

Senator McCLELLAN. Mr. Chairman, I would ask also that the dissenting opinion of Mr. Marshall in the *United States v. Fay*, 888 F. 2d 12, be placed in the record.

The CHAIRMAN. It will be placed in the record.

(The opinion referred to follows:)

#### UNITED STATES V. FAY

(Cited as 888 F.2d 12 (1984))

MARSHALL, Circuit Judge (with whom SMITH, Circuit Judge, concurs), dissenting:

I respectfully dissent. I cannot, and as I read the opinion in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1084, 6 L.Ed.2d 1081 (1961), we may not restrict its application to illegal searches and seizures, or convictions based upon illegally seized evidence, occurring after that decision. "It is significant that the Supreme Court did not specifically declare that the effect of its decision was to operate only in the future, as it might have done." *Hall v. Warden*, 318 F.2d 483, 490 (4 Cir. 1963). We are not free to circumscribe the application of a declared constitutional right.

The majority finds "the search and seizure was illegal and an invasion of An-gelet's constitutional rights." There is no question of the jurisdiction of the trial court and this court to pass upon the merits of the petition. Why, then, should not this conviction based upon evidence admittedly obtained by an invasion of peti-

tioner's constitutional rights, be subject to the usual form of post-conviction relief? *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961); *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). I believe it should, for the reasons set out below.

The scholarly majority opinion cites and discusses everything from Blackstone to Cardozo, from state court cases to a Learned Hand opinion to occasional expressions in other opinions of the Supreme Court in its philosophical quest for the elusive "purpose" of the exclusionary rule set out in *Mapp*. By contrast, I believe that the starting point of the inquiry must be the text of the *Mapp* opinion. And I believe that a careful examination of that text will show two things: first, that the exclusionary rule, whatever its supposed "purpose," is a fundamental constitutional guarantee and personal right of an accused and second, that the Supreme Court considered the issue of retroactivity and did not shrink from it.

The majority opinion in *Mapp v. Ohio* concluded:

"The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and to the courts, that judicial integrity so necessary in the true administration of justice." 367 U.S. at 660, 81 S.Ct. at 1694. (Emphasis added.)

The majority opinion is premised upon the proposition that the primary reason for the *Mapp* decision was to deter illegal searches and seizures in the future. This premise completely ignores the actual effect of *Mapp* in overruling *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1859, 98 L.Ed. 1782 (1949). The *Mapp* decision declared and defined the constitutional right of a defendant not to be convicted upon illegally seized evidence. All the arguments concerning the deterrent effect inherent in cases following *Weeks v. United States*, 232 U.S. 388, 34 S.Ct. 341, 58 L.Ed. 652 (1914) were discussed by Mr. Justice Clark in *Mapp*. After this discussion he recognized the constitutional right involved and stated:

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." *Wolf v. Colorado*, supra, 338 U.S. at 27, 69 S.Ct. at 1861. This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured] \* \* \* only after years of struggle," *Bram v. United States*, 168 U.S. 582, 543-544, 18 S.Ct. 188, 187, 42 L.Ed. 508 (1897). They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." *Feldman v. United States*, 322 U.S. 487, 489, 490, 64 S.Ct. 1082, 1088, 88 L.Ed. 1408 (1944). The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. Cf. *Rochin v. California*, 342 U.S. 165, 178, 72 S.Ct. 205, 98 L.Ed. 188 (1952); 367 U.S. at 656-657, 81 S.Ct. 1684.

The simple fact is that, in the view of the Supreme Court, the right not "to be convicted on unconstitutional evidence," is a fundamental ingredient of the due process of law guaranteed state criminal defendants by the 14th Amendment to the Constitution of the United States. However, the majority in this case, by focusing almost exclusively on a supposed "purpose" which it attributes to the exclusionary rule has obscured this basic point.

Again looking to the text of the Mapp opinion, which the majority scarcely mentions, we find footnote 9, at 367 U.S. 659, 81 S.Ct. at 1698:

"As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with *Burns v. State of Ohio*, 330 U.S. 252 [79 S.Ct. 1104, 3 L.Ed.2d 1200]; *Griffin v. People of State of Illinois*, 351 U.S. 12 [76 S.Ct. 585, 100 L.Ed. 891] and *Commonwealth of Pennsylvania ex rel. Herman v. Claudio*, 350 U.S. 116 [76 S.Ct. 223, 100 L.Ed. 126]. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties."

Two points are unmistakably clear about this footnote. First, the likelihood of retroactive application was clearly before the Court. Otherwise why cite such cases as Burns, Griffin and Herman, which could "affect" state convictions only if they were given retroactive effect? Second, to the extent that the footnote conditions application of the new doctrine on state procedural grounds, it no longer represents the law. *Fay v. Nola*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Thus, the only real comfort for the majority comes from the use of the word "possibly." But this may refer to a number of matters, e.g., the state procedural grounds discussed above, or the possibility that few convictions were in fact obtained by use of unconstitutionally seized evidence, which would tend to limit the Mapp holding's effect on existing convictions without impairing its retroactivity under other conditions. I believe that footnote 9, taken in context, reflects an intention that the rule of the case be applied to past as well as future convictions.

Next to the Mapp opinion itself, the most authoritative source of guidance is what the Court has done in similar situations. Without exception, retroactive application has been given to the principles of constitutional law developed over the years. Only a few months ago, as we pointed out in *U.S. ex rel. Durocher v. LaVallee*, 330 F.2d 803 (1964), the Supreme Court reversed a 1959 Ohio conviction, based on a guilty plea entered without counsel, on the basis of *Gideon v. Wainwright*, 372 U.S. 335, 88 S.Ct. 702, 9 L.Ed.2d 799 (1963), *Doughty v. Maxwell*, 370 U.S. 202 (1964). See also *House v. Mayo*, 324 U.S. 42, 65 S.Ct. 517, 89 L.Ed. 739 (1945). Again, in *Eskridge v. Washington State Board of Parole*, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958) the Court applied *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1958) involving the right of an indigent to a transcript for the purpose of taking an appeal without payment of fees, to a 1935 conviction.<sup>1</sup> See also *Burns v. Ohio*, 360 U.S. 252, 79 S.Ct. 1104, 3 L.Ed.2d 1200 (1959); *Douglas v. Green*, 368 U.S. 192, 80 S.Ct. 1048, 4 L.Ed.2d 1142 (1960); *Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961); *Lane v. Brown*, 372 U.S. 477, 483, 83 S.Ct. 708, 9 L.Ed.2d 982 (1963).<sup>2</sup>

<sup>1</sup> It is true that in *Norvell v. Illinois*, 378 U.S. 420, 83 S.Ct. 1366, 10 L.Ed.2d 450 (1963), the Court affirmed a decision of the Illinois Supreme Court that denied an indigent prisoner a transcript of his 1941 trial, where the court reporter had died in the interim and it was impossible to transcribe his notes or reconstruct the evidence from the testimony of witnesses. The prisoner had a lawyer at his trial, who did not pursue an appeal, and was apparently not requested to do so at that time. The Court's decision was based on the narrowest possible ground, saying that "where transcripts are no longer available, Illinois may rest on the presumption that he who had a lawyer at the trial had one who could protect his rights on appeal." Mr. Justice Goldberg, for himself and Mr. Justice Stewart, dissented. They believed that the Illinois state court erred in holding that Griffin operated "prospectively and not retroactively, in the sense that it invalidated only 'existing financial barriers' to appeal." Thus, that court did not reach the question whether Griffin had been deprived of his constitutional rights in 1941. The dissenters urged that, although the majority opinion did not go off on this analysis, the case should nevertheless be remanded for reconsideration in the light of the correct interpretation of Griffin, which was that it was fully retroactive. "Griffin was a constitutional decision vindicating basic Fourteenth Amendment rights and is no more to be restricted in scope or application in time than other constitutional judgments." 378 U.S., at 425, 83 S.Ct. at 1369.

<sup>2</sup> The Supreme Court has applied the exclusionary rule to three cases which involved the legality of searches conducted before the date of the decision in Mapp. *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 220, 11 L.Ed.2d 171 (1963); *Ker v. California*, 374 U.S. 29, 88 S.Ct. 1023, 10 L.Ed.2d 726 (1963).

The Supreme Court has also given retroactive application to the increasingly stringent tests employed by it in evaluating the voluntariness of confessions. In *Reck v. Pate*, 367 U.S. 438, 81 S.Ct. 1541, 6 L.Ed. 2d 948 (1961), the court ordered the release of Reck, a prisoner convicted in 1937, when it found that the circumstances of obtaining a confession were inherently coercive in the light of such cases as *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed. 2d 242 (1960); *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed. 2d 975 (1958); *Fikes v. Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed. 2d 246 (1957), and *Turner v. Pennsylvania*, 338 U.S. 62, 69 S.Ct. 1852, 98 L.Ed. 1810 (1949), all of which were decided many years after Reck's trial. Indeed, the District Court which held a hearing on Reck's petition recognized that, under the present-day standards expounded in the above and other cases, the confession would have to be excluded, but declined to apply those cases retroactively. See *United States ex rel. Reck v. Ragen*, 172 F. Supp. 784, 747 (N.D.Ill. 1959). The Supreme Court's opinion did not even allude to the problem of retroactivity.

The confession cases are a particularly persuasive analogy, not only because of their discussion in the Mapp opinion, but also because in them, as in the cases arising under the Mapp decision, there is often no doubt whatever of the defendant's guilt. The traditional basis for excluding confessions obtained under duress may have been their unreliability. But if any principle is clear in this area, it is that the presence of corroborative independent evidence of guilt should have no bearing on the federal court's consideration of the issue of coercion in a habeas corpus proceeding. See *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1830, 10 L.Ed. 2d 518 (1963); *Rogers v. Richmond*, *supra*.

The only distinction between the confession cases and the one before us is that the former did not involve overruling prior precedents. But this is a distinction which makes no difference. Surely the state cannot here claim any "good faith reliance" on the Wolf doctrine. It was on notice, at Angelet's trial, that the narcotics introduced into evidence had been seized in violation of the defendant's constitutional rights under the Fourteenth Amendment. It was on notice that the Supreme Court did not condone this procedure, and looked to the states to provide adequate corrective process. It was on notice that no such process had been provided.

But even if we assume that some importance should be accorded the fact that Mapp was an overruling decision, we must still weigh the interest of the state in relying on the Wolf decision at this time against the interest of the petitioner in not being confined under a judgment secured through the use of unconstitutional evidence. We now know that Angelet's trial was tainted by error of constitutional dimensions, although this was not known at the time. He is still suffering the consequences of that error—deprivation of his liberty. The writ of habeas corpus is available as a means of rectifying that deprivation. As Judge Hastie well stated, in the recent case of *United States ex rel. Craig v. Myers*, 320 F.2d 856, 859 (3 Cir. 1964):

"In actuality, all criminal convictions, all appellate judgments reversing convictions and, most notably, all judgments sustaining collateral attacks on convictions impose legal consequences upon the basis of the court's present legal evaluation of past conduct. It is irrelevant that the judge's views of what constitutes a denial of due process may have changed since the occurrence of the events in suit, or that he or some other judge might have rendered a different decision had the same matter reached his court years earlier. The petitioner is entitled to the most competent and informed decision the judge can now make whether there was fundamental unfairness in his past conviction. Our system is not so unenlightened as to require that in attaching present consequences to 1981 occurrences, a judge must ignore all of the insight that men learned in the law and observant of human behavior have acquired concerning the essentials of tolerable criminal procedure during the past 80 years."

I do not believe it is possible to draw lines between the several constitutional rights guaranteed by the 14th Amendment as interpreted by the Supreme Court of the United States. How can the right not to be convicted on unconstitutionally seized evidence not be deemed "fundamental," when the Court was willing to overrule a prior decision to establish it? The majority provides no satisfactory answer.

Moreover, I believe that the thrust of the Craig case, which, to put the matter quite baldly, requires a Federal Judge acting on a petition for habeas corpus to judge the constitutional validity of a state prisoner's confinement by assuming

that the trial was held on the very day that he is considering the petition, is a necessary implication of *Fay v. Noia*, 372 U.S. 391, 88 S.Ct. 822, 9 L.Ed.2d 837 (1963). I might note first that this decision will doubtless result in the release of far more state prisoners than those entitled to relief under Mapp. The "adequate state ground" doctrine was unquestionably the largest single limitation on federal habeas corpus relief, and it no longer exists. It was destroyed because of the Court's belief that a forum must be provided for the vindication of constitutional claims.

"The breadth of the federal courts' power of independent adjudication on habeas corpus stems from the very nature of the writ, and conforms with the classic English practice. \* \* \* It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void. Hence, the familiar principle that *res judicata* is inapplicable in habeas proceedings \* \* \* is really but an instance of the larger principle that void judgments may be collaterally impeached. \* \* \* So also, the traditional characterization of the writ of habeas corpus as an original \* \* \* remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceedings from what has gone before. This is not to say that a state criminal judgment resting on a constitutional error is void for all purposes. But conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Fay v. Noia*, 372 U.S. at 422-428, 88 S.Ct. at 840.

To be sure, *Fay v. Noia* did not directly involve the question of retroactive application of substantive principles of constitutional law, as distinguished from the procedural mechanisms whereby they may be asserted.<sup>8</sup> But if the federal writ of habeas corpus is to issue to redress a constitutional deprivation and terminate a detention despite the fact that state procedures could have been employed, then I can see no reason for declining to issue the writ where, during the course of a detention, it becomes clear that fundamental error was committed at the trial. The Court in *Noia* focussed almost exclusively on the fact of deprivation of liberty, and insisted that the federal courts be at all times prepared to restore liberty if the circumstances warranted.

A final practical difficulty with the majority approach to this case is that it presents the courts with the necessity of fixing an arbitrary date when the Mapp rule must begin to take effect. If the "deterrence" rationale is followed in all its implications, the Mapp should apply only to convictions involving evidence seized after the date of its decision. As the majority recognizes, *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1023, 10 L.Ed.2d 726 (1963); *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963) and *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), preclude this result. If a state court should nevertheless admit such evidence in a post-Mapp trial, no one could possibly contend that federal habeas corpus would not lie. The same three cases also indicate that, even as to pre-Mapp convictions, Mapp must be applied by state appellate courts which review such convictions after the decision, a result that does not in any way further "deterrence." To this extent, the purity of the majority's "ideal" view of Mapp has necessarily been compromised.

Next comes the question, already before this court, of an affirmance before Mapp but a petition for rehearing of the appeal afterward. If the petition is timely filed and denied, can there be much doubt that the Mapp issue is open on habeas corpus? Then, too, suppose that a defendant had lost his appeal in an in-

<sup>8</sup> It is noteworthy, however, that in footnote 85 of the *Noia* opinion, Mr. Justice Brennan cast doubt on the precedential importance of *Sunai v. Large*, 382 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982 (1947), which held that a prisoner who did not appeal his conviction for violation of the Selective Training and Service Act, might not obtain habeas corpus. The trial court there had held that no challenge to validity of the defendant's classification might be judged at trial, a position later rejected by the Supreme Court. Mr. Justice Brennan noted that the *Sunai* opinion "expressly excluded errors so grave that they cross the jurisdictional line", \* \* \* and implied that the claimed error was not even of constitutional dimension. He then cross-referred to previous pages in the opinion which noted the habeas relief has often been denied "upon allegations merely of error of law and not of a substantial constitutional denial" and that "such decisions are not however authorities against applications which invoke the historic office of the Great Writ to redress detentions in violation of fundamental law."

termediate state court and sought discretionary review in the highest court after Mapp came down. If this is refused, is the prisoner entitled to federal habeas corpus relief? If yes, should it really matter whether the order came on the Friday before Mapp was handed down, or the Tuesday afterward? Still other variations on the theme are possible, but I do not think it necessary to set them out. The point is simply that, under the majority approach, assertion of fundamental rights will depend on strained distinctions and accidents of timing which, I submit, have no place in the orderly administration of law.

Alternatively, the majority seems to suggest that convictions based on evidence illegally seized on or after the seizure date in Mapp, May 18, 1957, would be subject to habeas corpus relief but convictions on evidence illegally seized prior to that date would be immune. " \* \* \* We think this purpose is sufficiently, if not completely served by refusing to apply the rule to seizures long prior to the decision in *Mapp v. Ohio* or occurrences involved in that case \* \* \* " To make the constitutional rights of prisoners throughout the nation depend on when three Cleveland police officers happened to conduct a routine investigation, rather than on what the Supreme Court has said and done, is, to me at least, the height of unreason.

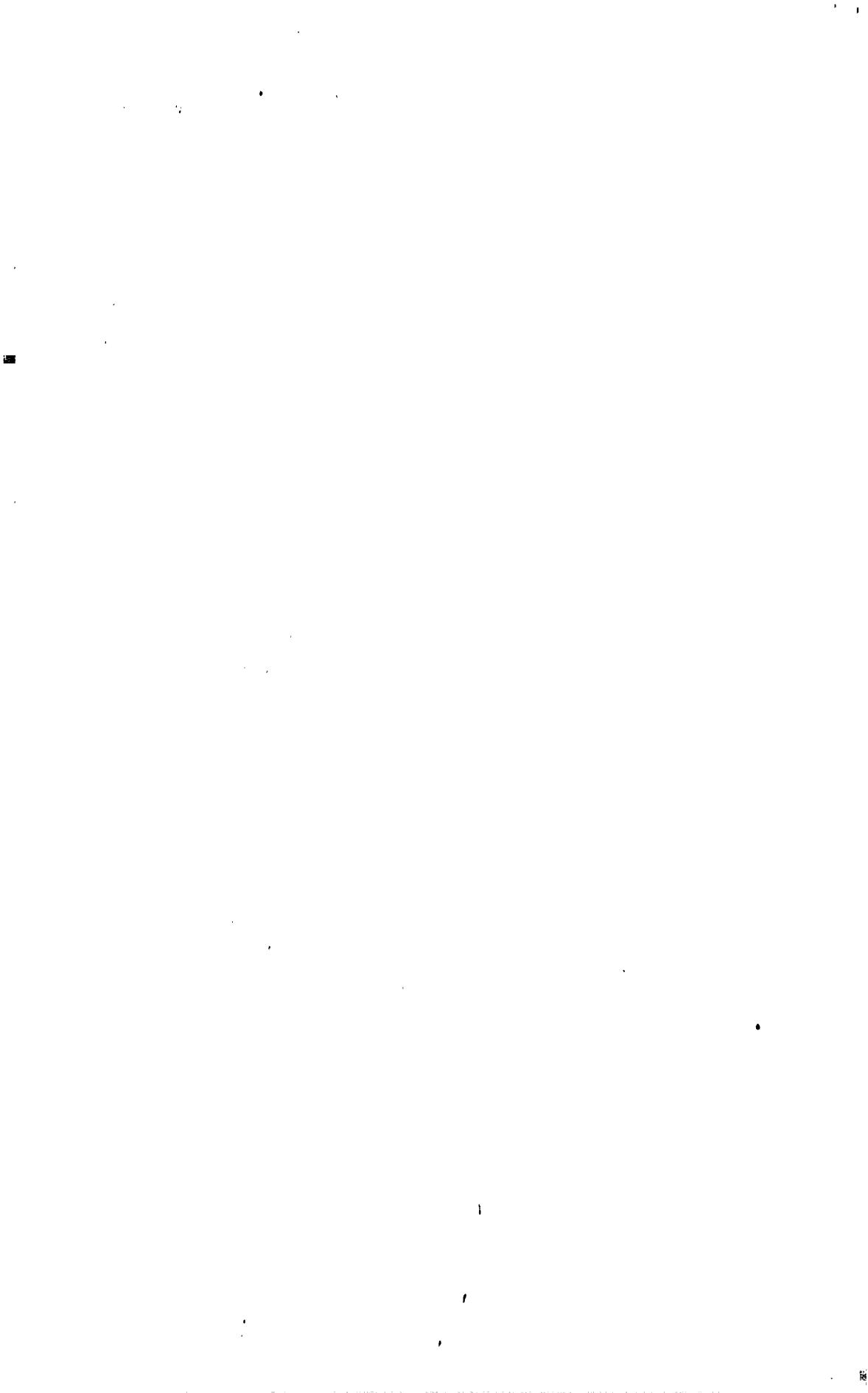
It may be objected that these problems do not arise in this particular case. But they are present in several appeals now pending in this very court, and are undoubtedly involved in many habeas corpus petitions now in the district courts of this and other circuits. I submit that the effect of the majority decision will be only to confuse the issues further. I believe we should say here, as we did in *Durocher*, supra, "against such caustry, we hasten to add our simple point: Constitutional rights should not depend on arcane logic or trivial events." 380 F.2d 303, 310 n. 4.

The majority here puts its greatest stress on the alleged interest of the State of New York in insisting on Angelet serving his sentence and fears of other convicted criminals being released. Constitutional rights are personal and may not be so conditioned or balanced away. New York's interest in enforcing its criminal laws is limited by the Constitution of the United States. At least since *Wolf v. Colorado*, supra, New York has been on notice that evidence of the type used to convict Angelet was illegally seized in violation of his constitutional rights. This evidence was knowingly introduced by the State. The judgment based upon this illegally seized evidence was pronounced by the State. The State has refused to correct this. After Mapp there is clearly no constitutionally recognized interest of the State of New York to continue this illegal detention of Angelet. Why is the conviction of Angelet any more immune from attack than the conviction of Miss Mapp? Perhaps the answer is suggested by the majority's argument in favor of *stare decisis* and *res judicata*. However, to hold that habeas corpus is available to challenge a conviction based on illegally seized evidence in violation of constitutional rights would actually be an application of *stare decisis*, for the reasons set out above. "Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense." *Mapp v. Ohio*, 367 U.S. at 657, 81 S.Ct. at 1688.

I would reverse the judgment below and direct the writ to issue, subject to the right of the State to order an immediate retrial of the prisoner if it be so advised.

The CHAIRMAN. The Committee will recess until tomorrow morning at 10:30.

(Whereupon, at 12 o'clock noon, July 18, 1967, the committee recessed, to resume at 10:30 the following morning.)



## NOMINATION OF THURGOOD MARSHALL

FRIDAY, JULY 14, 1967

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The committee met, pursuant to call, at 10:45 a.m., in Room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland (presiding), Ervin, Hart, Bayh, Dirkson, Hruska, Fong, and Thurmond.

Also present: John H. Holloman, chief clerk.

The CHAIRMAN. Come to order.

Senator ERVIN. I would like to state by way of preface that the American people had the most magnificent dream in history. That dream was that they could enshrine the fundamental principles of Government in a written Constitution and safely entrust the interpretation of that Constitution according to its true intent to the Supreme Court. For that reason, I think that every Senator who has an official duty to perform in connection with the nomination of a Supreme Court Justice has the right—indeed, that it is his duty, to determine to his own satisfaction whether or not the confirmation of a particular nominee will make it more certain that the American people will realize that dream, or whether or not the confirmation of that particular nominee will tend to make that dream vanish.

This is going to be the basis on which I ask questions. Apart from the Constitution, none of us has any security.

The Constitution provides in substance that the President has the power to appoint Supreme Court Justices by and with the advice and consent of the Senate. I believe that the duty which that provision of the Constitution imposes upon a Senator requires him to ascertain as far as he humanly can the Constitutional philosophy of any nominee to the Supreme Court.

Do you agree with that observation?

### STATEMENT OF HON. THURGOOD MARSHALL—Resumed

Judge MARSHALL. Yes, sir.

Senator ERVIN. Why do you think the American people established the written Constitution?

Judge MARSHALL. Well, as best I can find from my reading, the Constitution was adopted as a lasting document for the purpose of governing and having the overall say as to how our Government should run. I think the long years of existence proves that they were right.

**Senator ERVIN.** You are aware of the fact, are you not, that today a great many people are very much concerned about the decisions of the Supreme Court?

**Judge MARSHALL.** Yes, I have read considerable on it.

**Senator ERVIN.** And I have a great concern.

I would like to read one statement on this point. Before doing so, I wish to ask this question. Do you agree with me in the conviction that every American has the right to think and speak his honest thoughts concerning all things under the sun, including the decisions of Supreme Court majorities?

**Judge MARSHALL.** I think everybody has that basic right, but there are some limitations, according to your position.

**The CHAIRMAN.** What are those limitations?

**Judge MARSHALL.** Well, I do not think it would be proper, for example, for certain officials in the Judiciary Department of the several courts to be out discussing court decisions. I do not think the law clerks have a right to discuss or criticize Court opinions. I might be able to think of others.

But that limitation would be voluntarily assumed by the person if he took the position.

**Senator ERVIN.** I would like to have your comment on a statement of Chief Justice Harlan F. Stone. He said that where the courts deal, as ours do, with great public questions, the only protection against unwise decisions and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it.

**Judge MARSHALL.** Do you have any comment on that?

**Judge MARSHALL.** Certainly. I agree with that.

**Senator ERVIN.** I invite your attention to these words of Justice Robert H. Jackson, whom I deem to have been a very fine member of the Supreme Court.

**Judge MARSHALL.** A great justice,

**Senator ERVIN.** These words were taken out of his concurring opinion in the case of *Brown v. Allen*. He said this:

Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law, but is guided in these matters by personal impressions which, from time to time, may be shared by a majority of the justices. Whatever has been intended, this Court also has generated an impression in much of the Judiciary that regard for precedents and authorities is obsolete; that words no longer mean what they have always meant to the profession; that the law knows no fixed principles.

He added this observation a little later in his opinion:

I know of no way by which we can have equal justice under the law except to have some law.

I am not asking you whether you agree with the opinion which Justice Jackson said was widely held by the practicing profession, or whether you agree that the Court has generated such impression, but I am asking whether you agree that Justice Jackson stated an opinion widely entertained among the practicing bar of America with respect to the Court?

**Judge MARSHALL.** I disagree, Senator, that it is widely the view of a large number of members of the bar. That I do not believe is true.

Senator ERVIN. Do you not agree that it is widely held among the bench?

Judge MARSHALL. No, sir.

My problem, Senator, is with the word "widely".

Senator ERVIN. Are you not aware of the fact that in 1958, the chief justices of the States met at Pasadena, Calif., and that 36 of them joined in a resolution in which they implored the Supreme Court of the United States to exercise one of the greatest of all judicial virtues, the virtue of judicial self-restraint, and the text of such a resolution was accompanied by an analysis of many cases these chief justices asserted represented unwarranted encroachments by the Supreme Court upon the powers reserved to the States by the Constitution of the United States?

Judge MARSHALL. Well, Senator, up to this moment, I was not aware of such a resolution. I understand now, but I did not know of it until this moment.

Senator ERVIN. If 36 of the chief justices of the States constituting this Union adopted a resolution and make a statement to that effect, would it not indicate that there is a widespread opinion, at least among the State judiciary that the Supreme Court of the United States has failed in recent years to confine itself to its allotted constitutional sphere, that of interpreting the Constitution rightly?

Judge MARSHALL, Senator, I think the statement speaks for itself.

Senator ERVIN. Mr. Chairman, I would like to have a copy of the resolution of the 36 State chief justices and the statement which accompanied it printed at this point in the body of the record.

The CHAIRMAN. Without objection, it is so ordered.

(The document referred to follows:)

[U.S. News & World Report, Oct. 8, 1958]

#### WHAT 36 STATE CHIEF JUSTICES SAID ABOUT THE SUPREME COURT—FOR THE FIRST TIME, HERE IS FULL TEXT OF HISTORIC REPORT

The chief justices of 36 States recently adopted a report critical of the Supreme Court of the United States, declaring that the Court "has tended to adopt the role of policy maker without proper judicial restraint."

This report, approved by the chief justices of three fourths of the nation's States, found that the present Supreme Court has abused the power given to it by the Constitution. The Court is pictured as invading fields of Government reserved by the Constitution to the States.

Full text of this historic document has not previously been given wide distribution. It is printed below, together with the formal resolution of approval by the Conference of State Chief Justices.

*The Conference of Chief Justices, meeting in Pasadena, Calif., on Aug. 23, 1958, adopted a resolution submitted by its Committee on Federal-State Relationships as Affected by Judicial Decisions. Vote on the resolution was 36 to 8, with 2 members abstaining and 4 not present. Text of the resolution:*

1. That this Conference approves the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions submitted at this meeting.
2. That, in the field of federal-State relationships, the division of powers between those granted to the National Government and those reserved to the State Governments should be tested solely by the provisions of the Constitution of the United States and the Amendments thereto.
3. That this Conference believes that our system of federalism, under which control of matters primarily of national concern is committed to our National Government and control of matters primarily of local concern is reserved to the several States, is sound and should be more diligently preserved.

4. That this Conference, while recognizing that the application of constitutional rules to changed conditions must be sufficiently flexible as to make such rules adaptable to altered conditions, believes that a fundamental purpose of having a written Constitution is to promote the certainty and stability of the provisions of law set forth in such a Constitution.

5. That this Conference hereby respectfully urges that the Supreme Court of the United States, in exercising the great powers confided to it for the determination of questions as to the allocation and extent of national and State powers, respectively, and as to the validity under the Federal Constitution of the exercise of powers reserved to the States, exercise one of the greatest of all judicial powers—the power of judicial self-restraint—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government.

6. That this Conference firmly believes that the subject with which the Committee on Federal-State Relationships as Affected by Judicial Decisions has been concerned is one of continuing importance, and that there should be a committee appointed to deal with the subject in the ensuing year.

*Following is full text of the Committee's report as approved by the State chief justices:*

#### FOREWORD

Your Committee on Federal-State Relationships as Affected by Judicial Decisions was appointed pursuant to action taken at the 1957 meeting of the Conference, at which, you will recall, there was some discussion of recent decisions of the Supreme Court of the United States and a resolution expressing concern with regard thereto was adopted by the Conference. This Committee held a meeting in Washington in December, 1957, at which plans for conducting our work were developed. This meeting was attended by Sidney Spector of the Council of State Governments and by Professor Philip B. Kurland of the University of Chicago Law School.

The Committee believed that it would be desirable to survey this field from the point of view of general trends rather than by attempting to submit detailed analyses of many cases. It was realized, however, that an expert survey of recent Supreme Court decisions within the area under consideration would be highly desirable in order that we might have the benefit in drafting this report of scholarly research and of competent analysis and appraisal, as well as of objectivity of approach.

Thanks to Professor Kurland and to four of his colleagues of the faculty of the University of Chicago Law School, several monographs dealing with subjects within the Committee's field of action have been prepared and have been furnished to all members of the Committee and of the Conference. These monographs and their authors are as follows:

1. "The Supreme Court, the Due Process Clause, and the *In Personam* Jurisdiction of State Courts," by Professor Kurland;

2. "Limitations on State Power to Deal with Issues of Subversion and Loyalty," by Assistant Professor [Roger O.] Cramton;

3. "Congress, the States and Commerce," by Professor Allison Dunham;

4. "The Supreme Court, Federalism, and State Systems of Criminal Justice," by Professor Francis A. Allen; and

5. "The Supreme Court, the Congress and State Jurisdiction Over Labor Relations," by Professor Bernard D. Meltzer.

These gentlemen have devoted much time, study and thought to the preparation of very scholarly, interesting and instructive monographs on the above subjects. We wish to express our deep appreciation to each of them for his very thorough research and analysis of these problems. With the pressure of the work of our respective courts, the members of this Committee could not have undertaken this research work and we could scarcely have hoped, even with ample time, to equal the thorough and excellent reports which they have written on their respective subjects.

It had originally been hoped that all necessary research material would be available to your Committee by the end of April and that the Committee could study it and then meet for discussion, possibly late in May, and thereafter send

at least a draft of the Committee's report to the members of the Conference well in advance of the 1958 meeting; but these hopes have not been realized.

The magnitude of the studies, and the thoroughness with which they have been made rendered it impossible to complete them until about two months after the original target date and it has been impracticable to hold another meeting of this Committee until the time of the Conference.

Even after this unavoidable delay had developed, there was a plan to have these papers presented at a seminar to be held at the University of Chicago late in June. Unfortunately, this plan could not be carried through, either.

We hope, however, that these papers may be published in the near future with such changes and additions as the several authors may wish to make in them. Some will undoubtedly be desired in order to include decisions of the Supreme Court in some cases which are referred to in these monographs, but in which decisions were rendered after the monographs had been prepared. Each of the monographs as transmitted to us is stated to be in preliminary form and subject to change and as not being for publication.

Much as we are indebted to Professor Kurland and his colleagues for their invaluable research aid, your Committee must accept sole responsibility for the views herein stated. Unfortunately, it is impracticable to include all or even a substantial part of their analyses in this report.

#### BACKGROUND AND PERSPECTIVE

We think it desirable at the outset of this report to set out some points which may help to put the report in proper perspective, familiar or self-evident as these points may be.

First, though decisions of the Supreme Court of the United States have a major impact upon federal-State relationships and have had such an impact since the days of Chief Justice Marshall, they are only a part of the whole structure of these relationships. These relations are, of course, founded upon the Constitution of the United States itself. They are materially affected not only by judicial decisions but in very large measure by acts of Congress adopted under the powers conferred by the Constitution. They are also affected, or may be affected, by the exercise of the treaty power.

Of good practical importance as affecting federal-State relationships are the rulings and actions of federal administrative bodies. These include the independent-agency regulatory bodies, such as the Interstate Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission and the National Labor Relations Board.

Many important administrative powers are exercised by the several departments of the executive branch, notably the Treasury Department and the Department of the Interior. The scope and importance of the administration of the federal tax laws are, of course, familiar to many individuals and businesses because of their direct impact, and require no elaboration.

Second, when we turn to the specific field of the effect of judicial decisions on federal-State relationships, we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos. See Judge Learned Hand's most interesting Holmes Lectures on "The Bill of Rights" delivered at the Harvard Law School this year and published by the Harvard University Press.

Third, there is obviously great interaction between federal legislation and administrative action on the one hand and decisions of the Supreme Court on the other, because of the power of the Court to interpret and apply acts of Congress and to determine the validity of administrative action and the permissible scope thereof.

Fourth, whether federalism shall continue to exist and, if so, in what form is primarily a political question rather than a judicial question. On the other hand, it can hardly be denied that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the federal and State governments. Likewise, it can hardly be seriously disputed that on many occasions the decisions of the Supreme Court have produced exactly that effect.

Fifth, this Conference has no legal powers whatsoever. If any conclusions or recommendations at which we may arrive are to have any effect, this can only be through the power of persuasion.

Sixth, it is a part of our obligation to seek to uphold respect for law. We do not believe that this goes so far as to impose upon us an obligation of silence when we find ourselves unable to agree with pronouncements of the Supreme Court—even though we are bound by them—or when we see trends in decisions of that Court which we think will lead to unfortunate results.

We hope that the expression of our views may have some value. They pertain to matters which directly affect the work of our State courts. In this report we urge the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it. We endeavor not to be guilty ourselves of a lack of due restraint in expressing our concern and, at times, our criticisms in making the comments and observations which follow.

#### PROBLEMS OF FEDERALISM

The difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of our national Constitution acted in outlining the division of powers between the national and State governments.

This guiding principle, central to the American federal system, was recognized when the original Constitution was being drawn and was emphasized by De Tocqueville [Alexis de Tocqueville, author of "Democracy in America"]. Under his summary of the Federal Constitution he says:

"The first question which awaited the Americans was so to divide the sovereignty that each of the different States which compose the union should continue to govern itself in all that concerned its internal prosperity, while the entire nation, represented by the Union, should continue to form a compact body and to provide for all general exigencies. The problem was a complex and difficult one. It was as impossible to determine beforehand, with any degree of accuracy, the share of authority that each of the two governments was to enjoy as to foresee all the incidents in the life of a nation."

In the period when the Constitution was in the course of adoption, the "Federalist"—No. 45—discussed the division of sovereignty between the Union and the States and said:

"The powers delegated by the Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the internal order and prosperity of the State."

Those thoughts expressed in the "Federalist," of course, are those of the general period when both the original Constitution and the Tenth Amendment were proposed and adopted. They long antedated the proposal of the Fourteenth Amendment.

The fundamental need for a system of distribution of powers between national and State governments was impressed sharply upon the framers of our Constitution not only because of their knowledge of the governmental systems of ancient Greece and Rome. They also were familiar with the government of England; they were even more aware of the colonial governments in the original States and the governments of those States after the Revolution.

Included in government on this side of the Atlantic was the institution known as the New England town meeting, though it was not in use in all of the States. A town meeting could not be extended successfully to any large unit of population, which, for legislative action, must rely upon representative government.

#### LOCAL GOVERNMENT: "A VITAL FORCE"

But it is this spirit of self-government, of *local* self-government, which has been a vital force in shaping our democracy from its very inception.

The views expressed by our late brother, Chief Justice Arthur T. Vanderbilt [of the New Jersey Supreme Court], on the division of powers between the national and State governments—delivered in his addresses at the University of Nebraska and published under the title "The Doctrine of the Separation of Powers and Its Present-Day Significance"—are persuasive.

He traced the origins of the doctrine of the separation of powers to four sources: Montesquieu and other political philosophers who preceded him; English constitutional experience; American colonial experience; and the common sense and political wisdom of the Founding Fathers. He concluded his comments on the experiences of the American colonists with the British Government with this sentence:

"As colonists they had enough of a completely centralized government with no distribution of powers and they were intent on seeing to it that they should never suffer such grievances from a government of their own construction."

His comments on the separation of powers and the system of checks and balances and on the concern of the Founding Fathers with the proper distribution of governmental power between the nation and the several States indicates that he treated them as parts of the plan for preserving the nation on the one side and individual freedom on the other—in other words, that the traditional tripartite vertical division of powers between the legislative, the executive and the judicial branches of government was not an end in itself, but was a means toward an end, and that the horizontal distribution or allocation of powers between national and State governments was also a means towards the same end and was a part of the separation of powers which was accomplished by the Federal Constitution. It is a form of the separation of powers with which Montesquieu was not concerned; but the horizontal division of powers, whether thought of as a form of separation of powers or not, was very much in the minds of the framers of the Constitution.

#### TWO MAJOR DEVELOPMENTS IN THE FEDERAL SYSTEM

The outstanding development in federal-State relations since the adoption of the National Constitution has been the expansion of the power of the National Government and the consequent contraction of the powers of the State governments. To a large extent this is wholly unavoidable and, indeed, is a necessity, primarily because of improved transportation and communication of all kinds and because of mass production.

On the other hand, our Constitution does envision federalism. The very name of our nation indicates that it is to be composed of States. The Supreme Court of a bygone day said in *Texas v. White*, 7 Wall. 700, 721 (1868): "The Constitution, in all its provisions, looks to an indestructible Union of indestructible States."

Second only to the increasing dominance of the National Government has been the development of the immense power of the Supreme Court in both State and national affairs. It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields. It is not subject to the restraints to which a legislative body is subject. There are points at which it is difficult to delineate precisely the line which should circumscribe the judicial function and separate it from that of policy making.

Thus, usually within narrow limits, a court may be called upon in the ordinary course of its duties to make what is actually a policy decision by choosing between two rules, either of which might be deemed applicable to the situation presented in a pending case.

But, if and when a court in construing and applying a constitutional provision or a statute becomes a policy maker; it may leave construction behind and exercise functions which are essentially legislative in character, whether they serve in practical effect as a constitutional amendment or as an amendment of a statute. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, new need to urge it.

It would be useless to attempt to review all of the decisions of the Supreme Court which have had a profound effect upon the course of our history. It has been said that the Dred Scott decision made the Civil War inevitable. Whether this is really true or not, we need not attempt to determine. Even if it is dis-

counted as a serious overstatement, it remains a dramatic reminder of the great influence which Supreme Court decisions have had and can have.

As to the great effect of decisions of that Court on the economic development of the country, see Mr. Justice Douglas's Address on "*Stare Decisis*" [to stand by decided matters], 49 Columbia Law Review 735.

#### SOURCES OF NATIONAL POWER

Most of the powers of the National Government were set forth in the original Constitution; some have been added since. In the days of Chief Justice Marshall, the supremacy clause of the Federal Constitution and a broad construction of the powers granted to the National Government were fully developed and, as a part of this development, the extent of national control over interstate commerce became very firmly established.

The trends established in those days have never ceased to operate and, in comparatively recent years, have operated at times in a startling manner in the extent to which interstate commerce has been held to be involved, as for example in the familiar case involving an elevator operator in a loft building.

From a practical standpoint, the increase in federal revenues resulting from the Sixteenth Amendment--the income tax amendment--has been of great importance. National control over State action in many fields has been vastly expanded by the Fourteenth Amendment.

We shall refer to some subjects and types of cases which bear upon federal-State relationships.

#### THE GENERAL WELFARE CLAUSE

One provision of the Federal Constitution which was included in it from the beginning but which, in practical effect, lay dormant for more than a century, is the general-welfare clause. In *United States v. Butler*, 297 U.S. 1, the original Agricultural Adjustment Act was held invalid. An argument was advanced in that case that the general-welfare clause would sustain the imposition of the tax and that money deprived from the tax could be expended for any purposes which would promote the general welfare.

The Court viewed this argument with favor as a general proposition, but found it not supportable on the facts of that case. However, it was not long before that clause was relied upon and applied. See *Steward Machine Co. v. Davis*, 301 U.S. 548, and *Helvering v. Davis*, 301 U.S. 690. In those cases the Social Security Act was upheld and the general-welfare clause was relied upon both to support the tax and to support the expenditures of the money raised by the Social Security taxes.

#### GRANTS-IN-AID

Closely related to this subject are the so-called grants-in-aid which go back to the Morrill Act of 1862 and the grants thereunder to the so-called land-grant colleges. The extent of grants-in-aid today is very great, but questions relating to the wisdom as distinguished from the legal basis for such grants seem to lie wholly in the political field and are hardly appropriate for discussion in this report.

Perhaps we should also observe that, since the decision of *Massachusetts v. Mellon*, 262 U.S. 447, there seems to be no effective way in which either a State or an individual can challenge the validity of a federal grant-in-aid.

#### DOCTRINE OF PRE-EMPTION

Many, if not most, of the problems of federalism today arise either in connection with the commerce clause and the vast extent to which its sweep has been carried by the Supreme Court, or they arise under the Fourteenth Amendment. Historically, cases involving the doctrine of pre-emption pertain mostly to the commerce clause.

More recently the doctrine has been applied in other fields, notably in the case of *Commonwealth of Pennsylvania v. Nelson*, in which the Smith Act and other federal statutes dealing with Communism and loyalty problems were held to have pre-empted the field and to invalidate or suspend the Pennsylvania antisubversive statute which sought to impose a penalty for conspiracy to overthrow the Government of the United States by force or violence. In that particular case it happens that the decision of the Supreme Court of Pennsylvania

was affirmed. That fact, however, emphasizes rather than detracts from the wide sweep now given to the doctrine of pre-emption.

In connection with commerce-clause cases, the doctrine of pre-emption, coupled with only partial express regulation by Congress, has produced a state of considerable confusion in the field of labor relations.

#### LABOR-RELATIONS CASES

One of the most serious problems in this field was pointed up or created—depending upon how one looks at the matter—by the Supreme Court's decision in *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 883, which overturned a State statute aimed at preventing strikes and lockouts in public utilities. This decision left the States powerless to protect their own citizens against emergencies created by the suspension of essential services, even though, as the dissent pointed out, such emergencies were "economically and practically confined to a [single] State."

In two cases decided on May 28, 1958, in which the majority opinions were written by Mr. Justice Frankfurter and Mr. Justice Burton, respectively, the right of an employee to sue a union in a State court was upheld. In *International Association of Machinists v. Gonzales*, a union member was held entitled to maintain a suit against his union for damages for wrongful expulsion. In *International Union, United Auto, etc. Workers v. Russell*, an employee, who was not a union member, was held entitled to maintain a suit for malicious interference with his employment through picketing during a strike against his employer. Pickets prevented Russell from entering the plant.

Regardless of what may be the ultimate solution of jurisdictional problems in this field, it appears that, at the present time, there is unfortunately a kind of no-man's land in which serious uncertainty exists. This uncertainty is in part undoubtedly due to the failure of Congress to make its wishes entirely clear. Also, somewhat varying views appear to have been adopted by the Supreme Court from time to time.

In connection with this matter, in the case of *Textile Union v. Lincoln Mills*, 353 U. S. 448, the majority opinion contains language which we find somewhat disturbing. That case concerns the interpretation of Section 301 of the Labor-Management Relations Act of 1947.

Paragraph (a) of that section provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Paragraph (b) of the same section provides in substance that a labor organization may sue or be sued as an entity without the procedural difficulties which formerly attended suits by or against unincorporated associations consisting of large numbers of persons. Section 301 (a) was held to be more than jurisdictional and was held to authorize federal courts to fashion a body of federal law for the enforcement of these collective-bargaining agreements and to include within that body of federal law specific performance of promises to arbitrate grievances under collective-bargaining agreements.

What a State court is to do if confronted with a case similar to the Lincoln Mills case is by no means clear. It is evident that the substantive law to be applied must be federal law, but the question remains: Where is that federal law to be found? It will probably take years for the development of the "fashioning" of the body of federal law which the Supreme Court says the federal courts are authorized to make. Can a State court act at all? If it can act and does act, what remedies should it apply? Should it use those afforded by State law, or is it limited to those which would be available under federal law if the suit were in a federal court?

It is perfectly possible that these questions will not have to be answered, since the Supreme Court may adopt the view that the field has been completely preempted by the federal law and committed solely to the jurisdiction of the federal courts, so that the State courts can have no part whatsoever in enforcing rights recognized by Section 301 of the Labor-Management Relations Act. Such a result does not seem to be required by the language of Section 301 nor yet does the legislative history of that section appear to warrant such a construction.

Professor Meltzer's monograph has brought out many of the difficulties in this whole field of substantive labor law with regard to the division of power between State and federal governments. As he points out, much of this confusion is due to the fact that Congress has not made clear what functions the States may perform and what they may not perform. There are situations in which the particular activity involved is prohibited by federal law, others in which it is protected by federal law, and others in which the federal law is silent. At the present time there seems to be one field in which State action is clearly permissible. That is where actual violence is involved in a labor dispute.

#### STATE LAW IN DIVERSITY CASES

Not all of the decisions of the Supreme Court in comparatively recent years have limited or tended to limit the power of the States or the effect of State laws. The celebrated case of *Erie R.R. v. Tompkins*, 304 U.S. 64, overruled *Swift v. Tyson* and established substantive State law, decisional as well as statutory, as controlling in diversity [of citizenship] cases in the federal courts. This marked the end of the doctrine of a federal common law in such cases.

#### IN-PERSONAM JURISDICTION OVER NONRESIDENTS

Also, in cases involving the in-personam [against the person] jurisdiction of State courts over nonresidents, the Supreme Court has tended to relax rather than tighten restrictions under the due-process clause upon State action in this field. *International Shoe Co. v. Washington*, 326 U.S. 310, is probably the most significant case in this development.

In sustaining the jurisdiction of a Washington court to render a judgment in personam against a foreign corporation which carries on some activities within the State of Washington, Chief Justice Stone used the now-familiar phrase that there "were sufficient contracts or ties with the State of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the obligation which appellant has incurred there."

Formalistic doctrines or dogmas have been replaced by a more flexible and realistic approach, and this trend has been carried forward in subsequent cases leading up to and including *McGee v. International Life Insurance Co.*, 355 U.S. 220, until halted by *Hanson v. Denckla*, 357 U.S. decided June 23, 1958.

#### TAXATION

In the field of taxation, the doctrine of intergovernmental immunity has been seriously curtailed partly by judicial decisions and partly by statute. This has not been entirely a one-way street. In recent years, cases involving State taxation have arisen in many fields. Sometimes they have involved questions of burdens upon interstate commerce or the export-import clause, sometimes of jurisdiction to tax as a matter of due process, and sometimes they have arisen on the fringes of governmental immunity, as where a State has sought to tax a contractor doing business with the National Government. There have been some shifts in holdings. On the whole, the Supreme Court seems perhaps to have taken a more liberal view in recent years toward the validity of State taxation than it formerly took.

#### OTHER FOURTEENTH AMENDMENT CASES

In many other fields, however, the Fourteenth Amendment has been invoked to cut down State action. This has been noticeably true in cases involving not only the Fourteenth Amendment but also the First Amendment guarantee of freedom of speech or the Fifth Amendment protection against self-incrimination. State antisubversive acts have been practically eliminated by *Pennsylvania v. Nelson*, in which the decision was rested on the ground of pre-emption of the field by the federal statutes.

#### THE SWEENEY CASE—STATE LEGISLATIVE INVESTIGATION

One manifestation of this restrictive action under the Fourteenth Amendment is to be found in *Sweezy v. New Hampshire*, 354 U.S. 284.

In that case, the State of New Hampshire had enacted a subversive-activity statute which imposed various disabilities on subversive persons and subversive

organizations. In 1958, the legislature adopted a resolution under which it constituted the attorney general a one-man legislative committee to investigate violations of that act and to recommend additional legislation.

Sweezy, described as a non-Communist Marxist, was summoned to testify at the investigation conducted by the attorney general, pursuant to this authorization. He testified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the State during the 1948 campaign, and (2) inquiries concerning a lecture Sweezy had delivered in 1954 to a class at the University of New Hampshire.

He was adjudged in contempt by a State court for failure to answer these questions. The Supreme Court reversed the conviction, but there is no majority opinion. The opinion of the Chief Justice, in which he was joined by Justices Black, Douglas and Brennan, started out by reaffirming the position taken in *Watkins v. United States*, 354 U.S. 178, that legislative investigations can encroach on First Amendment rights. It then attacked the New Hampshire Subversive Activities Act and stated that the definition of subversive persons and subversive organizations was so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done free of any conscious intent to be a part of such activity."

Then followed a lengthy discourse on the importance of academic freedom and political expression. This was not, however, the ground upon which these four Justices ultimately relied for their conclusion that the conviction should be reversed. The Chief Justice said in part:

"The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The attorney general has been given such a sweeping and uncertain mandate that it is his discretion which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it cannot be stated authoritatively that the legislature asked the attorney general to gather the kind of facts comprised in the subjects upon which petitioner was interrogated."

Four members of the Court, two in a concurring opinion and two in a dissenting opinion, took vigorous issue with the view that the conviction was invalid because of the legislature's failure to provide adequate standards to guide the attorney general's investigation.

Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the reversal of the conviction on the ground that there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the State and, hence, that the liberties of the individual should prevail.

Mr. Justice Clark, with whom Mr. Justice Burton joined, arrived at the opposite conclusion and took the view that the State's interest in self-preservation justified the intrusion into Sweezy's personal affairs.

In commenting on this case Professor Cramton says:

"The most puzzling aspect of the Sweezy case is the reliance by the Chief Justice on delegation-of-power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible. The State had delegated power to the attorney general to determine the scope of inquiry within the general subject of subversive activities.

"Under these circumstances, the conclusion of the Chief Justice that the vagueness of the resolution violates the due-process clause must be, despite his protestations, a holding that a State legislature cannot delegate such a power."

#### PUBLIC-EMPLOYMENT CASES

There are many cases involving public employment and the question of disqualification therefor by reason of Communist Party membership or other questions of loyalty.

*Slochower v. Board of Higher Education*, 350 U.S. 551, is a well-known example of cases of this type. Two more recent cases, *Lerner v. Casey*, and *Bellan v. Board of Public Education*, both in 357 U.S. and decided on June 30, 1958, have upheld disqualifications for employment where such issues were involved, but they did so on the basis of lack of competence or fitness.

Lerner was a subway conductor in New York and Bellan was a public-school instructor. In each case the decision was by a 5-to-4 majority.

#### ADMISSION TO THE BAR

When we come to the recent cases on admission to the bar, we are in a field of unusual sensitivity. We are well aware that any adverse comment which we may make on those decisions lays us open to attack on the grounds that we are complaining of the curtailment of our own powers and that we are merely voicing the equivalent of the ancient protest of the defeated litigant—in this instance the wail of a judge who has been reversed. That is a prospect which we accept in preference to maintaining silence on a matter which we think cannot be ignored without omitting an important element on the subject with which this report is concerned.

Konigsberg v. State Bar of California, 353 U.S. 252, seems to us to reach the high-water mark so far established by the Supreme Court in overthrowing the action of a State and in denying to a State the power to keep order in its own house.

The majority opinion first hurdled the problem as to whether or not the federal question sought to be raised was properly presented to the State highest court for decision and was decided by that court. Mr. Justice Frankfurter dissented on the ground that the record left it doubtful whether this jurisdictional requirement for review by the Supreme Court had been met and favored a remand of the case for certification by the State highest court of "whether or not it did in fact pass on a claim properly before it under the due-process clause of the Fourteenth Amendment." Mr. Justice Harlan and Mr. Justice Clark shared Mr. Justice Frankfurter's jurisdictional views. They also dissented on the merits in an opinion written by Mr. Justice Harlan, of which more later.

The majority opinion next turned to the merits of Konigsberg's application for admission to the bar. Applicable State statutes required one seeking admission to show that he was a person of good moral character and that he did not advocate the overthrow of the National or State Government by force or violence. The committee of bar examiners, after holding several hearings on Konigsberg's application, notified him that his application was denied because he did not show that he met the above qualifications.

The Supreme Court made its own review of the facts.

On the score of good moral character, the majority found that Konigsberg had sufficiently established it, that certain editorials written by him attacking this country's participation in the Korean War, the actions of political leaders, the influence of "big business" on American life, racial discrimination and the Supreme Court's decision in Dennis v. United States, 341 U.S. 494, would not support any rational inference of bad moral character, and that his refusal to answer questions, "almost all" of which were described by the Court as having "concerned his political affiliations, editorials and beliefs" (353 U.S. 269), would not support such an inference either.

#### MEANING OF REFUSAL TO ANSWER

On the matter of advocating the overthrow of the National or State Government by force or violence, the Court held—as it had in the companion case of Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 282, decided contemporaneously—that past membership in the Communist Party was not enough to show bad moral character. The majority apparently accepted as sufficient Konigsberg's denial of any present advocacy of the overthrow of the Government of the United States or of California, which was uncontradicted on the record. He had refused to answer questions relating to his past political affiliations and beliefs, which the bar committee might have used to test the truthfulness of his present claims. His refusal to answer was based upon his views as to the effect of the First and Fourteenth Amendments. The Court did not make any ultimate determination of their correctness, but—at 353 U.S. 270—said that "prior decisions by this Court indicated" that his objections to answering the questions—which we shall refer to below—were not frivolous.

The majority asserted that Konigsberg "was not denied admission to the California bar simply because he refused to answer questions."

In a footnote appended to this statement it is said, 353 U.S. 259:

"Neither the committee as a whole nor any of its members even intimated that Konigsberg would be barred just because he refused to answer relevant inquiries or because he was obstructing the committee. Some members informed him that they did not necessarily accept his position that they were not entitled to inquire into his political associations and opinions and said that his failure to answer would have some bearing on their determination whether he was qualified. But they never suggested that his failure to answer their questions was, by itself, a sufficient independent ground for denial of his application."

#### A "CONVINCING" DISSENT

Mr. Justice Harlan's dissent took issue with these views—convincingly, we think. He quoted lengthy extracts from the record of Konigsberg's hearings before the subcommittee and the committee of the State bar investigating his application, 353 U.S. 284-300. Konigsberg flatly refused to state whether or not at the time of the hearing he was a member of the Communist Party and refused to answer questions on whether he had ever been a Communist or belonged to various organizations, including the Communist Party.

The bar committee conceded that he could not be required to answer a question if the answer might tend to incriminate him; but Konigsberg did not stand on the Fifth Amendment and his answer which came nearest to raising that question, as far as we can see, seems to have been based upon a fear of prosecution for perjury for whatever answer he might then give as to membership in the Communist Party.

We think, on the basis of the extracts from the record contained in Mr. Justice Harlan's dissenting opinion, that the committee was concerned with its duty under the statute "to certify as to this applicant's good moral character"—p. 295—and that the committee was concerned with the applicant's "disinclination" to respond to questions proposed by the Committee—p. 301—and that the committee, in passing on his good moral character, sought to test his veracity—p. 303.

The majority, however, having reached the conclusion above stated, that Konigsberg had not been denied admission to the bar simply because he refused to answer questions, then proceeded to demolish a straw man by saying that there was nothing in the California statutes or decisions, or in the rules of the bar committee which had been called to the Court's attention, suggesting that a failure to answer questions "is *ipso facto* a basis for excluding an applicant from the bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the bar examiners."

Whether Konigsberg's "overwhelming" showing of his own good character would have been shaken if he had answered the relevant questions which he refused to answer, we cannot say. We have long been under the impression that candor is required of members of the bar and, prior to Konigsberg, we should not have thought that there was any doubt that a candidate for admission to the bar should answer questions as to matters relating to his fitness for admission, and that his failure or refusal to answer such questions would warrant an inference unfavorable to the applicant or a finding that he had failed to meet the burden of proof of his moral fitness.

Let us repeat that Konigsberg did not invoke protection against self-incrimination. He invoked a privilege which he claimed to exist against answering certain questions. These might have served to test his veracity at the committee hearings held to determine whether or not he was possessed of the good moral character required for admission to the bar.

The majority opinion seems to ignore the issue of veracity sought to be raised by the questions which Konigsberg refused to answer. It is also somewhat confusing with regard to the burden of proof. At one point pp. 270-271—it says that the committee was not warranted in drawing from Konigsberg's refusal to answer questions any inference that he was of bad moral character; at another—p. 278—it says that there was no evidence in the record to justify a finding that he had failed to establish his good moral character.

Also at page 278 of 358 U.S., the majority said: "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedom in order to obtain that goal. It is also important to

society and the bar itself that lawyers be unintimidated—free to think, speak and act as members of an independent bar."

The majority thus makes two stated concessions—each, of course, subject to limitations—one, that it is important to leave the States free to select their own bars and the other, that "a bar composed of lawyers of good character is a worthy objective."

#### AVOIDING "A TEST OF VERACITY"

We think that Mr. Justice Harlan's dissent on the merits, in which Mr. Justice Clark, joined, shows the fallacies of the majority position. On the facts which we think were demonstrated by the excerpts from the record included in that dissent, it seems to us that the net result of the case is that a State unable to protect itself against admitting to its bars an applicant who, by his own refusal to answer certain questions as to what the majority regarded as "political" associations and activities, avoids a test of his veracity through cross-examination on a matter which he has the burden of proving in order to establish his right to admission to the bar.

The power left to the States to regulate admission to their bars under Konigsberg hardly seems adequate to achieve what the majority chose to describe as a "worthy objective"—"a bar composed of lawyers of good character."

We shall close our discussion of Konigsberg by quoting two passages from Mr. Justice Harlan's dissent, in which Mr. Justice Clark joined. In one, he states that "this case involves an area of federal-State relations—the right of States to establish and administer standards for admission to their bars—into which this Court should be especially reluctant and slow to enter." In the other, his concluding comment—p. 312—says: "[W]hat the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of State concern."

The Lerner and Beilan case, above referred to, seem to indicate some recession from the intimations, though not from the decisions, in the Konigsberg and Slochower cases. In Beilan, the schoolteacher was told that his refusal to answer questions might result in his dismissal, and his refusal to answer questions pertaining to loyalty matters was held relevant to support a finding that he was incompetent. "Incompetent" seems to have been taken in the sense of unfit.

#### STATE ADMINISTRATION OF CRIMINAL LAW

When we turn to the impact of decisions of the Supreme Court upon the State administration of criminal justice, we find that we have entered a very broad field. In many matters, such as the fair drawing of juries, the exclusion of forced confessions as evidence, and the right to counsel at least in all serious cases, we do not believe that there is any real difference in doctrine between the views held by the Supreme Court of the United States and the views held by the highest courts of the several States.

There is, however, a rather considerable difference at times as to how these general principles should be applied and as to whether they have been duly regarded or not. In such matters the Supreme Court not only feels free to review the facts, but considers it to be its duty to make an independent review of the facts. It sometimes seems that the rule which governs most appellate courts in the view of findings of fact by trial courts is given lip service, but is actually given the least possible practical effect.

Appellate courts generally will give great weight to the findings of fact by trial courts which had the opportunity to see and hear the witnesses, and they are reluctant to disturb such findings. The Supreme Court at times seems to read the records in criminal cases with a somewhat different point of view. Perhaps no more striking example of this can readily be found than in *Moore v. Michigan*, 355 U.S. 155.

In the Moore case, the defendant had been charged in 1937 with the crime of first-degree murder, to which he pleaded guilty. The murder followed a rape and was marked by extreme brutality. The defendant was a Negro youth, 17 years of age at the time of the offense, and is described as being of limited education—only the seventh grade—and as being of rather low mentality.

He confessed the crime to law-enforcement officers and he expressed a desire to plead guilty and "get it over with." Before such a plea was permitted to be

entered, he was interviewed by the trial judge in the privacy of the judge's chambers and he again admitted his guilt, said he did not want counsel and expressed the desire to "get it over with," to be sent to whatever institution he was to be confined in, and to be placed under observation. Following this, the plea of guilty was accepted and there was a hearing to determine the punishment which should be imposed.

About 12 years later the defendant sought a new trial, principally on the ground that he had been unfairly dealt with because he was not represented by counsel. He had expressly disclaimed any desire for counsel at the time of his trial. Pursuant to the law of Michigan, he had a hearing on this application for a new trial. In most respects his testimony was seriously at variance with the testimony of other witnesses. He was corroborated in one matter by a man who had been a deputy sheriff at the time when the prisoner was arrested and was being questioned.

The trial court, however, found in substance that the defendant knew what he was doing when he rejected the appointment of counsel and pleaded guilty, that he was then calm and not intimated, and, after hearing him testify, that he was completely unworthy of belief. It accordingly denied the application for a new trial. This denial was affirmed by the Supreme Court of Michigan, largely upon the basis of the findings of fact by the trial court.

The Supreme Court of the United States reversed.

The latter Court felt that counsel might have been of assistance to the prisoner, in view of his youth, lack of education and low mentality, by requiring the State to prove its case against him—saying the evidence was largely circumstantial—by raising a question as to his sanity, and by presenting factors which might have lessened the severity of the penalty imposed. It was the maximum permitted under the Michigan law—solitary confinement for life at hard labor.

The case was decided by the Supreme Court of the United States in 1957. The majority opinion does not seem to have given any consideration whatsoever to the difficulties of proof which the State might encounter after the lapse of many years or the risks to society which might result from the release of a prisoner of this type, if the new prosecution should fail. They are, however, pointed out in the dissent.

Another recent case which seems to us surprising, and the full scope of which we cannot foresee, is *Lambert v. California*, 355 U.S., decided Dec. 16, 1957. In that case a majority of the Court reversed a conviction under a Los Angeles ordinance which required a person convicted of a felony, or of a crime which would be felony under the law of California, to register upon taking up residence in Los Angeles.

*Lambert* had been convicted of forgery and had served a long term in a California prison for that offense. She was arrested on suspicion of another crime and her failure to register was then discovered and she was prosecuted, convicted and fined.

The majority of the Supreme Court found that she had no notice of the ordinance, that it was not likely to be known, that it was a measure merely for the convenience of the police, that the defendant had no opportunity to comply with it after learning of it and before being prosecuted, that she did not act willfully in failing to register, that she was not "blameworthy" in failing to do so, and that her conviction involved a denial of due process of law.

#### "A DEVIATION FROM PRECEDENTS"

This decision was reached only after argument and reargument. Mr. Justice Frankfurter wrote a short dissenting opinion in which Mr. Justice Harlan and Mr. Justice Whittaker joined. He referred to the great number of State and federal statutes which imposed criminal penalties for nonfeasance and stated that he felt confident that "the present decision will turn out to be an isolated deviation from the strong current of precedents—a dereliction on the waters of the law."

We shall not comment in this report upon the broad sweep which the Supreme Court now gives to habeas-corpus proceedings. Matters of this sort seem to fall within the scope of the Committee of this Conference on the Habeas Corpus Bill which has been advocated for some years by this Conference for enactment by the Congress of the United States, and has been supported by the Judicial Conference of the United States, the American Bar Association, the Association of Attorneys General and the Department of Justice.

We cannot, however, completely avoid any reference at all to habeas-corpus matters because what is probably the most far-reaching decision of recent years on State criminal procedure which has been rendered by the Supreme Court is itself very close to a habeas-corpus case. That is the case of *Griffin v. Illinois*, 351 U.S. 12, which arose under the Illinois Post Conviction Procedure Act.

The substance of the holding in that case may perhaps be briefly and accurately stated in this way: If a transcript of the record, or its equivalent, is essential to an effective appeal, and if a State permits an appeal by those able to pay for the cost of the record or its equivalent, then the State must furnish without expense to an indigent defendant either a transcript of the record at his trial, or an equivalent thereof, in order that the indigent defendant may have an equally effective right of appeal. Otherwise, the inference seems clear, the indigent defendant must be released upon habeas corpus or similar proceedings.

Probably no one would dispute the proposition that the poor man should not be deprived of the opportunity for a meritorious appeal simply because of his poverty. The practical problems which flow from the decision in *Griffin v. Illinois* are, however, almost unlimited and are now only in course of development and possible solution. This was extensively discussed at the 1957 meeting of this Conference of Chief Justices in New York.

We may say at this point that, in order to give full effect to the doctrine of *Griffin v. Illinois*, we see no basis for distinction between the cost of the record and other expenses to which the defendant will necessarily be put in the prosecution of an appeal. These include filing fees, the cost of printing the brief and of such part of the record as may be necessary, and counsel fees.

The *Griffin* case was very recently given retroactive effect by the Supreme Court in a *per curiam* [by the court as a whole] opinion in *Eskridge v. Washington State Board of Prison Terms and Paroles*, 78 S. Ct. 1061. In that case the defendant, who was convicted in 1935, gave timely notice of an appeal. His application then made for a copy of the transcript of the trial proceedings to be furnished at public expense was denied by the trial judge.

A statute provided for so furnishing a transcript if "In his (the trial judge's) opinion, Justice will thereby be promoted." The trial judge found that Justice would not be promoted, in that the defendant had had a fair and impartial trial, and that, in his opinion, no grave or prejudicial errors had occurred in the trial.

The defendant then sought a writ of mandate from the Supreme Court of the State, ordering the trial judge to have the transcript furnished for the prosecution of his appeal. This was denied and his appeal was dismissed.

In 1956 he instituted habeas-corpus proceedings which, on June 16, 1958, resulted in a reversal of the Washington court's decision and a remand "for further proceedings not inconsistent with this opinion." It was conceded that the "reporter's transcript" from the trial was still available. In what form it exists does not appear from the Supreme Court's opinion. As in *Griffin*, it was held that an adequate substitute for the transcript might be furnished in lieu of the transcript itself.

Justices Harlan and Whittaker dissented briefly on the ground that "on this record the *Griffin* case decided in 1956 should not be applied to this conviction occurring in 1935." This accords with the view expressed by Mr. Justice Frankfurter in his concurring opinion in *Griffin* that it should not be retroactive. He did not participate in the *Eskridge* case.

Just where *Griffin v. Illinois* may lead us is rather hard to say. That it will mean a vast increase in criminal appeals and a huge case load for appellate courts seems almost to go without saying. There are two possible ways in which the meritorious appeals might be taken care of and the nonmeritorious appeals eliminated.

One would be to apply a screening process to appeals of all kinds, whether taken by the indigent or by persons well able to pay for the cost of appeals. It seems very doubtful that legislatures generally would be willing to curtail the absolute right of appeal in criminal cases which now exists in many jurisdictions.

Another possible approach would be to require some showing of merit before permitting an appeal to be taken by an indigent defendant at the expense of the State.

Whether this latter approach, which we may call "screening" would be practical or not is, to say the least, very dubious. First, let us look at a federal statute and Supreme Court decisions thereunder. What is now subsection (a) of Section 1915 of Title 28, U.S.C.A. contains a sentence reading as follows: An appeal may not

be taken *in forma pauperis* [as a poor man] if the trial court certifies in writing that it is not taken in good faith."

This section or a precursor thereof was involved in *Miller v. United States*, 317 U.S. 192, *Johnson v. United States*, 352 U.S. 563, and *Farley v. United States*, 354 U.S. 521, 523. In the *Miller* case the Supreme Court held that the discretion of the trial court in withholding such a certificate was subject to review on appeal, and that, in order that such a review might be made by the Court of Appeals, it was necessary that it have before it either the transcript of the record or an adequate substitute therefor, which might consist of the trial judge's notes or of an agreed statement as to the points on which review was sought.

Similar holdings were made by *per curiam* opinions in the *Johnson* and *Farley* cases, in each of which the trial court refused to certify that the appeal was taken in good faith. In each case, though perhaps more clearly in *Johnson*, the trial court seems to have felt that the proposed appeal was frivolous, and hence not in good faith.

The *Eskridge* case, above cited, decided on June 16, 1958, rejected the screening process under the State statute there involved, and appears to require, under the Fourteenth Amendment, that a full appeal be allowed—not simply a review of the screening process, as under the federal statute above cited. The effect of the *Eskridge* case thus seems rather clearly to be that, unless all appeals, at least in the same types of cases, are subject to screening, none may be.

It would seem that it may be possible to make a valid classification of appeals which shall be subject to screening and of appeals, which shall not. Such a classification might be based upon the gravity of the offense or possibly upon the sentence imposed. In most, if not all, States, such a classification would doubtless require legislative action. In the *Griffin* case, it will be recalled, the Supreme Court stated that a substitute for an actual transcript of the record would be acceptable if it were sufficient to present the points upon which the defendant based his appeal. The Supreme Court suggested the possible use of bystanders' bills of exceptions.

It seems probable to us that an actual transcript of the record will be required in most cases. For example, in cases where the basis for appeal is the alleged insufficiency of the evidence, it may be very difficult to eliminate from that part of the record which is to be transcribed portions which seem to have no immediate bearing upon this question. A statement of the facts to be agreed upon by trial counsel for both sides may be still more difficult to achieve even with the aid of the trial judge.

The danger of swamping some State appellate courts under the flood of appeals which may be loosed by *Griffin* and *Eskridge* is not a reassuring prospect. How far *Eskridge* may lead and whether it will be extended beyond its facts remain to be seen.

#### CONCLUSIONS: THE JUSTICES SUM UP

This long review, though far from exhaustive, shows some of the uncertainties as to the distribution of power which are probably inevitable in a federal system of government. It also shows, on the whole, a continuing and, we think, an accelerating trend toward increasing power of the National Government and correspondingly contracted power of the State governments.

Much of this is doubtless due to the fact that many matters which were once mainly of local concern are now parts of larger matters which are of national concern. Much of this stems from the doctrine of a strong, central Government and of the plenitude of national power within broad limits of what may be "necessary and proper" in the exercise of the granted powers of the National Government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. Much, however, comes from the extent of the control over the action of the States which the Supreme Court exercises under its views of the Fourteenth Amendment.

We believe that strong State and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that, in the interests of active, citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened.

As long as this country continues to be a developing country and as long as the conditions under which we live continue to change, there will always be

problems of the allocation of power depending upon whether certain matters should be regarded as primarily of national concern or as primarily of local concern. These adjustments can hardly be effected without some friction. How much friction will develop depends in part upon the wisdom of those empowered to alter the boundaries and in part upon the speed with which such changes are effected. Of course, the question of speed really involves the exercise of judgment and the use of wisdom, so that the two things are really the same in substance.

We are now concerned specifically with the effect of judicial decisions upon the relations between the Federal Government and the State governments. Here we think that the over-all tendency of decisions of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly.

There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact that our government is still a federal government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of Justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policy maker is also of concern to us in the conduct of our judicial business. We realize that in the course of American history the Supreme Court has frequently—one might, indeed, say customarily—exercised policy-making powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that, in the fields with which we are concerned and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of State action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical nonreviewability in most instances, no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role. We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers. See Judge Learned Hand on the Bill of Rights.

We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises.

It is strange, indeed, to reflect that, under a Constitution which provides for a system of checks and balances and of distribution of power between national and State governments, one branch of one government—the Supreme Court—should attain the immense and, in many respects, dominant power which it now wields. We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy.

We further believe that, in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of State action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

#### "DOUBT" IN RECENT DECISIONS

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that, in constitutional cases, unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences,

We find next that divisions in result on a 5-to-4 basis are quite frequent. We find further that, on some occasions, a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from 1 year to 75, or even 95 years. See the tables appended to Mr. Justice Douglas's address on "*Stare Decisis*," 49 Columbia Law Review 735, 758-758.

The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be.

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the Court as from time to time constituted, or of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so.

It is our earnest hope, which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of State action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides.

The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and judicial decisions, bear repeating: "If the people of our country yield to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment." Quoted in 31 "Boston University Law Review" 48.

We believe that what Mr. Root said is sound doctrine to be followed toward the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is adhering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitation of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable.

We may expect the question as to what can be accomplished by the report of this Committee or by resolutions adopted in conformity with it. Most certainly some will say that nothing expressed here would deter a member or group of members of an independent judiciary from pursuing a planned course.

Let us grant that this may be true. The value of a firm statement by us lies in the fact that we speak as members of all the State appellate courts, with a background of many years' experience in the determination of thousands of cases of all kinds. Surely there are those who will respect a declaration of what we believe.

And it just could be true that our statement might serve as an encouragement to those members of an independent judiciary who now or in the future may in their conscience adhere to views more consistent with our own.

**REPORT ON HIGH COURT: WHO WROTE IT, WHO APPROVED IT**

*These 10 State justices were members of the committee which drew up the report on the Supreme Court:*

Frederick W. Brune, Chief Judge of Maryland, Chairman

Albert Conway, Chief Judge of New York

John R. Dethmers, Chief Justice of Michigan

William H. Duckworth, Chief Justice of Georgia

John E. Hickman, Chief Justice of Texas

John E. Martin, Chief Justice of Wisconsin

Martin A. Nelson, Associate Justice of Minnesota

William C. Perry, Chief Justice of Oregon

Taylor H. Stukes, Chief Justice of South Carolina

Raymond S. Wilkins, Chief Justice of Massachusetts

*Also voting to approve the report were chief justices from 26 other States:*

Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Washington, Wyoming.

*Voting against the report were chief justice from seven States, one territory:* California, New Jersey, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, Hawaii.

*Abstaining:* Nevada, North Dakota.

*Not present:* Arkansas, Connecticut, Indiana, Puerto Rico.

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[U.S. News & World Report, Aug. 20, 1958]

**SUPREME COURT : A CRITICAL LOOK BY STATE JUSTICES**

The U.S. Supreme Court needs more "judicial self-restraint," in the opinion of the chief justices of 10 States.

The justices had been appointed to a special committee by the Conference of Chief Justices to study recent decisions.

The U.S. Supreme Court is taken to task by a committee of State chief justices for going too far and too fast in expanding federal power. The chief justices urge Justices on the highest federal court to use a bit more "judicial restraint."

That's the main conclusion submitted last week to the Conference of Chief Justices by a special committee appointed last year to look into decisions affecting federal-State relationships.

The Committee, headed by Chief Judge Frederick W. Brune of the Maryland Court of Appeals, included top judges from seven Northern States and three Southern States. The Northern States represented were New York, Michigan, Wisconsin, Minnesota, Oregon and Massachusetts, besides Maryland. The Southern States were Texas, Georgia and South Carolina.

The report, at the outset, recognizes that "by almost universal common consent" the ultimate judicial power of the country rests with the U.S. Supreme Court. It goes on to say: "Any other allocation of such power would seem to lead to complete chaos." The report adds: "It is a part of our obligation to seek to uphold respect for law." But then this comment is made:

"We do not believe that this goes so far as to impose upon us an obligation of silence when we find ourselves unable to agree with pronouncements of the Supreme Court (even though we are bound by them), or when we see trends in decisions of that Court which we think will lead to unfortunate results."

*When laws conflict.* The report deals mainly with decisions involving the supremacy of federal laws over State laws, and with decisions rendered under the Fourteenth Amendment. However, recent decisions on racial segregation, which were rendered under the Fourteenth Amendment, are not mentioned.

In the field of labor relations, the justices noted that the theory of supremacy, "coupled with only partial express regulation by Congress, has produced a state of considerable confusion. . . ." Decisions are cited that prevented a State from

acting to bar strikes in public utilities and that seemed to give federal courts exclusive jurisdiction in suits between employers and unions. The report also notes that, in two decisions last year, the Supreme Court upheld the right of an employe to sue a labor union in a State court. In labor regulation, the report suggests that Congress might clear up the confusion.

The justices also note that, under the supremacy doctrine, the Supreme Court has "practically eliminated" any antisubversive laws by States.

When it comes to cases under the Fourteenth Amendment, the State justices take particular exception to decisions which limited the authority of States to make their own rules for the admission of lawyers to the bar. Their report quotes with approval a dissent by Justice John M. Harlan that "this case involves an area of federal-State relations—the right of States to establish and administer standards for admission to their bars—into which this Court should be especially reluctant and slow to enter."

The justices direct their sharpest criticism at Supreme Court decisions relating to State enforcement of criminal laws. They object to a decision that freed a confessed murderer because he pleaded guilty without having a lawyer; decisions that require States to provide free transcripts of trials so that convicted felons can appeal; and a decision that struck down a city ordinance aimed at supervising ex-convicts.

At one point, the report observes "Appellate courts generally will give great weight to the findings of fact by trial courts which had the opportunity to see and hear the witnesses, and they are reluctant to disturb such findings. The Supreme Court at times seems to read the records in criminal cases with a somewhat different point of view."

The justices appear especially disturbed at the decisions governing appeals from criminal convictions under State laws. There is a possibility, the committee fears, that State appellate courts may bog down under the weight of appeals from criminal convictions. "The danger of an almost complete breakdown in the work of State appellate courts under the flood of appeals which may be loosed . . . is not a reassuring prospect," the committee said.

The committee, however, acquits the Supreme Court of invading some State powers. The justices note that, in federal trials of suits between citizens of different States, the laws of States rather than of the Federal Government are to prevail. Supreme Court decisions also have upheld suits in State courts against corporations from other States. And on taxes, the report observes that: "On the whole, the Supreme Court seems perhaps to have taken a more liberal view in recent years towards the validity of State taxation than it formerly took."

*Court-made law.* Over all, however, the committee finds a Supreme Court majority often too eager to make policy decisions and to assume legislative power. In questioning this trend, the report notes that Supreme Court Justices themselves frequently disagree. Hence the suggestion for "judicial self-restraint."

Besides Judge Brune, the chief justices who signed the report are: Albert Conway of New York, John R. Dethmers of Michigan, William H. Duckworth of Georgia, John E. Hickman of Texas, John E. Martin of Wisconsin, William C. Perry of Oregon, Taylor H. Stukes of South Carolina and Raymond S. Wilkins of Massachusetts, plus Associate Justice Martin A. Nelson of Minnesota, who signed the report for the chief justice of his State.

#### "IMMENSE AND DOMINANT POWER"—THE REPORT THAT CITES NEED FOR "RESTRAINT" ON SUPREME COURT

*Following is the text of conclusions reached by the Committee on Federal-State Relationships as Affected by Judicial Decisions, in a report submitted to the Conference of Chief Justices in Pasadena, Calif., Aug. 20, 1958:*

This long review, though far from exhaustive, shows some of the uncertainties as to the distribution of power which are probably inevitable in a federal system of government. It also shows, on the whole, a continuing and, we think, an accelerating trend toward increasing power of the National Government and correspondingly contracted power of the State governments.

Much of this is doubtless due to the fact that many matters which were once mainly of local concern are now parts of larger matters which are of national concern. Much of this stems from the doctrine of a strong central Government and of the plenitude of national power within broad limits of what may be "necessary and proper" in the exercise of the granted powers of the National

Government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. Much, however, comes from the extent of the control over the action of the States which the Supreme Court exercises under its views of the Fourteenth Amendment.

We believe that strong State and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that, in the interest of active citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened.

As long as this country continues to be a developing country and as long as the conditions under which we live continue to change, there will always be problems of the allocation of power depending upon whether certain matters should be regarded as primarily of national concern or as primarily of local concern. These adjustments can hardly be effected without some friction. How much friction will develop depends in part upon the wisdom of those empowered to alter the boundaries and in part upon the speed with which such changes are effected. Of course, the question of speed really involves the exercise of judgment and the use of wisdom, so that the two things are really the same in substance.

We are now concerned specifically with the effect of judicial decisions upon the relations between the Federal Government and the State governments. Here we think that the overall tendency of decisions of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly.

There have been, of course, and still are very considerable differences within the Court, on these matters, and there has been quite recently a growing recognition of the fact that our government is still a federal government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of Justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policy maker is also of concern to us in the conduct of our judicial business. We realize that, in the course of American history, the Supreme Court has frequently—one might, indeed, say customarily—exercised policy-making powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that, in the fields with which we are concerned and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of State action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical nonreview ability in most instances no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers. See Judge Learned Hand on the Bill of Rights. We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises.

It is strange, indeed, to reflect that, under a Constitution which provides for a system of checks and balances and of distribution of power between national and State governments, one branch of one government—the Supreme Court—should attain the immense and, in many respects, dominant power which it now wields.

When we read the Lincoln Mills case in connection with the regulation of labor relations, we find language which reads to us very much as if the Supreme Court found in a somewhat obscurely worded section of the Labor-Management Relations Act a grant by Congress to the federal courts of a power closely approximating legislative power. Perhaps no more is meant by the term "to fashion a body of federal law" than to interpret and apply a statute whose meaning is rather vague, but the possible implications of this phrase may be considerably broader.

We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy.

We further believe that, in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of State action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that, in constitutional cases, unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences.

#### DIVERGENT VIEWS OF JUSTICE

We find next that divisions in result on a 5-to-4 basis are quite frequent. We find further that, on some occasions, a majority of the Court cannot be mustered in support of any one opin'on and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions or, for that matter, of others. We concede that a slavish adherence to *stare decisis* [standing by previous decisions] could at times have unfortunate consequences, but it seems strange that, under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from 1 year to 75, or even 95 years. See the tables appended to Mr. Justice Douglas's address on "*Stare Decisis*," 40 Columbia Law Review 735, 750-758.

The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be. If reasonable certainty and stability do not attach to a written constitution, is it a constitution or is it a sham?

#### "GRAVE CONCERN" OVER SOME RULINGS

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so. But to err is human, and even the Supreme Court is not divine.

It is our earnest hope, which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of State action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides.

The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and judicial decisions, bear repeating: "If the people of our country yield to impatience which would destroy

the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment." Quoted in 31 "Boston University Law Review" 43.

We believe that what Mr. Root said is sound doctrine to be followed toward the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is adhering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable.

**Senator ERVIN.** I want to call your attention to a statement made by Daniel Webster, whom I think you and I would agree was one of the great American lawyers of all time—

**Judge MARSHALL.** No question.

**Senator ERVIN.** He said :

Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

Would you like to make any comment on that observation of Daniel Webster, to the effect that it is hardly too strong to say that the Constitution was made to guard the people against the dangers of the good intentions of men in public office?

**Judge MARSHALL.** I would not disagree with that as a statement, but it is based on the fact that the Constitution was to protect the people from what might happen temporarily in any governmental agency.

**Senator ERVIN.** There was a great American constitutional scholar of a bygone generation who was a member of the Supreme Court of Michigan, and the dean of the Law School of the University of Michigan, Thomas M. Cooley, who stated in substance that the Constitution was written to put the fundamentals of government beyond the shifting winds of popular opinion. Do you agree with that?

**Judge MARSHALL.** I think there is almost unanimous agreement on that.

**Senator HART.** While Senator Ervin is going through the record, I would add that that continues to be the attitude of the University of Michigan Law School.

**Senator ERVIN.** I am glad to know that.

Justice Cooley also said that a court which should allow a change in public sentiment to influence it to give to a written constitution a construction not warranted by the intention of its framers would be justly chargeable with reckless disregard of official oath and public duty.

Do you agree or disagree with that?

**Judge MARSHALL.** I would say I think I agree with that.

**Senator ERVIN.** Do you not agree with this statement of Chief Justice John Marshall, which was made in the great case of *Gibbons v. Ogden*, 9 Wheat. 213, that the enlightened patriots who framed our Constitution and the people who adopted it must be understood to have intended what they said?

Judge MARSHALL. Surely, I agree with that.

Senator ERVIN. Does it not necessarily follow that the role of the Supreme Court as interpreter of the Constitution is simply to ascertain and give effect to the intention of its framers and the people who adopted it?

Judge MARSHALL. In general, yes.

Senator ERVIN. Well, is it not absolutely so?

Judge MARSHALL. Well, it is such a broad framework that I would say yes, but it is a very broad statement.

Senator ERVIN. I wish to repeat my question: Is not the role of the Supreme Court simply to ascertain and give effect to the intent of the framers of the Constitution and the people who ratified the Constitution?

Judge MARSHALL. Yes, Senator, with the understanding that the Constitution was meant to be a living document.

Senator ERVIN. Yes, but it is the duty of the Supreme Court, is it not, to interpret the Constitution according to its true intent?

Judge MARSHALL. I think so. No question.

The CHAIRMAN. Let me ask a question.

What do you mean by "living document"?

Judge MARSHALL. Well, back in the early decisions in the 1880's or so, it was said specifically that the Constitution was a living document to be interpreted and applied as of the time that a particular factual situation came up, that it was broad terms, written with a broad stroke, and was not intended to meet each individual problem as it came up, but to be the broad—

The CHAIRMAN. Do you think that was the opinion of the founders of this country?

Judge MARSHALL. I am certain of it, because the Constitution could not have foreseen what they obviously knew, that there would be changes in government.

The CHAIRMAN. It cannot mean one thing today and another thing tomorrow, can it?

Judge MARSHALL. Certainly not. I agree with you, sir.

Senator ERVIN. In the case of *South Carolina v. the United States*, which is reported at 199 U.S. 437, the Court says this, after stating that the Constitution is a written instrument:

That which it meant when adopted it means now. Those things which are within its grants of power, as those grants were understood when made, are still within them and those things not within them remain still excluded.

Do you agree with that?

Judge MARSHALL. I do.

Senator ERVIN. The Constitution provides in article V a certain method for its amendment by the Congress and the States, acting in concert. Do you agree with me that that is the only method by which the Constitution can be properly amended?

Judge MARSHALL. I know of no other way. It has to be amended by its own terms. That is the only way it can.

Senator ERVIN. It is the function, it is the role of the Supreme Court to interpret the Constitution, that is, to ascertain and give effect to the meaning of the Constitution. Is that not all that interpretation means, that is, ascertaining the meaning of the document and giving effect to it?

Judge MARSHALL. Without question.

Senator ERVIN. And an amendment of the Constitution is a change in the meaning of the Constitution, is it not?

Judge MARSHALL. Once it is adopted, it is a change.

Senator ERVIN. And since the sole power to change the meaning of the Constitution—that is, to amend the Constitution—resides in the Congress and the States under the fifth article of the Constitution, no Justice of the Supreme Court is ever authorized by any provision of the Constitution to change its meaning while professing to interpret it, is he?

Judge MARSHALL. I would say you are right. But it is still the duty of the Supreme Court to interpret it.

Senator ERVIN. But has it not been established that in the construction of the language of the Constitution, as indeed in all other instances where construction of the language of a document becomes necessary, the Justices of the Supreme Court must place themselves as nearly as possible in the position of the men who framed that instrument?

Judge MARSHALL. I see nothing wrong with that statement.

Senator ERVIN. Where the words of the Constitution are plain, there is no room for any construction whatever, is there? Where the meaning is obvious?

Judge MARSHALL. Yes, Senator, I agree, and I also agree that there are differences on that. I have read opinions which said that—it was not speaking of the Constitution; it was speaking of an act of Congress, if I remember correctly, and said that the interpretation discredited what would otherwise be plain meaning. I can conceive of that being a possibility, but I could not really foresee it.

Senator ERVIN. As I infer from your statement, you agree with me that a member of the Supreme Court should never base his opinion or his decision on what he would like for the Constitution or a statute, such as an act of Congress or other statute, to say, but he should base his opinion solely upon what the Constitution or the statute being interpreted does say.

Judge MARSHALL. Absolutely, with the addition that a Justice should never, or judge should never use his personal feeling in any fashion in deciding or writing an opinion in a lawsuit.

Senator ERVIN. I would like to invite your attention to section 1, article I, of the Constitution, which says:

All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

I will ask you if it is not the clear meaning of that constitutional provision that all the power to make laws at the Federal level belongs to the Congress, and none whatever to the Court or to the President?

Judge MARSHALL. I agree.

Senator ERVIN. I invite your attention to section 8 of article I, omitting certain provisions not relevant to the matter I have in mind:

The Congress shall have the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any Department or officer thereof.

Does not that section plainly mean that no power on earth, other than Congress, has authority to make a law for carrying into execution any

of the powers vested in the Federal Government or any officer or Department of the Federal Government by the Constitution?

Judge MARSHALL. Congress has the sole authority to legislate in our framework of government—sole.

Senator ERVIN. Now, Blackstone, in effect, defines law as a rule of action prescribed by the supreme power in the State commanding what is right and forbidding what is wrong. Of course, we do not have a supreme power in the United States in the sense that the British Parliament is the supreme power in England. But would you not say that a law is a rule of conduct prescribed by the lawmaking power of the government?

Judge MARSHALL. I would think so.

Senator ERVIN. And it may take the form of a rule of conduct to guide or control the action of officials discharging public duties or the form of a rule of conduct to guide the actions of citizens in general?

Judge MARSHALL. It would be restricted only by the authority of the U.S. Constitution. That is the only restriction I see to the power of Congress to legislate, the only restriction, if it could be called a restriction.

Senator ERVIN. That is implied, if not implicit, in the provision I read, because it says that the Congress may pass laws to enforce the provisions of the Constitution.

Of course, it cannot pass laws to authorize things that are not authorized by the Constitution.

I would like to invite your attention to this provision of the fifth amendment.

No person "shall be compelled in any criminal case to be a witness against himself."

Those words are fairly plain, are they not?

Judge MARSHALL. Yes, sir.

Senator ERVIN. Those words apply only to compelled or forced testimony, do they not?

Judge MARSHALL. That is what the words said.

Senator ERVIN. For this reason, they cannot rightly be applied to any voluntary confessions made under any circumstances, because voluntary confessions are voluntarily made, are they not?

Judge MARSHALL. Well, Senator, the word "voluntary," gets me in trouble. The real problem is whether a statement is or is not voluntary.

Senator ERVIN. That is all it is. If a confession is voluntary, it is voluntary, and it is involuntary if it is coerced.

Judge MARSHALL. There are hundreds of cases, you will remember, Senator, that you and I know of, where the whole question turned on whether it was voluntary.

Senator ERVIN. Yes.

Judge MARSHALL. But I do not know whether it is voluntary or not, the language is so broad.

Senator ERVIN. The language of the fifth amendment says that no person shall be compelled to be a witness against himself in any criminal case. This language has no reference whatever to voluntary confessions; do they?

Judge MARSHALL. I do not agree.

Senator ERVIN. You do not?

Judge MARSHALL. No, sir. I do not agree that it is limited to that.

Senator ERVIN. Where is there anything in the words, "No person shall be compelled to be a witness against himself in any criminal case" that has any possible reference to voluntary confessions?

Judge MARSHALL. I do not know when the case began.

Senator ERVIN. I am not talking about cases, I am talking about the Constitution, the plain words of it.

Judge MARSHALL. The case is in the words you just read. It says "in a criminal case." You just read it. I do not know when a criminal case starts and when it ends?

Senator ERVIN. You do not?

Judge MARSHALL. No, sir.

Senator ERVIN. You know what the decisions hold on it, do you not?

Judge MARSHALL. More or less. I know pretty well what they hold up to date.

Senator ERVIN. There is not a case until there is a formal charge in court, is there?

Judge MARSHALL. I do not know.

Senator ERVIN. Well, now, you have been practicing law a long time.

Judge MARSHALL. Since 1936. Since 1933, as a matter of fact.

Senator ERVIN. You have been a member of the court of appeals in the New York circuit for some time.

Judge MARSHALL. Four terms.

Senator ERVIN. And you do not know when a criminal case starts?

Judge MARSHALL. No, sir.

Senator ERVIN. You do not know what the decisions hold on that?

Judge MARSHALL. I know there are some decisions that say a criminal case starts when a man is indicted and information has been filed.

Senator ERVIN. That is criminal prosecution.

Judge MARSHALL. Yes; so I say I do not know.

Senator ERVIN. Let us get back to the first part of this.

Can you tell me how anyone who is willing to attribute to simple words in the English language their obvious meaning is able to say that the words of the fifth amendment, "no person shall be compelled in any criminal case to be a witness against himself," can apply to anything except compelled testimony?

Judge MARSHALL. Yes; I think it can be interpreted differently.

Senator ERVIN. I wish you would give me the interpretation you think those words are susceptible of receiving. Is there some application they can have to testimony which is not compelled or forced testimony?

Judge MARSHALL. I cannot give you a specific example. I can give you some cases.

Senator ERVIN. I am leaving the cases out. We are talking about the words of the Constitution.

Judge MARSHALL. Well, I say that the words of the Constitution, I do not know what the framers meant when they said "a criminal case." I do not know.

Senator ERVIN. Let us talk about the first part of this.

Judge MARSHALL. Well, the first part is—

Senator ERVIN. "Compelled." Does not the word "compelled" imply coercion or compulsion?

Judge MARSHALL. It implies coercion or compulsion, the degree not to be determined.

Senator ERVIN. And not voluntary action?

Judge MARSHALL. Voluntary can follow compulsion.

Senator ERVIN. It can also precede it, can it not?

Judge MARSHALL. Yes, sir. I tried a case in Oklahoma where the man "voluntarily" confessed after he was beaten up for 6 days. He "voluntarily" confessed.

Senator ERVIN. I would say he did not voluntarily confess.

Judge MARSHALL. I say that is the kind of difference that we find in these cases, and you take them case by case.

Senator ERVIN. I would say any judge who would hold a confession induced by a beating is voluntary is not capable of discharging the duties of a judge.

Judge MARSHALL. I would not comment on that, sir.

Senator ERVIN. A confession that is voluntary is voluntary in fact.

So you maintain that the words, "No person shall be compelled in any criminal case to be a witness against himself," can apply to testimony . . . extra judicial statements which are not compelled at all, that are voluntary?

Judge MARSHALL. My position, Senator, is that if such an issue is presented to me as a judge or a justice, I will look at the fifth amendment, I will look at the law, I will look at the precedents, and I will apply that to the facts of that particular case.

Senator ERVIN. Well, I think you can say that if these words mean anything at all, they apply only to compelled testimony.

Judge MARSHALL. I cannot say to you today what I will say when that case gets to me.

Senator ERVIN. I am not asking you as to that. I am not asking you what you are going to decide on any case.

Judge MARSHALL. Well, there will be fifth amendment cases before the Court.

Senator ERVIN. I will tell you, Judge, if you are not going to answer a question about anything which might possibly come before the Supreme Court some time in the future, I cannot ask you a single question about anything that is relevant to this inquiry.

Judge MARSHALL. All I am trying to say, Senator, is I do not think you want me to be in the position of giving you a statement on the fifth amendment, and then, if I am confirmed and sit on the Court, when a fifth amendment case comes up, I will have to disqualify myself.

Senator ERVIN. If you have no opinions on what the Constitution means at this time, you ought not to be confirmed. Anybody that has been at the bar as long as you have, and has as distinguished a legal career as you have, certainly ought to have some very firm opinions about the meaning of the Constitution.

Judge MARSHALL. But as to particular language of a particular section that I know is going to come before the Court, I do have an opinion as of this time. But I think it would be wrong for me to give that opinion at this time. When the case comes before the Court, that will be the time.

I say with all due respect, Senator, that is the only way it has been done before.

Senator ERVIN. How can this committee, or how can the Senate perform its duty and ascertain what your constitutional or judicial philosophy is without ascertaining what you think about the Constitution?

Judge MARSHALL. Well, one way, you can look at my opinions.

Senator ERVIN. I know, but I do not have time to read all of your opinions. I would think you would be the witness who could inform us in the most convincing fashion, and certainly in the most informed fashion, as to what your constitutional or judicial philosophy is.

Judge MARSHALL. My philosophy is that with this Constitution, the U.S. Constitution, that with the oath I have taken in the past on at least three occasions, I will abide by that Constitution and apply it in the best manner that I possibly can. That is the best I can do, Senator.

Senator ERVIN. I am not asking you about cases you are going to have to decide. I am asking you about the meaning of what I conceive to be very plain words of the Constitution.

Judge MARSHALL. Well, Senator—

Senator ERVIN. Judge, how can the words, "no person shall be compelled in any criminal case to be a witness against himself," apply to anything except testimony given in a court?

Judge MARSHALL. I would say, Senator, that we know, you and I, that you are talking about a matter which was in the *Miranda* cases, and there will be many more cases dealing with the *Miranda* rule and the use of confessions. Those cases are now either in the Supreme Court or on their way to the Supreme Court.

Senator ERVIN. Well, Judge, I would respectfully suggest that I am talking about 15 words which have been in the Constitution since June 15, 1790. Am I to take it that you are unwilling to tell me what you think those words, which have been in the Constitution since 1790, mean?

Senator HART. Would the Senator yield just briefly?

Senator ERVIN. Yes.

Senator HART. It would be interesting to know from the record how many cases have been litigated since 1790 over those very 15 words. It would be an enormously long hearing.

Senator ERVIN. Yes, sir.

Judge MARSHALL. It certainly would.

Senator ERVIN. I will ask you if every one of those cases which were litigated before the Supreme Court of the United States from June 15, 1790, down to the 13th day of June 1966 did not hold that these words had no possible application to voluntary confessions made outside of court?

Judge MARSHALL. For the same reason, I cannot answer that question.

Senator ERVIN. You cannot tell me about past decisions although I have to pass upon your qualifications to be an Associate Justice to my own satisfaction?

You cannot tell me what the decision of the courts were from June, 15, 1790, to the 13th day of June 1966, on this very simple question?

Judge MARSHALL. My whole point, Senator, is the question is not that simple. The question involves matters that are now pending before the Supreme Court, and any statement I make construing the fifth amendment would oblige me to disqualify myself in those cases, would it not?

Senator ERVIN. Well, Judge, I have been a judge and a lawyer.  
Judge MARSHALL. That is the truth.

Senator ERVIN. I have many opinions about the Constitution which I would not hesitate to express to anybody. If you have not an opinion you are willing to express on the Constitution these words of or on what the decisions have been on a fundamental question, an often recurring question such as this, I do not know what is the use of holding hearings on your nomination, because it would be absolutely useless.

Judge MARSHALL. Senator, I remind you, you said recurring. I do not think it is proper for me to comment on recurring questions.

✓ Senator ERVIN. Is it not theoretically possible that a case can come before the Supreme Court in the future involving the interpretation of every word in the Constitution?

Judge MARSHALL. Theoretically possible?

Senator ERVIN. Yes, sir.

Judge MARSHALL. Yes, sir; theoretically.

Senator ERVIN. I am not asking you about the *Miranda* case; I am not asking you what you would do about the *Miranda* case.

I am just asking a question as one lawyer to another. Did not the Supreme Court of the United States hold from June 15, 1790, until the *Miranda* case that these words of the fifth amendment did not apply to a voluntary confession, for three reasons:

First, because a voluntary confession is not compelled testimony; second, because a person, a suspect, or any other person in the custody of a police officer, when interrogated by the officer, is not testifying as a witness; and in the third place, that when he is merely being interrogated by an officer, there is no case?

Was that not the uniform holding of the Court?

Judge MARSHALL. I respectfully say it would be improper for me to comment on it.

Senator ERVIN. Judge, am I to imply that you feel you should not give any answers to questions relating to specific provisions of the Constitution which would tend to reveal to this committee or to the Senate what your constitutional or judicial philosophy is?

Judge MARSHALL. I do not agree that that is my position. My position is, which in every hearing I have gone over is the same, that a person who is up for confirmation for Justice of the Supreme Court deems it inappropriate to comment on matters which will come before him as a Justice.

Senator ERVIN. Well, now, did you read the questions I put to Justice Potter Stewart when he was before this committee on the occasion it was considering his nomination?

Judge MARSHALL. Yes, sir.

Senator ERVIN. And the questions I put to Justice Goldberg when he was before this committee?

Judge MARSHALL. Yes, sir.

Senator ERVIN. And I will ask you if they did not answer questions fully and freely about their constitutional and judicial philosophy?

Judge MARSHALL. I did not remember, sir, and I can, of course, be corrected, that they commented on any case that they knew was coming before them.

Senator ERVIN. You do not know that these cases will come before you, do you?

Judge MARSHALL. These cases are now pending in the Supreme Court or on their way.

Senator ERVIN. The Federal cases now pending are cases in which you would have to disqualify yourself, are they not, because you appeared for the Government in those cases?

Judge MARSHALL. Absolutely.

But the State cases, I would not have to disqualify myself.

Senator ERVIN. Do you not know that in the confirmation hearings of Justice Potter Stewart, I questioned him at great length on a case in which he wrote the opinion, in the Sixth Circuit?

Judge MARSHALL. Sixth Circuit, yes, sir.

Senator ERVIN. And he answered them fully and freely.

Judge MARSHALL. You have not asked me any questions about the Second Circuit.

Senator ERVIN. Would you answer me questions freely put to you?

Judge MARSHALL. No, sir, I do not object to that, unless they are cases that will come before me later. But these are cases —

Senator ERVIN. I am going to give you a chance to answer a question about the *Miranda* case on this point.

Did the Supreme Court hold for the first time in the *Miranda* case that a voluntary confession could not be received in evidence unless the enforcement officer having the suspect in custody first warned him that he could remain silent, that he did not have to say anything, that anything he said derogatory to himself could be used against him, and he did not have to answer any questions until the lawyer was present, and that if he did not have a lawyer and was unable to get one himself, the court would appoint a lawyer for him, and that he could not waive these requirements unless he stated in substance that he did not want a lawyer and was willing to make a statement?

Judge MARSHALL. I think substantially all but the last statement is in that opinion. I do not believe the last statement is as you say.

Senator ERVIN. My recollection is that they said he had to make an express waiver.

Judge MARSHALL. It was express; I think that was it. But we are not talking about what I remember the decision said.

Senator ERVIN. Do you not consider that in the final analysis, the Court was laying down rules of conduct for the guidance and control of the officer?

Judge MARSHALL. I said, Senator, I respectfully say I am not going to comment or give any interpretation of that opinion. I just cannot do it.

Senator ERVIN. I would like to remark in respect to the requirement you did not recall, the words of the Court were that he must expressly state, in substance, that he "is willing to make a statement and does not want an attorney."

Will you answer this question: Was not that the first decision of the Supreme Court that ever said any such requirements existed so far as you can recall?

Judge MARSHALL. So far as I can recall.

Senator ERVIN. Did not the Chief Justice say that an involuntary confession would be inadmissible under these words of the fifth amendment that I am quoting, unless "the principles announced today" and

"the system of warnings we delineate today" were observed by the officer having the suspect in custody?

Judge MARSHALL. I think that was in the opinion.

Senator ERVIN. Do you not construe that to be a voluntary confession by the five judges joining in the majority opinion that the Court was on that day adding a new requirement to the provision of the fifth amendment that I have read?

Judge MARSHALL. I think it speaks for itself.

Senator ERVIN. Well, does it not speak to that effect?

Judge MARSHALL. It is not—I would rather not comment on the opinion of the Supreme Court in the *Miranda* case in any form or fashion. ✓

Senator ERVIN. Can you point out a single syllable in the provision of the fifth amendment which says that no person shall be compelled in any criminal case to be a witness against himself that embraces the requirements announced and the system of warnings laid down by the majority opinion in the *Miranda* case for the first time on June 13, 1966?

Judge MARSHALL. I have to repeat, sir, I do not want to comment upon that decision. ✓

Senator ERVIN. To put the question frankly, do you believe that the Supreme Court has the power to add anything to a constitutional provision or to subtract anything from it?

Judge MARSHALL. I think its sole job is to interpret it as it is written or as it was written, either way you want to say it. That is the sole responsibility of the Supreme Court.

Senator ERVIN. Well, can you point out anything in the provision of the fifth amendment, we have been discussing, that says that a person has the right to remain silent and that anything that he says can be used against him, and that he has a right to have a lawyer present before he is interrogated, and which says that a lawyer will be appointed for him if he does not have one of his own selection?

Judge MARSHALL. My answer, Senator, is that I would not want to comment on the merits of that opinion or the language. I do not think it would be proper. ✓

Senator ERVIN. I think this is a very simple question. Did not the majority—that is, the five—who joined in the *Miranda* case on June 13, 1966, attempt to add to the provision of the fifth amendment something that never appeared in the fifth amendment?

Judge MARSHALL. If I might say, Senator, in the beginning, we agreed that people have a right to interpret and criticize the Supreme Court, but there are certain who cannot, and I am one of those. ✓

Senator ERVIN. I am not asking you to criticize the Supreme Court. I am just asking you if you do not think—this is not criticism. It is not criticism to express an opinion as to what is true or not. My question is simply, does not the *Miranda* case add some requirements to the fifth amendment which are not in the fifth amendment?

Judge MARSHALL. I cannot comment, respectfully; I say I cannot comment on that opinion. ✓

Senator ERVIN. I believe you did admit that you agreed with me that these requirements prescribed a rule of conduct for the arresting or the detaining officer, did you not?

Judge MARSHALL. No, sir; I agreed that the words you read were in the opinion, Senator. That is all I meant to say. That is all I meant to say, that they were in the opinion.

Senator ERVIN. But the words I read are not in the Constitution, are they?

Judge MARSHALL. No, sir.

Senator ERVIN. And prior to that time, no decision of the Supreme Court even intimated that they were implicit in the Constitution, did they?

✓ Judge MARSHALL. I would rather not comment on that, sir, because it is interpreting that opinion.

Senator ERVIN. Senator McClellan was speaking of something yesterday about the incidence of crime in the United States.

You are familiar, I know, as a lawyer, with the magazine, "Case and Comment," which is published by the Lawyers Co-op of Rochester, N.Y. It has this to say in its May-June 1967, issue:

The existence of crime, the talk about crime, the reports of crime, and the fear of crime has eroded the basic quality of life for many Americans. A commission study conducted in high crime areas of two large cities found that, first, 43 percent of the respondents say they stay off the streets at night because of their fear of crime; second, 35 percent say they do not speak to strangers any more because of their fear of crime; third, 21 percent say they use cars and cabs at night because of their fear of crime; fourth, 20 percent say they would like to move to another neighborhood because of the fear of crime.

Then it adds this:

The findings of the commission's national survey generally support those of the local surveys. One third of a representative sample of all Americans say that it is unsafe to walk alone at night in their neighborhoods. Slightly more than one third say they keep firearms in the house for protection against criminals. 28 percent say they keep watchdogs for the same reason.

Do you not think that these facts point out this truth, that this is no time for judges to be inventing new rules to handicap law enforcement officers in the enforcement of criminal laws?

Judge MARSHALL. Yes.

Senator ERVIN. Well, do you not think the Supreme Court invented new rules in the *Miranda* case?

Judge MARSHALL. No, sir.

Senator ERVIN. I will ask you again, then, did those rules laid down in the *Miranda* case ever exist before the *Miranda* case?

✓ Judge MARSHALL. I do not want to comment on the merits of the *Miranda* opinion one way or another.

Senator ERVIN. You say they did not lay down new rules in the *Miranda* case. You did say that.

Judge MARSHALL. No; I said I did not think the laying down of it did anything to increase crime.

The CHAIRMAN. Repeat that, please.

Judge MARSHALL. A broad statement, Mr. Chairman. I do not believe that any court decisions have, by the decisions themselves, increased crime.

Senator ERVIN. Do you believe that outlawing of voluntary confessions as admissible evidence would have any effect upon the enforcement of criminal laws?

Judge MARSHALL. My answer to that, Senator, would be the first case I remember was back in the 1930's that outlawed involuntary confessions, the case of *Brown v. Mississippi*. That was quite a while back. That was the first one, if I remember.

Senator ERVIN. That is not quite a relevant answer to my question.

Do you believe that outlawing voluntary confessions would have no impact upon the ability of prosecutors to bring self-confessed criminals to justice?

Judge MARSHALL. That is an arguable point.

Senator ERVIN. We have had quite a lot of testimony before the Subcommittee on Criminal Laws and Procedures. The prosecuting attorney in the city of Baltimore came before the Subcommittee on Criminal Laws and Procedures and testified as to the astounding number of serious cases he has had to nolle pros or dismiss because of the *Miranda* case.

I talked to prosecuting attorneys in North Carolina about this matter, and they said they were all seriously handicapped by the *Miranda* decision. I also read a newspaper account from your State of New York, which stated that a man who had voluntarily confessed that he had murdered his common-law wife and five of her children had to be released by the court because the arresting officer forgot to tell him that he had a right to a lawyer.

Judge MARSHALL. I am aware of that. I am also aware that the National Association of Prosecuting Attorneys—I have forgotten the exact name of it—appeared in the *Miranda* cases and gave very detailed figures on that. I am aware of those statements.

Senator ERVIN. Well, do you not consider—I am not now asking a thing about the *Miranda* case—do you not think that the most convincing evidence of the guilt of an accused is his voluntary confession that he committed the crime?

Judge MARSHALL. If it is voluntary. If it is voluntary in the eyes of the law.

Senator ERVIN. My question is a hypothetical question that has no reference to the *Miranda* case. I am assuming that it is voluntary.

Judge MARSHALL. I know of no case, Senator, that prevents a man from walking into a police precinct and, without anything else, saying in the very greatest detail, I committed the following crime. I do not see anything wrong with it. I do not know of any rule of law that would keep it out.

Senator ERVIN. Would that be the only kind of confession that you think would be voluntary?

Judge MARSHALL. No, sir. I am saying it is the most obvious one. That is why I mentioned it, because I say our point of disagreement among lawyers and judges and justices is as to what is voluntary and what is not.

Senator ERVIN. You joined in an opinion by Judge Friendly against the warden of Sing Sing Prison, in which Judge Friendly said:

Granting all this, it remains true that the chance of council's presence would have altered events considerably less here than in the case of voluntary confessions, where a lawyer's advice can almost insure that none will be forthcoming.

You evidently agree with that statement of Judge Friendly, because you concurred in his opinion.

Judge MARSHALL. Judge Friendly is one of my favorite authors, and I agree with what he writes usually, without much exception.

Senator ERVIN. And he says that a lawyer's presence, to use his words, almost insures that no confession will be forthcoming.

Judge MARSHALL. We had several articles and several statements that had been made in which that has been generally agreed among lawyers.

Senator ERVIN. And so do you not agree with me and with Judge Friendly that the securing of the presence of a lawyer as required in the *Miranda* case makes it virtually certain that nobody hereafter will ever make any confession?

Judge MARSHALL. I guess you would say, Senator, that the approves the rule, but in another case, the opinion of which I wrote, the lawyer advised the client to confess.

Senator ERVIN. Yes, but now, under the Federal rulings—

Judge MARSHALL. He advised him. The man would not have confessed, except the lawyer told him to.

Senator ERVIN. Now, under the Federal rulings they would have to set that aside, would they not, in Federal court?

Judge MARSHALL. If a man has a lawyer and the lawyer tells him to confess, it would be set aside? I do not know of any case that says that.

Senator ERVIN. The Federal court afterward would look into it and determine whether the lawyer ought to have given him that advice. In so doing, the court would look with hindsight instead of judging by the circumstances that existed in the trial court, and would probably reach the conclusion that the lawyer gave him improper advice and was, therefore, incompetent, and that the defendant ought to get a new trial.

Judge MARSHALL. I know of no case on that point.

Senator ERVIN. Has not the Supreme Court of the United States, during recent years, virtually abolished the doctrine which we lawyers call the doctrine of res judicata in criminal cases in State courts?

Judge MARSHALL. I do not know of any instances of that being true.

Senator ERVIN. Was it not a rule of law, when you and I got our licenses, that an accused in a criminal case had to set up every defense that he had and every claim that could be litigated in the criminal case, and that a conviction and a judgment pronounced upon it was conclusive as to every matter actually litigated in the cases and every matter which could have been litigated in the case under the applicable law?

Judge MARSHALL. I say with all due respect, we have to leave habeas corpus. It was always available.

Senator ERVIN. Formerly in habeas corpus proceedings the only question that was inquired into was the jurisdiction of the court which tried and sentenced the accused.

I ask you if the doctrine of res judicata did not once apply in criminal cases, and if that doctrine did not say to the accused, you must speak now or forever after hold your peace, and that a verdict of guilty and judgment on the verdict of guilty ended all possible controversy as far as trial courts were concerned in respect of every matter litigated and every matter that could be litigated?

Judge MARSHALL. With all due respect, Senator, as I remember back in the thirties, most of the States in this Union had postconviction remedies.

Senator ERVIN. Yes. Illinois was the first State that passed a post-conviction statute, was it not?

Judge MARSHALL. I do not remember, but in my time, they all had some form—not all. Florida did not get one until recently.

Senator ERVIN. As a matter of fact, did not Illinois have to pass a postconviction act in order to protect itself against decisions of the Supreme Court of the United States which released from prisons persons who had been sentenced years before?

Judge MARSHALL. I do not know the reason for the passage of the Illinois law.

Senator ERVIN. It is a fact, is it not?

Judge MARSHALL. I do not know.

Senator ERVIN. I think if you look into the history of it, the answer which my question implies as being correct, will be found.

As a matter of fact, we have a post-conviction act in North Carolina. I believe I wrote the first decision under it. And in the system we have now, under the doctrines now prevailing in the Federal courts, that State court first tries a defendant, and then the defendant tries the State court in the postconviction procedure. He can now, under some recent decisions of the Federal courts, go into court the third time and try his lawyer to see whether he had a competent lawyer.

Is that not permissible under—

Judge MARSHALL. I know of one fourth circuit case which did grant release on the basis of incompetence of the lawyer. That is the only decision I know of in the country.

Senator ERVIN. And in that case, Chief Judge Haynesworth stated in a dissenting opinion that there is no longer any finality to a criminal trial so far as the defendant is concerned.

Judge MARSHALL. As I remember, that is what Chief Judge Haynesworth said.

Senator ERVIN. Just to save time and not to ask questions to which I will receive no answer, you are not willing to comment or give us the benefit of your opinion on any provision of the Constitution that might hereafter under any circumstances come into question in the Supreme Court?

Judge MARSHALL. I am not unwilling. I think it would be improper for me to give an opinion on any provision of the Constitution or any case that will be involved if I am confirmed. It is not—

Senator ERVIN. Does that not mean in substance that you are unwilling to give us an opinion on any part of the Constitution, because conceivably, every part of the Constitution can be involved in some litigation in the Supreme Court?

Judge MARSHALL. To the contrary, Senator, I have limited mine so far to cases I am certain will come up or are already there.

Senator ERVIN. Can you think of any cases that you think will never come up in the Supreme Court?

Judge MARSHALL. No, sir.

Senator ERVIN. I cannot think of one, because its jurisdiction is vast. I will tell a story concerning some Justices of the Supreme Court in a bygone day which illustrates how broad the jurisdiction of the Supreme Court is. According to the story, two Justices concluded they had been imbibing alcoholic beverages a little too much, and

decided to curtail this activity jointly. They agreed that they would not take any drinks except on the days when it was raining. A long dry spell came, and these two Justices became exceedingly thirsty. They held a conference and decided that no matter how dry it was in Washington, their jurisdiction was very broad and that it was bound to be raining somewhere within their jurisdiction. Consequently, they concluded that they would not violate their agreement if they took a drink.

Since the jurisdiction of the Supreme Court is so broad, I cannot think of a single case involving the Constitution or acts of Congress enacted pursuant to it, or treaties made in behalf of the United States that could not possibly come before the Supreme Court for decision. Do you not agree with me that Members of the Senate have a right to be concerned with the decisions the Supreme Court is likely to hand down?

Judge MARSHALL. I think so, Senator, and I think that has been the problem every time a nominee has come before this committee. It is the same problem. There is nothing new about it. It is a problem.

Senator ERVIN. With all due respect, I would have to say, you not only refuse—or, rather you say that you prefer not to answer questions relating to decisions that may be handed down in the future, but you do not want to answer any questions with respect to decisions handed down in the past.

Judge MARSHALL. If it is in the contemporary history of the Court—I mean we discussed Ogden and cases back in the past century. They are so solidified in the law, there is no problem there, as I see it.

Senator ERVIN. Some of these other things I asked you about were solidified in the law from 1790 until June 13, 1966.

Judge MARSHALL. I was perfectly willing to discuss the fifth amendment and to look it up against the recent decisions of the Supreme Court.

Senator ERVIN. Let us discuss it before the recent decisions. That is what I am trying to do. Did not the Supreme Court in every case prior to these recent decisions, whose names I will not mention, hold that the words of the Constitution that no person shall be compelled in any criminal case to be a witness against himself, did not apply to voluntary confessions for three reasons: First, the amendment applied to compelled testimony only; secondly, it applied only to testimony which an accused is required or permitted to give as a witness; and third, it applied only to such testimony when given in a judicial proceeding?

Judge MARSHALL. No, sir, I do not agree.

Senator ERVIN. Can you tell me some case that did not hold that?

Judge MARSHALL. The first two confession cases did go off—they were involuntary. But they involved outside of the jurisdiction of the court. The confessions were obtained in the sheriff's office and you had in your question only providing they were in the court. That is the thing I do not agree with.

Senator ERVIN. That is all the provision of the Constitution alludes to, the testimony of a witness. A person is not a witness except when he is required or permitted to give testimony before a tribunal of some sort.

Judge MARSHALL. Brown versus Mississippi said a confession involuntarily obtained outside of the courtroom could not be used, and Chief Justice Hughes said the rack and torture chamber shall not be used for due process.

Senator ERVIN. That was not the first time an involuntary confession was excluded.

Judge MARSHALL. The first one I know of.

Senator ERVIN. That was the first time that the Supreme Court held that the due process clause of the 14th amendment applied to an involuntary confession in a State court. As a matter of fact, in every jurisdiction that I know anything about, every American jurisdiction that I know anything about, they have had the rule that a voluntary confession is admissible and an involuntary confession is inadmissible. This was true since the creation of this Republic.

Judge MARSHALL. But I think it was the first United States Supreme Court decision on the point.

Senator ERVIN. I think you will find it is the first time that the Supreme Court of the United States held that the due process clause of the 14th amendment applied to a criminal case tried in a State court.

Judge MARSHALL. I think that is correct.

Senator ERVIN. But before that, the Supreme Court of the United States certainly had cases dealing with involuntary confessions in Federal courts, and all of the courts of the States had cases dealing with involuntary confessions involved in State trial wants.

Judge MARSHALL. I thought I said, Senator, that that was the first time the Supreme Court had held a State conviction based on an involuntary confession to be unconstitutional and reversed.

Senator ERVIN. Well, I agree with you, I think it is the first time the Supreme Court said that the due process clause of the 14th amendment applies to involuntary confessions in State cases.

Judge MARSHALL. I think I also agreed with you that prior to that time, the States had uniformly taken care of it themselves in the State courts.

Senator ERVIN. Yes, but now they are not trusted to take care of themselves any more.

Senator HART. Mr. Chairman, yesterday Senator Kennedy had indicated that he would offer for the committee record the files on briefs and opinions of Solicitor General Marshall. Senator Kennedy was called to Boston on what we hope will be a blessed event, and has left the statement with me that I would like to read as I make this offer.

I am submitting for the record briefs filed by Solicitor General Marshall in the Court criminal cases which were heard by the Supreme Court during the past two terms. They show, in my opinion, that the Solicitor General has a full awareness of the needs and problems of law enforcement, as well as a conscientious regard for individual rights. In putting this material into the record, I think we ought to offer it for the permanent committee files, I emphasize that these were briefs filed by Judge Marshall in his role as an Advocate. I respect the point which you made yesterday, that he is perfectly willing that this committee examine and consider all the statements of record and it reflects his briefs as filed and opinions as written, but does not believe in his present status as a nominee that he should express any opinion concerning specific issues which are likely to come before him in the future as a Justice.

The CHAIRMAN. You want that copied into the record?

Senator HART. No, Mr. Chairman. Senator Kennedy, I think, offers them for the permanent committee files, but makes them available.

The CHAIRMAN. Without objection.

(The material referred to will be found in the files of the committee.)

Senator HART. This is a continuation of Senator Kennedy's statement:

In addition, Mr. Chairman, Judge Marshall's opinions as a Judge of the Second Circuit are already listed at Pages 4 through 6 of the hearings held upon his nomination as Solicitor General on July 29, 1965.

That concludes Senator Kennedy's statement.

I just want to indicate that I share fully the position Senator Kennedy has taken.

Senator ERVIN. Well, unfortunately, I do not believe we will have time during this month to read all of those decisions or all of those briefs. Frankly, I am sorry that the nominee will not do as all of us enjoy doing, speak for himself. I am disappointed that the nominee has a reluctance, and I believe I could even go far enough as to characterize it as an unwillingness, to answer any questions concerning the meaning of the Constitution which would reveal to the members of the committee and Senate what his constitutional or judicial philosophy is. That would be the easiest and most direct way to get it.

Senator HART. Mr. Chairman, I would like to make just a very brief comment.

The CHAIRMAN. We will recess now until 10:30 o'clock Tuesday morning.

Senator HART. Could we not come back this afternoon? We are not in session.

The CHAIRMAN. Certain Members of the Senate are going to leave town at 1 o'clock.

Senator HART. To continue the thought that Senator Ervin has mentioned, I think it is one that causes us all trouble, and it would require some study, but the briefs that have been filed by Solicitor General Marshall, the opinions written by Judge Marshall, the briefs offered by him in a wide-ranging career, give us probably as full a basis on which to judge his qualifications for nomination to the Supreme Court as any man who in all history has appeared before this committee.

Senator ERVIN. You would not suggest that we postpone acting until we have such an opportunity. I have tried to read the nominee's opinions. I find some of them to be 15 or more pages long.

The CHAIRMAN. We can save that for executive session, gentlemen.

We will recess now until next Tuesday at 10:30.

(Whereupon, at 12 m., the committee recessed until Tuesday, July 18, 1967, at 10:30 a.m.)

## NOMINATION OF THURGOOD MARSHALL

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TUESDAY, JULY 18, 1967

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The committee met, pursuant to call, at 10:30 a.m., in room 2228, New Senate Office Building, Senator John L. McClellan presiding.

Present: Senators McClellan, Ervin, Hart, Bayh, Burdick, Tydings, Hruska, Scott, Fong, and Thurmond.

Also present: John H. Holloman, chief clerk.

Senator McCLELLAN. The committee will come to order.

Good morning, Mr. Solicitor General.

### STATEMENT OF HON. THURGOOD MARSHALL, SOLICITOR GENERAL OF THE UNITED STATES—Resumed

Judge MARSHALL. Good morning, Mr. Senator.

Senator McCLELLAN. The Chair will announce that Chairman Eastland will not be here this morning. He missed an airplane connection and has asked me to preside during the morning session. I was not here at the last meeting of the committee, but I am advised that Senator Ervin was in the process of questioning the nominee at that time. I assume he would like to proceed.

So, Senator Ervin, go right ahead.

Senator ERVIN. Judge, the sixth amendment says that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

Did not the Supreme Court uniformly hold, prior to the *Escobedo* case, that the right to counsel accrued at the beginning of criminal prosecution, and that a criminal prosecution did not begin until some formal charge in the form of a complaint or warrant or bill of indictment or an information was filed against him by one having the authority to take such action?

Judge MARSHALL. I think that is correct.

Senator ERVIN. Did not the Court hold in the *Escobedo* case for the first time that the right of counsel arose not at the time of the commencement of the criminal prosecution, but arose whenever an officer having him in custody began to suspect in his mind that the person in his custody might have some connection with the crime he was investigating?

Judge MARSHALL. I think he went a little further, Senator. It was not that he thought so, but that his investigation up to that time centered in on a particular person as a suspect.

Senator ERVIN. Is that not, in effect, that when the officer began to suspect that the man in his custody had a part in the commission of the crime he is investigating, then his right to counsel arose?

Judge MARSHALL. Bear in mind that in the *Escobedo* case, the lawyer was standing outside trying to get in.

Senator ERVIN. The *Escobedo* case was a hard case. Hard cases are the quicksands of law. The Court ought to have held, in my opinion, in the circumstances there that it was an involuntary confession and excluded it on that basis. Instead of doing so, it undertook to change the meaning of the Constitution. Instead of saying that his right to counsel arose when the criminal prosecution was begun, the Court held it arose when the officer having the accused in custody began to suspect that he was the guilty party. I do not know how you can invade the contents of the officer's mind and determine when a suspicion arises in it.

Judge MARSHALL. I think it is not just a suspicion, it is that the man is a suspect. It is a little more.

Senator ERVIN. Yes. But the Court holds that the constitutional right of counsel arises when the officer begins to have a substantial suspicion that the party in custody is the guilty party?

Judge MARSHALL. I guess that would be fair to say.

Senator ERVIN. Yes, sir.

Now, that was quite a substantial change from the interpretation placed on the sixth amendment prior to that time; was it not?

Judge MARSHALL. I do not think the specific issue had come up before, in that context.

Senator ERVIN. The issue had come up time after time, had it not, as to when a man's right to counsel accrues and the Court had consistently held it only accrued when the criminal prosecution was formally begun?

Judge MARSHALL. Well, a few years before that, it was generally understood you did not have a right of counsel at arraignment. Then the Supreme Court, in the Maryland case and in the Alabama case—I think I am correct—held that he should be there at arraignment.

Senator ERVIN. The accused is arraigned to ascertain how he pleads to a charge already made. Are you familiar with the case of *South Carolina v. Katzenbach*?

Judge MARSHALL. Yes, sir.

Senator ERVIN. That involved the Voting Rights Act of 1965; did it not?

Judge MARSHALL. That is right. It was the Voting Rights. I think it was the 1965.

Senator ERVIN. I will ask you if the Supreme Court of the United States did not say in the case of *ex parte Milligan* 4 Wall. 2, that the U.S. Constitution is the law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men at all times and under all circumstances, and that no doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Does not section 2 of article I of the Constitution provide that Representatives in Congress shall be elected by the persons possessing the qualifications for voting required for electors of the most numerous branch of the State legislature?

Judge MARSHALL. I think that is accurate.

Senator ERVIN. And does not the 17th amendment provide that U.S. Senators are to be elected by electors possessing the qualifications prescribed by law for electors of the most numerous branch of the State legislature also?

Judge MARSHALL. I think that is correct.

Senator ERVIN. Do not those two provisions of the Constitution make it plain that the State has the power to prescribe qualifications for voting for State and Federal offices, subject only to the limitation that they cannot deny or abridge the right to vote by reason of race or sex?

Judge MARSHALL. Well, Senator, it is my understanding that that was thoroughly debated in the Halls of Congress.

Senator ERVIN. It was.

Judge MARSHALL. And Congress decided it was within their province to pass that bill.

Senator ERVIN. But after all, the power to make the determination as to whether an act of Congress resides in the Supreme Court; does it not?

Judge MARSHALL. The Supreme Court's interpretation of the Constitution.

Senator ERVIN. And did not the Supreme Court of the United States hold in the case of *South Carolina versus Katzenbach* that Congress had the power to determine by a legislative act without a judicial trial that the election officials of six States had violated the provisions of the 15th amendment and that on the basis of that legislative declaration of guilt that Congress had the power to suspend the constitutional right of the States to prescribe and use literacy tests in establishing the qualifications of voters?

Judge MARSHALL. Well, I would prefer to rely on the decision itself, but I think that that is a fair statement.

Senator ERVIN. Yes. Now, how can you reconcile that holding with the declaration in *Ex parte Milligan* that the Constitution of the United States is a law for rulers as well as the people and that no doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions be suspended during any of the great exigencies of government?

Judge MARSHALL. Well, I rely upon the opinion of the Supreme Court. That argument was made to the Supreme Court and the Supreme Court rejected it.

Senator ERVIN. Do you accept as a correct interpretation of the power of Congress under the Constitution that Congress can suspend the power of the State to perform the functions which the Constitution allows it to perform?

Judge MARSHALL. As an abstract statement, I would say "No." As an abstract statement.

Senator ERVIN. But the Court decided Congress did have that power in the *South Carolina v. Katzenbach*?

Judge MARSHALL. I do not think the Court said exactly that. I am sure it did not.

Senator ERVIN. Do you not agree with me that under the second section of the first article of the Constitution, the States have the power to prescribe the qualifications of the voters; not only in respect to their own State legislatures, but also the U.S. Congress?

Judge MARSHALL. Subject to the restrictions of the same Constitution.

Senator ERVIN. And do you not agree with me that under the 17th amendment, the States have the like power with respect to electors of the Senators?

Judge MARSHALL. Subject to the same Constitution.

Senator ERVIN. What provisions of the Constitution would interfere with that right?

Judge MARSHALL. The 14th and 15th amendments.

Senator ERVIN. But also under the Constitution it says that Congress shall pass no law, no bill of attainder?

Judge MARSHALL. That is right.

Senator ERVIN. And a bill of attainder is a legislation act which condemns persons without a judicial trial, is it not?

Judge MARSHALL. I do not think the bill of attainder has come up in the Supreme Court more than once.

Senator ERVIN. It came up in the *Garland* case, the *Cummings* case, and in the *Lovett* case.

Judge MARSHALL. Yes.

Senator ERVIN. In the *Lovett* case, the Court held that the Constitution prohibited passing bills of attainders applying to Federal officials, did it not?

Judge MARSHALL. That is right.

Senator ERVIN. And in *South Carolina v. Katzenbach*, it held in effect that the constitutional prohibition against passing bills of attainder did not apply to State officials, did it not?

Judge MARSHALL. I do not remember whether that was specifically said.

Senator ERVIN. Did Congress not condemn the election officials of six different States or parts of States and say that they would have to come to the District of Columbia to establish their innocence in the District Court of the District of Columbia?

Judge MARSHALL. They said that pursuant to the 1965 act, they were required to follow the 1965 act.

Senator ERVIN. The Congress declared they were guilty, did they not, of violating the 15th amendment?

Judge MARSHALL. I do not buy the word "guilty" necessarily. It said that they had violated it.

Senator ERVIN. It said they had violated the 15th amendment. If they violated the 15th amendment, they must have been guilty, must they not?

Judge MARSHALL. I just would not use the word "guilty."

Senator ERVIN. If it did not declare them guilty of doing so, if found they did so, did it not?

Judge MARSHALL. It found that they did that.

Senator ERVIN. And it said they could not exercise the power the Constitution gave to the States to require and use a literacy test in determining the qualifications of the voters?

Judge MARSHALL. That is right.

Senator ERVIN. And they said the States, in order to get back their constitutional powers, would have to come to only one court on the face of the entire earth, the District Court of the District of Columbia?

Judge MARSHALL. That is as I remember the act.

Senator ERVIN. And the act which was held constitutional by the Court requires the State officials of the State of Mississippi to come 1,000 miles and bring witnesses with them, to establish their innocence here, does it not?

Judge MARSHALL. I think that that is possible, but I do not see where that is—

Senator ERVIN. I am trying to find out your idea of due process of law. Do you think the due process of law clause of the fifth amendment would permit the Congress to pass a law saying that persons other than persons subjected to criminal charges can have their rights vindicated in only one court of the United States?

Judge MARSHALL. Is it not true, Senator, that many governmental actions have to be brought in the District of Columbia, regardless of where the particular matter occurred?

Senator ERVIN. Only so far as I know in respect to the questions of the situations where the Federal Government permits itself to be sued or permits its officials to be sued.

Judge MARSHALL. But you do have to come to Washington.

Senator ERVIN. If as the Supreme Court holds in *South Carolina v. Katzenbach* such an act as that constitutes or affords due process of law, then Congress has the power to provide that in all civil cases the only court that could have jurisdiction would be a Federal court sitting in the island of Guam, would it not?

Judge MARSHALL. I do not agree.

Senator TYDINGS. I do not understand your question, Senator. I am mixed up.

You were in the Voting Rights Act and you jumped to *Escobedo*.

Senator ERVIN. I beg your pardon. I am asking about the Voting Rights Act. I have not gone back to *Escobedo*.

Do you not think it is a rather shabby form of due process of law for the Congress to say and the court to uphold its saying that a person can vindicate its right under the Constitution of the United States in only one court on the face of the earth; namely, the District Court of the District of Columbia?

Judge MARSHALL. I would have to get the particular crime that is involved. I cannot answer that in an abstract proposition. I would say that normally if you go back to your common law, you are tried in the area where you commit the crime.

Senator ERVIN. Do you not think it is implicit in the guarantee of due process of law that litigation should be conducted where the litigants have a fair opportunity to present their testimony and to bring the witnesses?

Judge MARSHALL. I think that would be true.

Senator ERVIN. Do you not think it is a handicap and an obstacle to State elections officials in Southern States to have to journey anywhere

up to 1,000 miles and bring witnesses that distance in order to establish their innocence of a congressional condemnation rather than a judicial condemnation?

Judge MARSHALL. The main problem is there is no problem of cost. The States can afford it. No. 2, with air travel today—

Senator ERVIN. As a matter of fact, that bill as originally framed did not even provide that they could obtain a subpoena that would run more than 100 miles from the District of Columbia. I raised the point and Congress amended the bill so that the court in its discretion could authorize a subpoena to run further than that. Do you not think the State election officials in North Carolina or Mississippi are denied the right to due process of law when they do not have a right to compulsory process to bring the witnesses here?

Judge MARSHALL. I do not know whether you are right or wrong on that.

Senator ERVIN. You do not? Well, you have no opinion whether that is right or wrong?

Judge MARSHALL. As an abstract proposition, I say I do not have an opinion, Senator. It is an abstract proposition.

Senator ERVIN. It is a very concrete proposition in the case of North Carolina. We have the election officers of 40 of our counties condemned by act of Congress and denied the right to exercise the constitutional powers of the State of North Carolina in those 40 counties. Under the Voting Rights Act, they have to come to the District of Columbia and bring witnesses all the way to the District of Columbia to prove their innocence in the district court here. And under this act, they do not even have the right of compulsory process to obtain the attendance of their witnesses. They cannot even enjoy such right unless the court here grants it to them as a matter of grace.

Judge MARSHALL. My answer, Senator, would be that if that were presented to me as a Justice of the Supreme Court, I would consider it on both sides and make up my mind as to whether it was constitutional or not.

Senator ERVIN. Well, I am not a Justice of the Supreme Court and never will be, but if I were a Justice of the Supreme Court, I would say that was too shabby a course of procedure to constitute due process of law.

Senator TYDINGS. Is the Senator asking him how he would rule if the case came before him?

Senator ERVIN. No, all I am asking him is on the decisions of the Supreme Court that have been handed down.

Senator TYDINGS. Those are the past. I do not think it would be fair to ask him a hypothetical fact question about a case in the future.

Senator ERVIN. I am just telling him at this point what I would do if I were a Justice of the Supreme Court.

You are familiar with the case of *Katzenbach v. Morgan*?

Judge MARSHALL. Yes, sir.

Senator ERVIN. In that case, Congress passed a law invalidating the New York constitutional provision prescribing that no person should be permitted to vote in New York unless he is literate in the English language. Is that right?

Judge MARSHALL. That is right.

**Senator ERVIN.** Did not the majority of the Supreme Court hold in that case that the Supreme Court would not inquire into whether or not the New York constitutional provision was in harmony with the equal protection of the laws clause of the first section of the 14th amendment?

**Judge MARSHALL.** In the *Morgan* case, as I remember it, the particular provision was based on the equal protection clause of the fourteenth amendment and the Supreme Court held that Congress, under section 5 of the 14th amendment, had power to pass that particular section.

**Senator ERVIN.** And it was held there by the Supreme Court that Congress had power to invalidate the state law of New York, notwithstanding the fact that the court itself might hold that that law was in perfect harmony with the Constitution and particularly with the equal protection clause of the first section of the 14th amendment, did it not?

**Judge MARSHALL.** I do not agree with the last part of your statement. I agree with the first part.

**Senator ERVIN.** Well, it said in that case that New York did not even have the right to have the Supreme Court to determine whether its law was constitutional, did it not?

**Judge MARSHALL.** I do not remember. I do not have the case before me and I do not remember. All I remember is that the Supreme Court upheld that particular provision of the Voting Rights Act.

**Senator ERVIN.** Did it not hold this? I call your attention to head-note (b) on page 642 of the report in 384 U.S. "Congress power under section 5 of the 14th amendment to enact legislation prohibiting enforcement of a State law is not limited to situations where the State law has been adjudged to violate the provisions of the amendment which Congress sought to enforce. It is therefore the Court's task here to determine, not whether New York's English literacy requirement as applied violates the equal protection clause, but whether section 4(e)'s prohibition against that requirement is 'appropriate legislation' to enforce the clause."

Is that not a correct summarization?

**Judge MARSHALL.** That is correct.

**Senator ERVIN.** In other words, Congress can nullify a State law, regardless of whether the State law is in conformity to the equal protection clause of the 14th amendment?

**Judge MARSHALL.** The holding as I understand it is that under section 5, which gives Congress the authority to pass necessary legislation to enforce the 14th amendment gives Congress certain rights that the courts would not have.

**Senator ERVIN.** Do you not think that when New York came to the Supreme Court asserting its constitutional provision requiring literacy in the English language as a condition precedent to the right to vote was constitutional, it was the duty of the courts to pass on that question?

**Judge MARSHALL.** If it had come there without an act of Congress.

**Senator ERVIN.** With or without an act of Congress.

**Judge MARSHALL.** Well, Senator, that is my point of difference. If there is no act of Congress specifically interpreting the 14th amend-

ment, then the court has the duty to interpret it. But their limitation is greater against the Court doing it than it is against Congress, solely because of section 5.

Senator ERVIN. Is that not a statement of the doctrine that Congress, instead of the court, passes on the constitutionality of a State statute?

Judge MARSHALL. Not in the least.

Senator ERVIN. Did not the Supreme Court of the United States hold in the *Lassiter* case, 360 U.S. 45, from North Carolina, that exactly the same kind of a State literacy test—that is, one in the English language—was in full compliance with the equal protection clause of the 14th amendment?

Judge MARSHALL. I do not want to quarrel with words, but it said it did not violate the equal protection clause.

Senator ERVIN. Did not Justice Douglas say in the opinion in the *Lassiter* case not only that such a State law does not violate it, but a State clearly has a right to decide that literacy in the English language is a reasonable qualification for voting?

Judge MARSHALL. That was in the absence of a specific act of Congress.

Senator ERVIN. Then what the Constitution means where there is no act of Congress is one thing, and what the Constitution means where there is an act of Congress is quite a different thing. Is that your position?

Judge MARSHALL. It is not my position.

Senator ERVIN. You said that the act of Congress interpreted the first section of the 14th amendment respecting the equal protection clause.

Judge MARSHALL. That was after extensive hearings, miles of record, and Congress came to that conclusion. The Supreme Court then had to look at that and determine as to whether or not Congress had that authority.

Senator ERVIN. Did not the State of New York raise the point, saying that under the Constitution it had the right to establish literacy in the English language as a qualification for voting? Did the State of New York not say that in that case?

Judge MARSHALL. Substantially correct.

Senator ERVIN. Do you not think as a lawyer it was the duty of the Supreme Court to determine whether New York had that right?

Judge MARSHALL. I think it was the duty of the Supreme Court to interpret the Constitution as applied to the act of Congress, which was the one point, the only point that was before the Court.

Senator ERVIN. Now, the Supreme Court did not pass on that question, did it, in the New York case, *Katzenbach v. Morgan*?

Judge MARSHALL. In *Katzenbach v. Morgan*, the only point before the Court was the constitutionality of section 4(e), as I remember.

Senator ERVIN. The Supreme Court declined to pass on whether the New York law was constitutional under section 1, did it not?

Judge MARSHALL. I do not say they declined. I say they did consider the *Lassiter* case in great detail.

Senator ERVIN. The majority opinion undertook to distinguish the case from the *Lassiter* case, which held a similar act was constitutional, because there was not an act of Congress in the *Lassiter* case.

Judge MARSHALL. That is right. That is the way I understand it.

Senator ERVIN. But there were acts of Congress, that is, civil rights acts which were passed a hundred years ago and which were in force at the time of the *Lassiter* case, they provided that no person should be denied his right to vote under the Constitution?

Judge MARSHALL. That has never been declared unconstitutional.

Senator ERVIN. The majority opinion sets out these words on page 648. I read:

The Attorney General of the State of New York argues that an exercise of congressional power under Section 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the Judicial Branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that Section 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by Section 4(e) is forbidden by the Equal Protection Clause itself.

That is what the Attorney General of New York contended. He claimed the Supreme Court should rule upon the constitutionality of the New York law in respect to the equal protection clause of the 14th amendment. That was his position, which I have just read.

Now, the majority opinion says "we disagree."

Then it goes on to the next page, omitting some matters not germane:

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause.

Is that not an astounding doctrine, that it is not the duty of the Supreme Court to pass upon the constitutionality of a State law which has been stricken down by Congress?

Judge MARSHALL. The constitutionality of the New York law was not before the Court. What was before the Court, as I remember it, was the constitutionality of 4(e).

Senator ERVIN. Well, the State of New York tried to put it before the Court, did it not?

Judge MARSHALL. It did it in brief and in argument.

Senator ERVIN. New York asserted that the act of Congress invalidating its literacy test was unconstitutional because such literacy test was consistent with the equal protection clause of the first section of the 14th amendment. The Court declared that Congress had the power under section 4 of the 14th amendment to pass appropriate legislation to enforce the equal protection clause, and the act of Congress constituted appropriate legislation under section 4, regardless of whether the New York law stricken down by the act of Congress was consistent with the equal protection clause. Hence, the Court in effect said that Congress rather than the Court had the right to pass on the constitutionality of the New York law under section 1. Is that not the result of that opinion?

Judge MARSHALL. I do not agree, because the Supreme Court finally passed upon the constitutionality of 4(e). The Supreme Court passed on it.

Senator ERVIN. Yes, but the Court ignored the question of whether or not it was constitutional under the first section of the 14th amendment, did it not? It absolutely refused to pass on that question.

Judge MARSHALL. Refusing to pass on it and ignoring it is different. It held it was not in that case.

Senator ERVIN. The Court said it would not pass on that question because Congress had passed on it, did it not?

Judge MARSHALL. Well, they said that Congress had passed on it and their job was to interpret whether Congress had constitutional authority to do so.

Senator ERVIN. Yes; and the Court held, in essence, that the Congress instead of the Court had the power to pass on the question whether the New York literacy test violated or was in harmony with the equal protection clause of the 14th amendment. Is that not exactly what they held?

Judge MARSHALL. Subject to the final determination of constitutionality by the Supreme Court.

Senator ERVIN. The Court said it did not, or could not, even pass on it as far as the equal protection clause was concerned.

Judge MARSHALL. They said they passed on section 4(e), Senator.

Senator ERVIN. Yes; but the Court refused to pass on section 1, did it not? It said that was for Congress.

Judge MARSHALL. The record speaks for itself.

Senator ERVIN. We will put this opinion in the record and let it speak for itself.

I ask that this copy of the case of *Katzenbach v. Morgan* be printed at this point in the record.

Senator McCLELLAN. Without objection, so ordered.

(The copy of the case referred to follows:)

[Syllabus]

**KATZENBACH, ATTORNEY GENERAL, ET AL. V. MORGAN ET UX**

*Appeal From the United States District Court for the District of Columbia*

No. 847. Argued April 18, 1966.—Decided June 13, 1966\*

Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of § 4(e) of the Voting Rights Act of 1965 to the extent that the provision prohibits enforcement of the statutory requirement for literacy in English as applied to numerous New York City residents from Puerto Rico who, because of that requirement, had previously been denied the right to vote. Section 4(e) provides that no person who has completed the sixth grade in a public school, or an accredited private school, in Puerto Rico in which the language of instruction was other than English shall be disfranchised for inability to read or write English. A three-judge District Court granted appellees declaratory and injunctive relief, holding that in enacting § 4(e) Congress had exceeded its powers. *Held:* Section 4(e) is a proper exercise of the powers under § 5 of the Fourteenth Amendment, and by virtue of the Supremacy Clause, New York's English literacy requirement cannot be enforced to the extent it conflicts with § 4(e). Pp. 646–658.

(a) Though the States have power to fix voting qualifications they cannot do so contrary to the Fourteenth Amendment or any other constitutional provision. P. 647.

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\*Together with No. 877, *New York City Board of Elections v. Morgan et ux.*, also on appeal from the same court.

(b) Congress' power under § 5 of the Fourteenth Amendment to enact legislation prohibiting enforcement of a state law is not limited to situations where the state law has been adjudged to violate the provisions of the Amendment which Congress sought to enforce. It is therefore the Court's task here to determine, not whether New York's English literacy requirement as applied violates the Equal Protection Clause, but whether § 4(e)'s prohibition against that requirement is "appropriate legislation" to enforce the Clause. *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, distinguished. Pp. 648-650.

(c) Section 5 of the Fourteenth Amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure Fourteenth Amendment guarantees. The test of *McCulloch v. Maryland*, 4 Wheat. 316, 421, is to be applied to determine whether a congressional enactment is "appropriate legislation" under § 5 of the Fourteenth Amendment. Pp. 650-651.

(d) Section 4(e) was enacted to enforce the Equal Protection Clause as a measure to secure nondiscriminatory treatment by government for numerous Puerto Ricans residing in New York, both in the imposition of voting qualifications and the provision or administration of governmental services. Pp. 652-653.

(e) Congress had an adequate basis for deciding that § 4(e) was plainly adapted to that end. Pp. 653-656.

(f) Section 4(e) does not itself invidiously discriminate in violation of the Fifth Amendment for failure to extend relief to those educated in non-American flag schools. A reform measure such as § 4(e) is not invalid because Congress might have gone further than it did and did not eliminate all the evils at the same time. Pp. 656-658.

247 F. Supp. 196, reversed.

*Solicitor General Marshall* argued the cause for appellants in No. 847. With him on the brief were *Assistant Attorney General Doar*, *Ralph S. Spritzer*, *Louis F. Claiborne*, *St. John Barrett* and *Louis M. Kauder*.

*J. Lee Rankin* argued the cause for appellant in No. 877. With him on the brief were *Norman Redlich* and *Seymour B. Quel*.

*Alfred Avins* argued the cause and filed a brief for appellees in both cases.

*Rafael Hernandez Colon*, Attorney General, argued the cause and filed a brief for the Commonwealth of Puerto Rico, as *amicus curiae*, urging reversal.

*Jean M. Coon*, Assistant Attorney General, argued the cause for the State of New York, as *amicus curiae*, urging affirmance. With her on the brief were *Louis J. Lefkowitz*, Attorney General, and *Ruth Kessler Toch*, Acting Solicitor General.

#### OPINION OF THE COURT

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These cases concern the constitutionality of § 4(e) of the Voting Rights Act of 1965.<sup>1</sup> That law, in the respects pertinent in these cases, provides that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of § 4(e) insofar as it *pro tanto* prohibits the enforcement

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<sup>1</sup> The full text of § 4(e) is as follows:

"(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

"(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English," 79 Stat. 439, 42 U.S.C. § 1973b(e) (1964 ed., Supp. I).

of the election laws of New York<sup>3</sup> requiring an ability to read and write English as a condition of voting. Under these laws many of the several hundred thousand New York City residents who have migrated there from the Commonwealth of Puerto Rico had previously been denied the right to vote, and appellees attack § 4(e) insofar as it would enable many of these citizens to vote." Pursuant to § 14(b) of the Voting Rights Act of 1965, appellees commenced this proceeding in the District Court for the District of Columbia seeking a declaration that § 4(e) is invalid and an injunction prohibiting appellants, the Attorney General of the United States and the New York City Board of Elections, from either enforcing or complying with § 4(e).<sup>4</sup> A three-judge district court was designated. 28 U.S.C. §§ 2282, 2284 (1964 ed.). Upon cross motions for summary judgment, that court, one judge dissenting, granted the declaratory and injunctive relief appellees sought. The court held that in enacting § 4(e) Congress exceeded the powers granted to it by the Constitution and therefore usurped powers reserved to the States by the Tenth Amendment. 247 F. Supp. 196. Appeals were taken directly to this Court, 28 U.S.C. §§ 1252, 1253 (1964 ed.), and we noted probable jurisdiction. 382 U.S. 1007. We reverse. We hold that, in the application challenged in these cases, § 4(e) is a proper exercise of the powers granted to Con-

<sup>2</sup> Article II, § 1, of the New York Constitution provides, in pertinent part: "Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English."

Section 150 of the New York Election Law provides, in pertinent part:

"\* \* \* In the case of person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A 'new voter,' within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the State of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight."

Section 168 of the New York Election Law provides, in pertinent part:

"1. The board of regents of the state of new York shall make provisions for the giving of literacy tests.

"2. \* \* \* But a new voter may present as evidence of literacy a certificate or diploma showing that he has completed the work up to and including the sixth grade of an approved elementary school or of an approved higher school in which English is the language of instruction or a certificate or diploma showing that he has completed the work up to and including the sixth grade in a public school or a private school accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominantly in the English language or a matriculation card issued by a college or university to a student then at such institution or a certificate or a letter signed by an official of the university or college certifying to such attendance."

Section 168 of the Election Law as it now reads was enacted while § 4(e) was under consideration in Congress. See 111 Cong. Rec. 19376-19377. The prior law required the successful completion of the eighth rather than the sixth grade in a school in which the language of instruction was English.

<sup>3</sup> This limitation on appellees' challenge to § 4(e), and thus on the scope of our inquiry, does not distort the primary intent of § 4(e). The measure was sponsored in the Senate by Senators Javits and Kennedy and in the House of Representatives Gilbert and Ryan, all of New York, for the explicit purpose of dealing with the disenfranchisement of large segments of the Puerto Rican population in New York. Throughout the congressional debate it was repeatedly acknowledged that § 4(e) had particular reference to the Puerto Rican population in New York. That situation was the almost exclusive subject of discussion. See 111 Cong. Rec. 11028, 11060-11074, 15666, 16235-16245, 16282-16283, 19192-19201, 19375-19378; see also Voting Rights, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 6400, 89th Cong., 1st Sess., 100-101, 420-421, 508-517 (1965). The Solicitor General informs us in his brief to this Court, that in all probability, the practical effect of § 4(e) will be limited to enfranchising those educated in Puerto Rican schools. He advises us that, aside from the schools in the Commonwealth of Puerto Rico, there are no public or parochial schools in the territorial limits of the United States in which the predominant language of instruction is other than English and which would have generally been attended by persons who are otherwise qualified to vote save for their lack of literacy in English.

<sup>4</sup> Section 14(b) provides, in pertinent part:

"No court other than the District Court for the District of Columbia \* \* \* shall have jurisdiction to issue \* \* \* any restraining order or temporary or permanent injunction against the \* \* \* enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto." 79 Stat. 445, 42 U.S.C. § 1973(b) (1964 ed., Supp. I).

The Attorney General of the United States was initially named as the sole defendant. The New York City Board of Elections was joined as a defendant after it publicly announced its intention to comply with § 4(e); it has taken the position in these proceedings that § 4(e) is a proper exercise of congressional power. The Attorney General of the State of New York has participated as *amicus curiae* in the proceedings below and in this Court, urging § 4(e) be declared unconstitutional. The United States was granted leave to intervene as a defendant, 28 U.S.C. § 2403 (1964 ed.); Fed. Rule Civ. Proc. 24(a).

gress by § 5 of the Fourteenth Amendment<sup>6</sup> and that by force of the Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with § 4(e).

Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators, Art. I, § 2; Seventeenth Amendment; *Ex parte Yarbrough*, 110 U.S. 651, 663. But, of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action. The Equal Protection Clause itself has been held to forbid some state laws that restrict the right to vote.<sup>7</sup>

The Attorney General of the State of New York argues that an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that § 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of § 5 supports such a construction.<sup>8</sup> As was said with regard to § 5 in *Ex parte Virginia*, 100 U.S. 389, 345. "It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.<sup>9</sup> It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. See *Fay v. New York*, 332 U.S. 261, 282-284.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. Accordingly, our decision in *Lassiter v. Northampton*

<sup>6</sup> "SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It is therefore unnecessary for us to consider whether § 4(e) could be sustained as an exercise of congressional power under Art. I, § 4, see *Minor v. Happersett*, 21 Wall. 162, Judge McGowan below, 247 F. Supp., at 204; or as a measure to discharge certain treaty obligations of the United States, see *Treaty of Paris of 1898*, 30 Stat. 1754, 1759; *United Nations Charter*, Articles 55 and 56; Art. I, § 8, cl. 18. Nor need we consider whether § 4(e) could be sustained insofar as it relates to the election of federal officers as an exercise of congressional power under Art. I, § 4, see *Minor v. Happersett*, 21 Wall. 162, 171; *United States v. Classic*, 213 U.S. 299, 315; Literacy Tests and Voter Requirements in Federal and State Elections, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 480, S. 2750, and S. 2979, 87th Cong., 2d Sess., 302, 306-311 (1962) (brief of the Attorney General); nor whether § 4(e) could be sustained, insofar as it relates to the election of state officers, as an exercise of congressional power to enforce the clause guaranteeing to each State a republican form of government, Art. IV, § 4; Art. I, § 8, cl. 18.

<sup>7</sup> *Harper v. Virginia Board of Elections*, 383 U.S. 663; *Carrington v. Rash*, 380 U.S. 89. See also *United States v. Mississippi*, 380 U.S. 128; U.S. 128; *Louisiana v. United States*, 380 U.S. 145, 151; *Lassiter v. Northampton Election Bd.*, 360 U.S. 45; *Pope v. Williams*, 193 U.S. 621, 632-634; *Minor v. Happersett*, 21 Wall. 162; cf. *Burns v. Richardson*, ante, p. 73, at 92; *Reynolds v. Sims*, 377 U.S. 533.

<sup>8</sup> For the historical evidence suggesting that the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary, see generally Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 78 Yale L. J. 1353, 1356-1357; Harris, The Quest for Equality, 33-56 (1960); tenBroek, The Antislavery Origins of the Fourteenth Amendment 187-217 (1951).

<sup>9</sup> Senator Howard, in introducing the proposed Amendment to the Senate, described § 5 as "a direct affirmative delegation of power to Congress," and added:

"It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." Cong. Globe, 39th Cong., 1st Sess., 2766, 2768 (1866).

This statement of § 5's purpose was not questioned by anyone in the course of the debate. Flack, The Adoption of the Fourteenth Amendment 138 (1908).

*Election Bd.*, 360 U.S. 45, sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments, is inapposite. Compare also *Gunn v. United States*, 238 U.S. 347, 366; *Camacho v. Doe*, 81 Misc. 2d 692, 221 N.Y.S. 2d 262 (1958) aff'd 7 N.Y. 2d 762, 163 N.E. 2d 140 (1959); *Camacho v. Rogers*, 199 F. Supp. 155 (D.C.S.D.N.Y. 1961). *Lassiter* did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18.<sup>9</sup> The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 421:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited; but consist with the letter and spirit of the constitution, are constitutional."

*Ex parte Virginia*, 100 U.S., at 345-346, decided 12 years after the adoption of the Fourteenth Amendment, held that congressional power under § 5 had the same broad scope:

"Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

*Strauder v. West Virginia*, 100 U.S. 303, 311; *Virginia v. Rives*, 100 U.S. 313, 318. Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by "appropriate legislation" the provisions of that amendment; and we recently held in *South Carolina v. Katzenbach*, 383 U.S. 301, 326, that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." That test was identified as the one formulated in *McCulloch v. Maryland*. See also *James Everard's Breweries v. Day*, 265 U.S. 545, 558-559 (Eighteenth Amendment). Thus the *McCulloch v. Maryland* standard is the measure of what constitutes "appropriate legislation" under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

We therefore proceed to the consideration whether § 4 (e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch v. Maryland* standard, whether § 4 (e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution."<sup>10</sup>

There can be no doubt that § 4 (e) may be regarded as an enactment to enforce the Equal Protection Clause. Congress explicitly declared that it enacted § 4 (e) "to secure the rights under the fourteenth amendment of persons educated in

<sup>9</sup> In fact, earlier drafts of the proposed Amendment employed the "necessary and proper" terminology to describe the scope of congressional power under the Amendment. See tenBroek, *The Antislavery Origins of the Fourteenth Amendment 187-190* (1951). The substitution of the "appropriate legislation" formula was never thought to have the effect of diminishing the scope of this congressional power. See, e.g., Cong. Globe, 42d Cong., 1st Sess., App. 83 (Representative Bingham, a principal draftsman of the Amendment and the earlier proposals).

<sup>10</sup> Contrary to the suggestion of the dissent, *post*, p. 608, § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

American-flag schools in which the predominant classroom language was other than English." The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English, and the Fourteenth Amendment rights referred to include those emanating from the Equal Protection Clause. More specifically, § 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of government services, such as public schools, public housing and law enforcement.

Section 4 (e) may be readily seen as "plainly adapted" to furthering these aims of the Equal Protection Clause. The practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370. This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.<sup>11</sup> Section 4 (e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and the equal protection of the laws." It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support § 4 (e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.<sup>12</sup>

The result is no different if we confine our inquiry to the question whether § 4(e) was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided,<sup>13</sup> and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement,<sup>14</sup>

<sup>11</sup> Cf. *James Everard's Breweries v. Day, supra*, which held that under the Enforcement Clause of the Eighteenth Amendment, Congress could prohibit the prescription of intoxicating malt liquor for medicinal purposes even though the Amendment itself only prohibited the manufacture and sale of intoxicating liquors for beverage purposes. Cf. also the settled principle applied in the *Shreveport Case* (*Houston, E. & W. T. R. Co. v. United States*, 234 U.S. 342), and expressed in *United States v. Darby*, 312 U.S. 100, 118, that the power of Congress to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end \* \* \*." Accord, *Atlanta Motel v. United States*, 379 U.S. 241, 258.

<sup>12</sup> See, e.g., 111 Cong. Rec. 11061-11062, 11065-11066, 16240; Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, *supra*, 507-508.

<sup>13</sup> The principal exemption complained of is that for persons who had been eligible to vote before January 1, 1922. See n. 2, *supra*.

<sup>14</sup> This evidence consists in part of statements made in the Constitutional Convention first considering the English literacy requirement, such as the following made by the sponsor of the measure: "More precious even than the forms of government are the mental qualities of our race. While those stand unimpaired, all is safe. They are exposed to a single danger, and that is that by constantly changing our voting citizenship through the wholesale, but valuable and necessary infusion of Southern and Eastern European races \* \* \*. The danger has begun. \* \* \* We should check it." III New York State Constitutional Convention 3012 (Rev. Record 1918).

See also *id.*, at 3015-3017, 3021-3055. This evidence was reinforced by an understanding of the cultural milieu at the time of proposal and enactment, spanning a period from 1915 to 1921—not one of the enlightened eras of our history. See generally Chafee, Free Speech in the United States 102, 227, 269-282 (1954 ed.). Congress was aware of this evidence. See e.g., Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, *supra*, 507-513; Voting Rights, House Hearings, n. 3, *supra*, 508-513.

whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.<sup>15</sup> Finally, Congress might well have concluded that as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs.<sup>16</sup> Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, see *South Carolina v. Katzenbach*, *supra*, to which it brought a specially informed legislative competence,<sup>17</sup> it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

There remains the question whether the congressional remedies adopted in § 4(e) constitute means which are not prohibited by, but are consistent "with the letter and spirit of the constitution." The only respect in which appellees contend that § 4(e) fails in this regard is that the section itself works an invidious discrimination in violation of the Fifth Amendment by prohibiting the enforcement of the English literacy requirement only for those educated in American-flag schools (schools located within United States jurisdiction) in which the language of instruction was other than English, and not for those educated in schools beyond the territorial limits of the United States in which the language of instruction was also other than English. This is not a complaint that Congress, in enacting § 4(e), has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected in § 4(e) to those educated in non-American-flag schools. We need not pause to determine whether appellees have a sufficient personal interest to have § 4(e) invalidated on this ground, see generally *United States v. Raines*, 362 U.S. 17, since the argument, in our view, falls on the merits.

Section 4(e) does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. Thus we

<sup>15</sup> Other States have found ways of assuring an intelligent exercise of the franchise short of total disenfranchisement of persons not literate in English. For example, in Hawaii, where literacy in either English or Hawaiian suffices, candidates' names may be printed in both languages. Hawaii Rev. Laws § 11-38 (1963 Supp.); New York itself already provides assistance for those exempt from the literacy requirement and are illiterate in no language. N. Y. Election Law § 169; and, of course, the problem of assuring the intelligent exercise of the franchise has been met by those States, more than 30 in number, that have no literacy requirement at all, see e.g., Fla. Stat. Ann. §§ 97.061, 101.061 (1960). (form of personal assistance); New Mexico Stat. Ann. §§ 3-2-11, 3-3-13 (personal assistance for those literate in no language), §§ 3-3-7, 3-3-12, 3-2-41 (1953) (ballots and instructions authorized to be printed in English or Spanish). Section 4(e) does not preclude resort to these alternative methods of assuring the intelligent exercise of the franchise. True, the statute precludes, for a certain class, disenfranchisement and thus limits the States' choice of means of satisfying a purported state interest. But our cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened, see e. g., *Carrington v. Rash*, 380 U. S. 89, 96; *Harper v. Virginia Board of Elections*, 383 U. S. 603, 670; *Thomas v. Collins*, 323 U. S. 516, 529-530; *Thornhill v. Alabama*, 310 U. S. 88, 95-96; *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153, n. 4; *Meyer v. Nebraska*, 262 U. S. 390; and Congress is free to apply the same principle in the exercise of its powers.

<sup>16</sup> See, e.g., 111 Cong. Rec. 11060-11061, 15666, 16235. The record in this case includes affidavits describing the nature of New York's two major Spanish-language newspapers, one daily and one weekly, and its three full-time Spanish-language radio stations and affidavits from those who have campaigned in Spanish-speaking areas.

<sup>17</sup> See, e.g., 111 Cong. Rec. 11061 (Senator Long of Louisiana and Senator Young), 11064 (Senator Holland), drawing on their experience with voters literate in a language other than English. See also an affidavit from Representative Willis of Louisiana expressing the view that on the basis of his thirty years' personal experience in politics he has "formed a definite opinion that French-speaking voters who are illiterate in English generally have as clear a grasp of the issues and an understanding of the candidates, as do people who read and write the English language."

need not decide whether a state literacy law conditioning the right to vote on achieving a certain level of education in an American-flag school (regardless of the language of instruction) discriminates invidiously against those educated in non-American-flag schools. We need only decide whether the challenged limitation on the relief effected in § 4(e) was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights, see n. 15, *supra*, is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did." *Roschen v. Ward*, 270 U.S. 337, 339, that a legislature need not "strike at all evils at the same time," *Semler v. Dental Examiners*, 294 U.S. 608, 610, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489.

Guided by these principles, we are satisfied that appellees' challenge to this limitation in § 4(e) is without merit. In the context of the case before us, the congressional choice to limit the relief effected in § 4(e) may, for example, reflect Congress' greater familiarity with the quality of instruction in American-flag schools,<sup>18</sup> a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico,<sup>19</sup> an awareness of the Federal Government's acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth schools,<sup>20</sup> and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States.<sup>21</sup> We have no occasion to determine in this case whether such factors would justify a similar distinction embodied in a voting-qualification law that denied the franchise to persons educated in non-American-flag schools. We hold only that the limitation on relief effected in § 4(e) does not constitute a forbidden discrimination since these factors might well have been the basis for the decision of Congress to go "no further than it did."

We therefore conclude that § 4(e), in the application challenged in this case, is appropriate legislation to enforce the Equal Protection Clause and that the judgment of the District Court must be and hereby is *Reversed*.

MR. JUSTICE DOUGLAS joins the Court's opinion except for the discussion, at pp. 658-658, of the question whether the congressional remedies adopted in § 4(e) constitute means which are not prohibited by, but are consistent with "the letter and spirit of the constitution." On that question, he reserves judgment until such time as it is presented by a member of the class against which that particular discrimination is directed.

#### HARLAN, J., DISSENTING

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.\*

Worthy as its purposes may be thought by many, I do not see how § 4(e) of the Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. § 1973b(e) (1964 ed. Supp. I), can be sustained except at the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function and the boundaries between federal and state political authority. By the same token I think that the validity of New York's literacy test, a question which the Court considers *only* in the context of the federal statute, must be upheld. It will conduce to analytical clarity if I discuss the second issue first.

#### I. *The Cardona Case* (No. 673)

This case presents a straightforward Equal Protection problem. Appellant, a resident and citizen of New York, sought to register to vote but was refused registration because she failed to meet the New York English literacy qualification

<sup>18</sup> See, e.g., 111 Cong. Rec. 11060-11061.

<sup>19</sup> See Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1 (1953).  
<sup>20</sup> See, e.g., 111 Cong. Rec. 11060-11061, 11066, 11073, 16235. See Osuna, *A History of Education in Puerto Rico* (1949).

<sup>21</sup> See, e.g., 111 Cong. Rec. 16235; *Voting Rights*, House Hearings, n. 3, *supra*, 862. See also Jones Act of 1917, 30 Stat. 953, conferring United States citizenship on all citizens of Puerto Rico.

\*[This opinion applies also to *Cardona v. Power*, post, p. 672.]

respecting eligibility for the franchise.<sup>1</sup> She maintained that although she could not read or write English, she had been born and educated in Puerto Rico and was literate in Spanish. She alleges that New York's statute requiring satisfaction of an English literacy test is an arbitrary and irrational classification that violates the Equal Protection Clause at least as applied to someone who, like herself, is literate in Spanish.

Any analysis of this problem must begin with the established rule of law that the franchise is essentially a matter of state concern, *Minor v. Happersett*, 21 Wall. 162; *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, subject only to the overriding requirements of various federal constitutional provisions dealing with the franchise, e.g., the Fifteenth, Seventeenth, Nineteenth, and Twenty-fourth Amendments,<sup>2</sup> and, as more recently decided, to the general principles of the Fourteenth Amendment, *Reynolds v. Sims*, 377 U.S. 533; *Carrington v. Rash*, 380 U.S. 89.

The Equal Protection Clause of the Fourteenth Amendment, which alone concerns us here, forbids a State from arbitrarily discriminating among different classes of persons. Of course it has always been recognized that nearly all legislation involves some sort of classification, and the equal protection test applied by this Court is a narrow one: a state enactment or practice may be struck down under the clause only if it cannot be justified as founded upon a rational and permissible state policy. See, e.g., *Powell v. Pennsylvania*, 127 U.S. 678; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61; *Walters v. City of St. Louis*, 347 U.S. 231.

It is suggested that a different and broader equal protection standard applies in cases where "fundamental liberties and rights are threatened," see *ante*, p. 655, note 15; dissenting opinion of DOUGLAS, J., in *Cardona, post*, pp. 676-677, which would require a State to show a need greater than mere rational policy to justify classifications in this area. No such dual-level test has ever been articulated by this Court, and I do not believe that any such approach is consistent with the purposes of the Equal Protection Clause, with the overwhelming weight of authority, or with well-established principles of federalism which underlie the Equal Protection Clause.

Thus for me, applying the basic equal protection standard, the issue in this case is whether New York has shown that its English-language literacy test is reasonably designed to serve a legitimate state interest. I think that it has.

In 1959, in *Lassiter v. Northampton Election Bd.*, *supra*, this Court dealt with substantially the same question and resolved it unanimously in favor of the legitimacy of a state literacy qualification. There a North Carolina English literacy test was challenged. We held that there was "wide scope" for State qualifications of this sort. 360 U.S., at 51. Dealing with literacy tests generally, the Court there held:

"The ability to read and write \* \* \* has some relation to standards designed to promote intelligent use of the ballot. \* \* \* Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. \* \* \* It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. *Stone v. Smith*, 159 Mass. 413-414, 34 N.E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards." 360 U.S., at 51-53.

I believe the same interests recounted in *Lassiter* indubitably point toward upholding the rationality of the New York voting test. It is true that the issue here is not so simply drawn between literacy *per se* and illiteracy. Appellant alleges that she is literate in Spanish, and that she studied American history and government in United States Spanish-speaking schools in Puerto Rico. She alleges further that she is "a regular reader of the New York City Spanish-language daily newspapers and other periodicals, which \* \* \* provide proportionately more coverage of government and politics than do most English-language news-

<sup>1</sup> The pertinent portions of the New York Constitution, Art. II, § 1, and statutory provisions are reproduced in the Court's opinion, *ante*, pp. 644-645, n. 2.

<sup>2</sup> The Fifteenth Amendment forbids denial or abridgement of the franchise "on account of race, color, or previous condition of servitude"; the Seventeenth deals with popular election of members of the Senate; the Nineteenth provides for equal suffrage for women; the Twenty-fourth outlaws the poll tax as a qualification for participation in federal elections.

papers," and that she listens to Spanish-language radio broadcasts in New York which provide full treatment of governmental and political news. It is thus maintained that whatever may be the validity of literacy tests *per se* as a condition of voting, application of such a test to one literate in Spanish, in the context of the large and politically significant Spanish-speaking community in New York, serves no legitimate state interest, and is thus an arbitrary classification that violates the Equal Protection Clause.

Although to be sure there is a difference between a totally illiterate person and one who is literate in a foreign tongue, I do not believe that this added factor vitiates the constitutionality of the New York statute. Accepting appellant's allegations as true, it is nevertheless also true that the range of material available to a resident of New York literate only in Spanish is much more limited than what is available to an English-speaking resident, that the business of national, state, and local government is conducted in English, and that propositions, amendments, and offices for which candidates are running listed on the ballot are likewise in English. It is also true that most candidates, certainly those campaigning on a national or statewide level, make their speeches in English. New York may justifiably want its voters to be able to understand candidates directly, rather than through possibly imprecise translations or summaries reported in a limited number of Spanish news media. It is noteworthy that the Federal Government requires literacy in English as a prerequisite to naturalization, 66 Stat. 239, 8 U.S.C. § 1423 (1964 ed.), attesting to the national view of its importance as a prerequisite to full integration into the American political community. Relevant too is the fact that the New York English test is not complex,<sup>3</sup> that it is fairly administered,<sup>4</sup> and that New York maintains free adult education classes which appellant and members of her class are encouraged to attend.<sup>5</sup> Given the State's legitimate concern with promoting and safeguarding the intelligent use of the ballot, and given also New York's long experience with the process of integrating non-English-speaking residents into the mainstream of American life, I do not

<sup>3</sup> The test is described in McGovney, *The American Suffrage Medley* 63 (1949) as follows: "The examination is based upon prose compositions of about ten lines each, prepared by the personnel of the State Department of Education, designed to be of the level of reading in the sixth grade \* \* \*. These are uniform for any single examination throughout the state. The examination is given by school authorities and graded by school superintendents or teachers under careful instructions from the central authority, to secure uniformity of grading as nearly as is possible." The 1943 test, submitted by the Attorney General of New York as representative, is reproduced below:

#### NEW YORK STATE REGENTS LITERACY TEST

(To be filled in by the candidate in ink)

Write your name here \_\_\_\_\_ First name \_\_\_\_\_ Middle initial \_\_\_\_\_ Last name \_\_\_\_\_

Write your address here \_\_\_\_\_

Write the date here \_\_\_\_\_ Month \_\_\_\_\_ Day \_\_\_\_\_ Year \_\_\_\_\_

Read this and then write the answers to the questions

Read it as many times as you need to

The legislative branch of the National Government is called the Congress of the United States. Congress makes the laws of the Nation. Congress is composed of two houses. The upper house is called the Senate and its members are called Senators. There are 96 Senators in the upper house, two from each State. Each United States Senator is elected for a term of six years. The lower house of Congress is known as the House of Representatives. The number of Representatives from each state is determined by the population of that state. At present there are 435 members of the House of Representatives. Each Representative is elected for a term of two years. Congress meets in the Capitol at Washington.

The answers to the following questions are to be taken from the above paragraph:

- 1 How many houses are there in Congress? \_\_\_\_\_
- 2 What does Congress do? \_\_\_\_\_
- 3 What is the lower house of Congress called? \_\_\_\_\_
- 4 How many members are there in the lower house? \_\_\_\_\_
- 5 How long is the term of office of a United States Senator? \_\_\_\_\_
- 6 How many Senators are there from each state? \_\_\_\_\_
- 7 For how long a period are members of the House of Representatives elected? \_\_\_\_\_
- 8 In what city does Congress meet? \_\_\_\_\_

<sup>4</sup> There is no allegation of discriminatory enforcement, and the method of examination, see n. 3, *supra*, makes unequal application virtually impossible. McGovney has noted, *op. cit. supra*, at 62, that "New York is the only state in the Union that both has a reasonable reading requirement and administers it in a manner that secures uniformity of application throughout the state and precludes discrimination, so far as is humanly possible." See *Camacho v. Rogers*, 199 F. Supp. 155, 159-160.

<sup>5</sup> See McKinney's Consolidated Laws of New York Ann., Education Law § 4605. See generally Handbook of Adult Education in the United States 455-465 (Knowles ed. 1960).

see how it can be said that this qualification for suffrage is unconstitutional. I would uphold the validity of the New York statute, unless the federal statute prevents that result, the question to which I now turn.

## II. *The Morgan Cases* (Nos. 847 and 877)

These cases involve the same New York suffrage restriction discussed above, but the challenge here comes not in the form of a suit to enjoin enforcement of the state statute, but in a test of the constitutionality of a federal enactment which declares that "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language." Section 4(e) of the Voting Rights Act of 1965. Section 4(e) declares that anyone who has successfully completed six grades and schooling in an "American-flag" school, in which the primary language is not English, shall not be denied the right to vote because of an inability to satisfy an English literacy test.<sup>6</sup> Although the statute is framed in general terms, so far as has been shown it applies in actual effect only to citizens of Puerto Rican background, and the Court so treats it.

The pivotal question in this instance is what effect the added factor of a congressional enactment has on the straight equal protection argument dealt with above. The Court declares that since § 5 of the Fourteenth Amendment<sup>7</sup> gives to the Congress power to "enforce" the prohibitions of the Amendment by "appropriate" legislation, the test for judicial review of any congressional determination in this area is simply one of rationality; that is, in effect, was Congress acting rationally in declaring that the New York statute is irrational? Although § 5 most certainly does give to the Congress wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action, *Ex parte Virginia*, 100 U.S. 339, I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature.

When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs. See *Strauder v. West Virginia*, 100 U.S. 303, 310. But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all. Thus, in *Ex parte Virginia*, *supra*, involving a federal statute making it a federal crime to disqualify anyone from jury service because of race, the Court first held as a matter of constitutional law that "the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offenses against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color." 100 U. S., at 315. Only then did the Court hold that to enforce this prohibition upon state discrimination, Congress could enact a criminal statute of the type under consideration. See also *Clyatt v. United States*, 197 U.S. 297, sustaining the constitutionality of the anti-peonage laws, 14 Stat. 546, now 42 U. S. C. § 1994 (1964 ed.), under the Enforcement Clause of the Thirteenth Amendment.

A more recent Fifteenth Amendment case also serves to illustrate this distinction. In *South Carolina v. Katzenbach*, 383 U. S. 301, decided earlier this Term, we held certain remedial sections of this Voting Rights Act of 1965 constitutional under the Fifteenth Amendment, which is directed against deprivations of the right to vote on account of race. In enacting those sections of the Voting Rights Act the Congress made a detailed investigation of various state practices that had been used to deprive Negroes of the franchise. See 383 U. S., at 308-315. In passing upon the remedial provisions, we reviewed first the "voluminous legislative history" as well as judicial precedents supporting the basic

<sup>6</sup> The statute makes an exception to its sixth-grade rule so that where state law "provides that a different level of education is presumptive of literacy," the applicant must show that he has completed "an equivalent level of education" in the foreign-language United States school.

<sup>7</sup> Section 5 of the Fourteenth Amendment states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

congressional finding that the clear commands of the Fifteenth Amendment had been infringed by various state subterfuges. See 383 U. S., at 309, 329-330, 333-334. Given the existence of the evil, we held the remedial steps taken by the legislature under the Enforcement Clause of the Fifteenth Amendment to be a justifiable exercise of congressional initiative.

Section 4(e), however, presents a significantly different type of congressional enactment. The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command, that is, whether a particular state practice or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine. Were the rule otherwise, Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments, let alone those under other provisions of the Constitution, by resorting to congressional power under the Necessary and Proper Clause. In view of this Court's holding in *Lassiter, supra*, that an English literacy test is a permissible exercise of state supervision over its franchise, I do not think it is open to Congress to limit the effect of that decision as it has undertaken to do by § 4(e). In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.

I do not mean to suggest in what has been said that a legislative judgment of the type incorporated in § 4(e) is without any force whatsoever. Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect.<sup>8</sup> In *South Carolina v. Katzenbach, supra*, such legislative findings were made to show that racial discrimination in voting was actually occurring. Similarly, in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, and *Katzenbach v. McClung*, 379 U.S. 294, this Court upheld Title II of the Civil Rights Act of 1964 under the Commerce Clause. There again the congressional determination that racial discrimination in a clearly defined group of public accommodations did effectively impede interstate commerce was based on "voluminous testimony," 379 U.S., at 253, which had been put before the Congress and in the context of which it passed remedial legislation.

But no such factual data provide a legislative record supporting § 4(e)<sup>9</sup> by way of showing that Spanish-speaking citizens are fully as capable of making informed decisions in a New York election as are English-speaking citizens. Nor was there any showing whatever to support the Court's alternative argument that § 4(e) should be viewed as but a remedial measure designed to cure or assure against unconstitutional discrimination of other varieties, e.g., in "public schools, public housing and law enforcement," *ante*, p. 632, to which Puerto Rican minorities might be subject in such communities as New York. There is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns. See *Heart of Atlanta Motel, supra*; *South Carolina v. Katzenbach, supra*.

Thus, we have here not a matter of giving deference to a congressional estimate, based on its determination of legislative facts, bearing upon the validity *vel non* of a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection. Although this kind of declaration is of course entitled to the most respectful consideration, coming as it does from a concurrent branch and

<sup>8</sup> See generally Karst, *Legislative Facts in Constitutional Litigation*, 1960 *The Supreme Court Review* 75 (Kurland ed.); Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. Pa. L. Rev. 637 (1966).

<sup>9</sup> There were no committee hearings or reports referring to this section, which was introduced from the floor during debate on the full Voting Rights Act. Sec. 111 Cong. Rec. 11027, 15666, 16234.

one that is knowledgeable in matters of popular political participation. I do not believe it lessens our responsibility to decide the fundamental issue of whether in fact the state enactment violates federal constitutional rights.

In assessing the deference we should give to this kind of congressional expression of policy, it is relevant that the judiciary has always given to congressional enactments a presumption of validity. *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 457-458. However, it is also a canon of judicial review that state statutes are given a similar presumption, *Butler v. Commonwealth*, 10 How. 402, 415. Whichever way this case is decided, one statute will be rendered inoperative in whole or in part, and although it has been suggested that this Court should give somewhat more deference to Congress than to a state legislature,<sup>10</sup> such a simple weighing of presumptions is hardly a satisfying way of resolving a matter that touches the distribution of state and federal power in an area so sensitive as that of the regulation of the franchise. Rather it should be recognized that while the Fourteenth Amendment is a "brooding omnipresence" over all state legislation, the substantive matters which it touches are all within the primary legislative competence of the States. Federal authority, legislative no less than judicial, does not intrude unless there has been a denial by state action of Fourteenth Amendment limitations, in this instance a denial of equal protection. At least in the area of primary state concern a state statute that passes constitutional muster under the judicial standard of rationality should not be premitted to be set naught by a mere contrary congressional pronouncement unsupported by a legislative record justifying that conclusion.

To deny the effectiveness of this congressional enactment is not of course to disparage Congress' exertion of authority in the field of civil rights; it is simply to recognize that the Legislative Branch like the other branches of federal authority is subject to the governmental boundaries set by the Constitution. To hold, on this record, that § 4(e) overrides the New York literacy requirement seems to me tantamount to allowing the Fourteenth Amendment to swallow the States's constitutionally ordained primary authority in this field. For if Congress by what, as here, amounts to mere *ipse dicit* can set that otherwise permissible requirement partially at naught I see no reason why it could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well.

I would affirm the judgments in each of these cases.<sup>11</sup>

**Senator ERVIN.** Do you still decline to answer questions about *Miranda*?

Judge MARSHALL. I would respectfully request that I not be required to answer questions involving *Miranda* in the areas that will come before the Supreme Court in the immediate future.

**Senator ERVIN.** I have asked you questions about *Miranda* which you said you preferred not to answer because you thought they were not proper. I will make a statement what I think about *Miranda*.

The *Miranda* decision is based upon these words of the fifth amendment: no person shall be compelled in any criminal case to be a witness against himself. Those words became effective as part of the Constitution of the United States on the 15th day of June 1790. They were uniformly interpreted by the Supreme Court itself from the 15th day of June 1790 until 13th day of June 1966 to have no possible application to voluntary confessions. The decisions held that this was true because the words clearly apply to compelled testimony only which a person testifying as a witness against himself gives in a judicial tribunal in a criminal case or a case of the nature of a criminal case.

<sup>10</sup> See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 120, 154-155 (1893).

<sup>11</sup> A number of other arguments have been suggested to sustain the constitutionality of § 4(e). These are referred to in the Court's opinion, *ante*, pp. 646-647, n. 5. Since all of such arguments are rendered superfluous by the Court's decision and none of them is considered by the majority, I deem it unnecessary to deal with them save to say that in my opinion none of those contentions provides an adequate constitutional basis for sustaining the statute.

On the 13th day of June 1966, the Supreme Court, by a 5-4 decision, undertook to change the meaning of those words and to practical intents and purposes, for the time being at least, did change their meaning, by holding that a confession made by a suspect to a law enforcement officer having him in custody, no matter how voluntary the confession may be and no matter how intelligent or learned in the law the suspect may be, cannot be received in evidence unless these certain requirements are met; namely: The suspect in custody must be warned prior to any question that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be provided for him prior to any questioning if he so desires. Moreover, the majority of the Court declares that an opportunity to exercise these rights must be afforded the suspect throughout the interrogation.

The majority opinion provides, moreover, that even if the specified warnings are given, no subsequent voluntary confession of the suspect can be received in evidence in any court unless his attorney is present when it is made or unless he waives the rights enumerated in the warning, and that the suspect can waive such rights only expressly by saying, in substance, that he "is willing to make a statement and does not want an attorney." The majority holds that even in that event, a voluntary confession is inadmissible unless it "closely" follows the express waiver.

I say that on that day, the Supreme Court attempted to add to the self-incrimination clause of the fifth amendment something which is not in the fifth amendment or any other provision of the Constitution.

I further assert without fear of successful contradiction by anybody that the holding of the majority of the Supreme Court in that case is absolutely inconsistent with the very words of the Constitution it was professing to interpret.

I further assert for whatever it is worth that the judges who joined in the majority opinion made a voluntary confession in the opinion that they were adding to the Constitution requirements which were not there, when they called these requirements "the principles announced today" and "the systems or warnings we delineate today."

I construe that to be a voluntary confession on the part of the majority of the Court that it was creating new requirements which were not a part of the Constitution prior to the 13th day of June 1966, notwithstanding that the constitutional provision involved had been in the Constitution since June 15, 1790.

If you care to make any observations on my comments, I will be pleased to have you do so.

Judge MARSHALL. I respectfully would rather not, Senator.

Senator ERVIN. I did not quite understand you.

Judge MARSHALL. I say respectfully that I would rather not give my opinion on your statement.

Senator ERVIN. I will not insist, then.

Judge MARSHALL. Thank you, sir.

Senator ERVIN. I will add, however, that what I have said is in accord with the dissenting opinions of Justices Harlan, Stewart, Clark, and White.

Justice Harlan says this in his dissenting opinion, and it is as strong an indictment as anything I said:

The decision of the Court represents poor constitutional law and entails harmful consequences for the country at large.

I would add that from the testimony given before the Judiciary Committee, Subcommittee on Criminal Laws and Procedures by Federal and State judges, by prosecuting attorneys, and by law enforcement officers and from what appears in the press frequently, this statement of Justice Harlan that this decision entails harmful consequences for the country at large is certainly true. This is so because throughout the length and breadth of this country Federal and State courts, are compelled to free self-confessed murderers, rapists, robbers, burglars, and other felons simply because the law enforcement officer having them in custody at the time they made their voluntary confessions did not repeat these warnings to them—warnings about things virtually all of them already know.

I would like to ask you this question, Judge: As a result of your experience in practicing law, what percentage of persons who commit murders, rapes, robberies, burglaries, and other serious offenses do not already know that they have a right to remain silent and do not already know that whatever they say derogatory to themselves will be used against them in court and do not already know that they have the right of counsel at the time they are interrogated?

Judge MARSHALL. I would say, Senator, that the percentage would give me great difficulty, but that the violent crimes, for the most part, are spur-of-the-moment crimes and the person perpetrating the crime does not consider *Miranda* or anybody else. That runs from that scope to the calculating, so-called white-collar crimes. They are not worried about *Miranda*, because they have a lawyer. So I say the figures would get me in great difficulty.

I would also say that following the *Miranda* case was the *Johnson* case of New Jersey, which made certain that it was not retroactive.

Senator ERVIN. That is one thing I was going to ask you about: How a constitutional provision which has been in the Constitution since the 15th day of June 1790 applies to cases which arose after a certain date, but does not apply to cases that arose before that date, when the language of the Constitution itself has never been changed.

Judge MARSHALL. Senator, I took that position in a case on the second circuit. But I lost.

Senator ERVIN. Yes, you did, and I thought you took a very sound position.

Judge MARSHALL. But I lost on that.

Senator ERVIN. I would like to know just between you and myself as lawyers, how can a constitutional provision which was placed in the Constitution on the 15th day of June 1790, the wording of which has not been changed since that time, how can it apply to cases which occur after a certain date in 1966, or 1965, and not apply to cases that occurred before that date?

Judge MARSHALL. I would have to rely on the opinion of the case in *Angela and Fahy*.

Senator ERVIN. I have to say I agree with those opinions. A ruling ought to have a retroactive application if it is really a ruling justified

by the Constitution. The Constitution was in effect prior to the time the case arose in which the ruling was made. But it must be conceded that the Supreme Court has ruled to the contrary and it does move, like the Lord, in mysterious ways its wonders to perform.

I want to call to your attention a case you wrote while a judge of the U.S. Court of Appeals for the Second Circuit, *U.S. v. Walter H. Wilkins, Warden of the Connecticut State Prison*, which is reported at 348 Federal Reporter, Second Series, 804.

Judge MARSHALL. Senator, I would have to get the other name. Wilkins is the warden of the prison. There are several hundreds of those.

Senator ERVIN. The man's name was George Heteny.

Judge MARSHALL. Heteny, yes, sir.

Senator ERVIN. In that case, at pages 862 and 863, you had this to say:

Thirdly, and perhaps most significantly, the authority of Brantley and the Kring dictum, (even if the latter be read to reach the instant double jeopardy claim) has been tarnished by the gradual but certain evolution of our constitutional understanding of justice and fairness. Mr. Justice Frankfurter, the most eloquent and ardent contemporary advocate of the fundamental fairness standard, consistently maintained that in applying this standard the courts are permitted, nay are required, to re-evaluate prior interpretations of the due process clause in the light of "changing concepts as to minimum standards of fairness" and with this view there could be little dispute. What was regarded as fair in one epoch of our history as a nation may be regarded as fundamentally unfair in the next, even though the judgment is "not ad hoc and episodic, but duly mindful of reconciling the need of continuity and of change in progressive society."

Does not that statement indicate that it was your opinion at that time, that a judge has the right to assign different meanings, or to change the meaning of the due process of law clause to fit his own conceptions of what is fundamental fairness?

Judge MARSHALL. Well, I am bitterly opposed to a judge at any time using his own personal proclivities in deciding a lawsuit or writing an opinion. In that opinion, I relied completely on Mr. Justice Frankfurter's statement. I still think his statement is accurate.

But it is not changing the meaning of the due process clause, it is applying the due process clause to the issue that is now before the court.

Senator ERVIN. Well, does not that mean that the requirements of due process change from time to time without any change being made in the wording of the due process clause?

Judge MARSHALL. I think that the meaning of the due process clause must change, because it is a one-sentence clause, and I imagine there must be a thousand interpretations of it.

Senator ERVIN. Do you think that is one provision of the Constitution which does change?

Judge MARSHALL. I do not think the provision changes, it is what is the meaning.

Senator ERVIN. The words do not change, but the meaning changes?

Judge MARSHALL. Yes, that could be true.

Senator ERVIN. And under this theory nobody has anything to do with determining when the meaning of the words change except the courts.

Judge MARSHALL. It is the court's job to interpret the due process clause as it applies to this state of facts on this date.

Senator ERVIN. The people of the United States have nothing to do with changing the meaning of the due process cause under this concept, do they?

Judge MARSHALL. Except by amendment.

Senator ERVIN. I say when the judges change its meaning, the people do not participate in that, do they?

Judge MARSHALL. I do not think so.

Senator ERVIN. And have no recourse against it, do they?

Judge MARSHALL. Yes, sir, to amend the Constitution.

Senator ERVIN. Do you not know that when the question of ratification of the Constitution was under consideration in this country, Elbridge Gerry of Massachusetts, a great lawyer, and George Mason of Virginia, another great lawyer, pointed out that there is really no actual limitation in the Constitution upon the powers of the court, and stated in substance that under the guise of interpreting the Constitution, the Justice of the Supreme Court would exercise the power to change its meaning?

Judge MARSHALL. I think you are correct. My history is not as good as yours.

Senator ERVIN. Did not Gerry and Mason state at that time that when judges did change the meaning of the Constitution while professing to interpret it the errors they committed in so doing were without remedy for all practical intents and purposes?

Judge MARSHALL. I do not agree on that. Congress is still here.

Senator ERVIN. There is no way to change an error in constitutional interpretation except by a constitutional amendment, is there?

Judge MARSHALL. If it is an interpretation of an act or an article of the Constitution, I would assume that that would be correct.

Senator ERVIN. No way.

Judge MARSHALL. But there have been cases where the Supreme Court, and I tell you I cannot at this moment name them, interpreted provisions and Congress changed that. There have been instances of that.

Senator ERVIN. Yes, sometimes there is judicial repentance and judges repair their error. But outside of that method, the only way the people can change an erroneous constitutional ruling is by a vote of two-thirds of both Houses of Congress and the consent of three-fourths of the States?

Judge MARSHALL. I still say, Senator, that Congress has certain authorities that they can change and there have been cases where the Supreme Court has ruled and Congress in its next session has made clear that they have moved into the field.

Senator ERVIN. But Congress cannot change a ruling when the Court puts it on constitutional grounds, can it?

Judge MARSHALL. It is on constitutional grounds, but—

Senator ERVIN. Of course, I am talking about decisions in which the Court allegedly bases its rulings on the Constitution.

Judge MARSHALL. Very often, Senator, if I may—for example, in the *Miranda* case, the Court left open the right of what Congress could do and what the State legislatures could do in the field of enforcement of criminal law.

Senator ERVIN. Oh, yes; the Court said in the *Miranda* case that it gave Congress and the States permission to legislate provided they did not make any requirements less stringent than those which the Court laid down on the 18th day of June 1966.

Judge MARSHALL. That might be true.

Senator ERVIN. I can assert that it is.

Judge MARSHALL. That is your interpretation of it, sir.

Senator ERVIN. The due process clause not only applies to procedural matters, but also applies to substantive matters, does it not?

Judge MARSHALL. I would think so.

Senator ERVIN. If the courts have the right to assign new meanings to the due process clause from day to day, then the courts have the right to change the Constitution in respect to both substantive and procedural matters; do they not?

Judge MARSHALL. Senator, my basic disagreement is I do not believe—I mean I am certain that the Supreme Court cannot change the wording of the Constitution.

Senator ERVIN. I know that. But the Court need not change the wording of the Constitution if it can change its meaning. In fact, the wording does not have any meaning if the Court can change it.

Judge MARSHALL. But the Constitution gave the Supreme Court the duty to pass on the constitutionality of any act.

Senator ERVIN. Yes. But the Court held in the *Morgan* case that it did not have the right to pass on the constitutionality of section 1 of the 14th amendment. This was a queer holding, to me.

Mr. Justice Black takes issue with the doctrine that the Court has the power to change the meaning of the due process clause, does he not?

Judge MARSHALL. I think pretty consistently.

Senator ERVIN. I would just like to read this statement from his opinion, which is the dissenting opinion in *Stovall v. Denno*, a decision handed down on June 12, 1967:

The Court goes on, however, to hold that even though its new constitutional rule about the Sixth Amendment's right to counsel cannot help this petitioner, he is nevertheless entitled to a consideration of his claim "independent of any right to counsel claim" that his identification by one of the victims of the robbery was made under circumstances so "unfair" that he was denied "due process of law" guaranteed by the Fourteenth Amendment. Although the Court finds petitioner's claim without merit, I dissent from its holding that a general claim of "unfairness" at the line-up is "open to all persons to allege and prove." The term "due process of law" is a direct descendant of Magna Charta's promise of a trial according to the "law of the land" as it has been established by the lawmaking agency, constitutional or legislative. No one has ever been able to point to a word in our constitutional history that shows the framers ever intended that the Due Process Clause of the Fifth or Fourteenth Amendment was designed to mean any more than that defendants charged with crimes should be entitled to a trial governed by the laws, constitutional and statutory, that are in existence at the time of the commission of the crime and the time of the trial. The concept of due process under which the Court purports to decide this question, however, is that this Court looks at the "totality of circumstances" of a particular case to determine on its own judgment whether they comport with the Court's notion of decency, fairness, and fundamental justice, and if so, declares they comport with the Constitution and if not, declares they are forbidden by the Constitution.

Such a constitutional formula substitutes this Court's judgment of what is right for what the Constitution declares shall be the supreme law of the land. This due process notion proceeds as though our written Constitution, designed to grant limited powers to government, had neutralized its limitations by using

the due process clause to authorize this Court to override its written limiting language by substituting the Court view of what powers the framers should have granted government. Once again I dissent from any such view of the Constitution. Where accepted, its result is to make this Court not a Constitution-interpreter but a day-to-day Constitution-maker.

But even if the due process clause could possibly be construed as giving such latitudinal powers to the Court, I would still think the Court goes too far in holding that the courts can look at the particular circumstances of each identification line-up to determine at large whether they are too 'suggestive and conducive to irreparable mistaken identification' to be constitutional. That result is to freeze as constitutional or as unconstitutional the circumstances of each case, giving the States and the Federal Government no permanent constitutional standards. It also transfers to this Court power to determine what the Constitution should say, instead of performance of its undoubted constitutional power to determine what the Constitution does say.

Is not the doctrine which was espoused by Justice Frankfurter and which you embraced and applied in what I call the *Wilkins* case, based on the theory that in interpreting the due process clause judges have the right to take into consideration their own notions of decency, fairness, and fundamental justice, and to adjudge a course of action to conform to the Constitution if they find it satisfies their notions in this respect, and to declare it forbidden by the Constitution if they find it inconsistent with such notions.

Judge MARSHALL. I would say the judge is not permitted to use his own personal views under any circumstances but if the particular decisionmaker, whether he be judge or justice or magistrate, applies the Constitution to the facts and it comes out that way, that is inevitable. But there is nothing personal allowed, nothing personal.

Senator ERVIN. Where do the judges obtain their standard of fairness if it is not personal?

Judge MARSHALL. It is personal to this extent, that once he applies the law to the facts and arrives at a conclusion, that is, you could say, his personal conclusion. But it should not be his personal idea that this is good or this is bad just because I think so.

Senator ERVIN. Justice Frankfurter states in substance, that the courts are permitted, nay, are required, to reevaluate prior interpretations of the due process clause in light of changing concepts as to minimum standards of fairness. You approve this doctrine in the *Wilkins* case. Where does the judge get these new or changing standards of fairness in passing on the due process clause?

Judge MARSHALL. Senator, they are not necessarily new standards. The case you just talked about, I have been unable to find another line-up case before this one. This was the first case I know of where the issue of lineup was placed before any court that has a reported decision on it. There might have been others but we could not find any.

Senator ERVIN. What I am trying to get at is this: How does the due process clause of the 14th amendment change its meaning? How does a judge decide when it changes its meaning?

Judge MARSHALL. The 14th amendment never changes its meaning, but if the fact is never presented in court—

Senator ERVIN. I believe you stated awhile ago that the words of the due process clause never change, but the meaning of the words changes.

Judge MARSHALL. The interpretation could change.

Senator ERVIN. An interpretation does not change the meaning of the things; it ascertains the meaning of things.

Judge MARSHALL. But if the point has never been before the court, any court, the court cannot be charged with changing anything, because it has never been there before and the lineup case is a brand-new case.

Senator ERVIN. Well, in this opinion which speaks of changing concepts as to the minimum standards of fairness required by the due process clause, you said, "What was regarded as fair in one epoch of our history as a nation may be regarded as fundamentally unfair in the next."

Now, who determines what—

Judge MARSHALL. I was paraphrasing.

Senator ERVIN. Who determines that a thing which is fair one time under the due process clause is fundamentally unfair at another time? Who determines that?

Judge MARSHALL. The judge who decides the case.

Senator ERVIN. In other words, this is what it comes down to: Under the due process clause, the Constitution automatically changes its meaning from time to time, and any five members of the Supreme Court are the sole judges of when the Constitution changes its meaning or how it changes its meaning. That power is vested in the majority of the Supreme Court of the United States? Is that not true?

Judge MARSHALL. It is vested in the majority of the Supreme Court. It is also understood that they shall not use their personal views, and indeed, they take an oath not to.

Senator ERVIN. We discussed something about the doctrine of *res judicata*. I will ask you if the majority of the Supreme Court as now constituted has not largely forsaken the doctrine of *stare decisis*.

Judge MARSHALL. I do not think so.

Senator ERVIN. Do you recall the statement of Justice Roberts to the effect that a decision of the U.S. Supreme Court has become like a one-way railway ticket, good for this day and trip only?

Judge MARSHALL. I know of one case in particular where he spelled out in great detail the number of times the Supreme Court had reversed itself, and that was in a decision on April 15, 1944. But it was a dissenting opinion.

Senator ERVIN. It was in a dissenting opinion, but he stated that in a case where the Supreme Court overruled a decision it had handed down only 9 years before, did he not? And he stated in his dissenting opinion—

Judge MARSHALL. The case I am talking about is *Smith v. Alright*.

Senator ERVIN. That is the one I had in mind. He said the decision of the Court had become like a one-way railroad ticket, good for this trip and day only.

Do you recall the *Stovall* case?

Judge MARSHALL. Yes, sir.

Senator ERVIN. I would like to ask you if these were not the facts in the *Stovall* case. I undertake to state the facts myself because I would like to finish my questions. I know my brethren would like to question you. But in the *Stovall* case, Dr. Behrendt and his wife lived in a house, I believe, on Long Island.

Judge MARSHALL. Long Island, yes.

Senator ERVIN. And sometime about midnight a person entered their home in some fashion. When the occupants of the house under-

took to ascertain what was happening, this person, whoever he was, stabbed Dr. Behrendt in such a way that he killed him, did he not?

Judge MARSHALL. Very viciously.

Senator ERVIN. Then Mrs. Behrendt ran into the room where this person, whoever he was, was stabbing her husband, and attempted to come to her husband's assistance and this person, this intruder, I will call him, knocked her down and stabbed her 11 times, did he not?

Judge MARSHALL. I do not remember the number of times.

Senator ERVIN. This is in the record.

Judge MARSHALL. But she was almost killed.

Senator ERVIN. Then Mrs. Behrendt was taken to the hospital, and for some time there was a question whether she would live or die. Her life hung in the balance, did it not?

Judge MARSHALL. That is correct.

Senator ERVIN. Then the police arrested the accused, Stovall, and Stovall was taken before the magistrate and the magistrate told him he had the right to have a lawyer and offered to appoint him a lawyer, and Stovall said he would like to have a lawyer of his own selection, did he not?

Judge MARSHALL. I think that is correct.

Senator ERVIN. Then the case was continued for his benefit so he could get a lawyer.

Judge MARSHALL. The arraignment was continued.

Senator ERVIN. Yes, the arraignment before the magistrate. Meanwhile the grand jury indicted Stovall for murder.

Judge MARSHALL. That could be correct. I do not know.

Senator ERVIN. Then before Stovall had gotten a lawyer of his own choice, or before one had been appointed for him, the police officers, not knowing whether Mrs. Behrendt would live or die, took Stovall from the jail to the nearby hospital in which she was a patient.

Judge MARSHALL. No, sir, they took him directly from the arraignment, the original arraignment, and instead of returning to the prison, which the law of New York required, that very same day took him immediately to the hospital.

Senator ERVIN. I will accept that. Anyway, that was the day after the crime was committed, was it not?

Judge MARSHALL. I do not remember.

Senator ERVIN. Anyway, very shortly after the crime was committed.

Judge MARSHALL. I would assume so.

Senator ERVIN. And the police officers took him to the hospital room where Mrs. Behrendt was a patient. She identified him as having been the man who stabbed and killed her husband and stabbed her, did she not?

Judge MARSHALL. That is correct.

Senator ERVIN. Then later, the case came on for trial in the State court of New York and the jury found Stovall guilty of first degree murder, did they not?

Judge MARSHALL. That is correct.

Senator ERVIN. And he was sentenced to death.

Judge MARSHALL. Correct.

Senator ERVIN. And that case was appealed by him to the highest court in the State of New York, the Court of Appeals, was it not?

Judge MARSHALL. Correct.

Senator ERVIN. I will ask you if during the trial in the State court Mrs. Behrendt did not testify positively that she had identified Stovall as the person who had committed the crimes on her husband and herself, and if she did not testify positively that she based her identification of him in the courtroom solely on what she observed at the time of the commission of the crime, rather than at the time she saw him in the hospital room?

Judge MARSHALL. It was both. She testified to both, as I remember. She testified both ways.

Senator ERVIN. This case was heard first in the State trial court, then in the New York Court of Appeals, then in the U.S. district court, then twice in the U.S. court of appeals for that circuit, and then by the Supreme Court of the United States, was it not?

Judge MARSHALL. That is right.

Senator ERVIN. The opinion of Chief Judge Lumbard is set forth in the report of the case which is entitled in the report as *United States v. Denno*, and which is reported in 355 Fed. Second. I ask you if Judge Lumbard does not say this on page 741 of the report?

Mrs. Behrendt made a positive courtroom identification of Stovall and she indicated that this identification was the product of her recollection of the night of the crime.

Judge MARSHALL. I have not read the record in that case since that case came down, which was in 1965. But as I remember the record, she was not sure, and that is why the lineup testimony was put in. I could be wrong.

Senator ERVIN. Well, this is Judge Lumbard's statement. He was the chief judge of the court of appeals, and this is his analysis of the record, on page 741. He says:

Mrs. Behrendt made a positive courtroom identification of Stovall and she indicated that this identification was the product of her recollection on the night of the crime. It seemed highly probable that the use made of the hospital room procedure *a priori* did not influence this courtroom identification. Under these circumstances, the impact of testimony after the hospital room incident was cumulative.

Judge MARSHALL. Well, Senator Ervin, that, it seems to me, makes clear that his conclusion and my conclusion differ, after having read the same record.

Senator ERVIN. I was going to read further:

Nevertheless, there remains the possibility that Mrs. Behrendt's ability reliably to identify Stovall at the trial was in fact psychologically helped by the impact of the previous confrontation in the hospital room. This presence does not depend upon whether there was testimony on the hospital room identification.

Judge MARSHALL. I think Judge Lumbard and I are in agreement.

Senator ERVIN. Yes. He says she testified positively in the courtroom at the time of the trial that she identified Stovall, and he says that it seems highly probable that the use made of the hospital room procedure at the trial did not influence this courtroom identification; and he says that she indicated that this identification was the product of her recollection on the night of the crime.

Well, anyway, she was the only person, so far as the evidence disclosed, on the face of this earth who was a living eyewitness of that crime; was she not?

Judge MARSHALL. So far as the record says, Senator ERVIN. She was the only human being that could give testimony to the effect that she saw the crime committed and he was the man who committed it, was she not?

Judge MARSHALL. I think that is correct.

Senator ERVIN. The only other evidence consisted of a few slight circumstances, did it not?

Judge MARSHALL. That was the reason they picked him up.

Senator ERVIN. You joined in the opinion of Judge Friendly, did you not?

Judge MARSHALL. That is correct. That was the original panel, Senator ERVIN. The original panel in this case was composed of Judge Friendly, Judge Moore, and yourself?

Judge MARSHALL. That is right.

Senator ERVIN. And Judge Friendly wrote an opinion in which you concurred. This opinion held that the provision of the sixth amendment giving a person the right to counsel in all criminal prosecutions rendered made it unconstitutional for Mrs. Behrendt, the victim of the crime and a witness of the crime, to look at Stovall while he was in custody unless an attorney representing Stovall was present.

Judge MARSHALL. I do not think the opinion says that, Senator. I think the opinion says that once the man was arraigned, the criminal process had started, and once the criminal process had started, he was entitled to have a lawyer before anything further was done. The man was arraigned, he was warned of his right to a lawyer, and that arraignment was postponed or continued, whatever the word was. We said that at that moment, he was entitled to a lawyer, at the time of arraignment.

Senator ERVIN. And Judge Friendly and you said that he was entitled to have the presence of a lawyer at the time Mrs. Behrendt, a patient in a hospital room, looked at him.

Judge MARSHALL. I thought we said that we did not have any idea what the lawyer could do. We did not know. I think that is what we said. It is copied in the last paragraph of Judge Friendly's dissenting opinion.

Senator ERVIN. Yes. Judge Friendly said that, assuming there was no self-incrimination in violation of the fifth amendment, Stovall's right to the assistance of counsel for his defense was violated by permitting Mrs. Behrendt to look at him for the purpose of identifying him. Judge Friendly said there were many things his counsel might have done. He said counsel might have persuaded the prosecutor in the State's own interest, if not to forgo the hospital identification, at least to assure conditions better designed to avoid suggestion. He might have persuaded the judge to direct that Stovall be immediately sent to and then kept in jail pending trial, or put before Mrs. Behrendt only under fair conditions such as a lineup or that counsel might have questioned her.

In other words, Judge Friendly suggested Stovall's counsel might have cross examined her about the identification in the hospital room while she is lying between life and death.

Judge MARSHALL. The point was these are sheer speculations. We do not know what a lawyer would do in those circumstances.

Senator ERVIN. You joined Judge Friendly in making this decision, did you not?

Judge MARSHALL. In every word he wrote I joined it; in every word he wrote. My question would be, How would that have injured anything if they had appointed a lawyer and took him and she identified him? What harm could that have done to the enforcement of criminal process?

Senator ERVIN. I will tell you one thing. She could have died without having an opportunity of identifying him. That would have prevented his being tried for her murder.

Judge MARSHALL. Well, she did not.

Senator ERVIN. No, she did not. But they could also have kept her from identifying him when her mind was fresh.

Judge MARSHALL. I do not agree that the lawyer could have stopped the identification.

Senator ERVIN. No, but Judge Friendly said that he might have been accompanied by counsel who might question her.

Judge MARSHALL. And the prosecutor could have told her, "Do not answer."

Senator ERVIN. Yes, he could have.

But anyway, when you come right down to it, did not Judge Friendly hold in his opinion that permitting Mrs. Behrendt to look at Stovall in the absence of counsel was unconstitutional, notwithstanding the fact that she was a patient in the hospital?

Judge MARSHALL. Solely because the lawyer had not been appointed at the time of arraignment.

Senator ERVIN. Yes, sir. In the ultimate analysis, the decision was because the lawyer was not present. Did he not hold that that was unconstitutional for Mrs. Behrendt to look at Stovall with a view to determining whether he was or was not the person she saw commit the crime because he was not accompanied by counsel?

Judge MARSHALL. It was, because he was taken from the arraignment officer and, instead of being taken back to jail, was carried over to the hospital for that purpose. It was what they did to him, not what she did.

Senator ERVIN. Yes, but was it not all put on the ground that Stovall was entitled to have the assistance of counsel when the officers took Stovall to Mrs. Behrendt's hospital room for the purpose of permitting her to look at him for purposes of identification?

Judge MARSHALL. That is correct, I think.

Senator ERVIN. Did not Judge Friendly rule that this evidence was incompetent and could not be used in the trial on account of the fact that it was taken under circumstances which you and he decided were unconstitutional?

Judge MARSHALL. I think that is correct.

Senator ERVIN. And you joined Judge Friendly's opinion, which held that the accused must be freed unless the case was retried without the use of the testimony of the only person on earth who could identify the man from personal observation?

Judge MARSHALL. You mean we said she could not testify?

Senator ERVIN. Yes.

Judge MARSHALL. No, we did not say that.

**Senator ERVIN.** Then why did your opinion say that a writ of habeas corpus could issue to free Stovall unless the State, within a reasonable time, afforded him a new trial?

**Judge MARSHALL.** That is a normal procedure in any habeas corpus case. We did not want to turn that man loose.

**Senator ERVIN.** No. He had not been turned loose, he had been convicted. He had been convicted in part, at least, on Mrs. Behrendt's testimony that he was the man she saw commit the crime. Then Judge Friendly and you held that the admission of that evidence was unconstitutional.

**Judge MARSHALL.** We said that the admission of the testimony concerning the hospital identification, that that could not be admissible. That was the whole point in the case. We did not say she could not testify. At least, I do not think we did.

**Senator ERVIN.** What did you order a new trial for if you felt that she could testify? Why did you grant a new trial?

**Judge MARSHALL.** We granted a new trial because a part of her testimony was that she had identified him at the hospital room at a time when he was entitled to have counsel and did not in fact have counsel; that that testimony should not be used.

**Senator ERVIN.** Well, that is the point I am making. You said the testimony should not be used.

**Judge MARSHALL.** The testimony of the hospital identification.

**Senator ERVIN.** Yes.

**Judge MARSHALL.** That should not be used. But if she could identify him on her own, I do not see a thing wrong with it.

**Senator ERVIN.** That is exactly the thing Judge Lumbard said she did, that she sat up on the witness stand in open court and said in substance, under oath, "That is the man I saw commit the crime."

**Judge MARSHALL.** And we said that was influenced by the identification in the hospital room.

**Senator ERVIN.** The prosecution did not bring out a thing about the hospital room, did it? That was brought out by the defense?

**Judge MARSHALL.** Because of the statement made by the prosecutor, as I remember it.

**Senator ERVIN.** But the evidence about the hospital visit was brought out by the counsel for the defense, was it not?

**Judge MARSHALL.** That is right.

**Senator ERVIN.** And the only testimony the prosecution relied on was her positive testimony given as a witness on the stand that Stovall was the perpetrator of the crime and she saw him?

**Judge MARSHALL.** That is right.

**Senator ERVIN.** Why in the world did you order a new trial?

**Judge MARSHALL.** Because we applied the law as we understood it to the facts and decided that.

**Senator ERVIN.** Do you not know as a matter of fact that from time immemorial, the accused or suspect has been taken before eyewitness or eyewitnesses have been permitted to look at the accused for the purposes of identification in the absence of counsel?

**Judge MARSHALL.** I think that is true.

**Senator ERVIN.** Was there any case in any jurisdiction that you know of that sustained your view that this evidence was unconstitutional?

Judge MARSHALL. I do not believe we found one.

Senator ERVIN. So that Judge Friendly and you, in effect, wrote into the sixth amendment something that nobody had even suspected was there before.

Judge MARSHALL. We did not write anything into the sixth amendment. We applied the law of the land, which was at that time that when a man reached the stage of arraignment, he was entitled to a lawyer. He had reached that stage, he did not have a lawyer. So any identification question or what have you after that should be withheld until he gets a lawyer. That was our position, as I remember it.

Senator ERVIN. Since the prosecution did not offer any evidence except courtroom identification, why did Judge Friendly and you not hold that her own attorney opened the door to this evidence which you all decided for the first time in history, so far as I know, was unconstitutional?

Judge MARSHALL. I repeat, Senator, the right of a lawyer at arraignment was not established in *Stovall*. It was established long before *Stovall*.

Senator ERVIN. I know, I am not talking about that. We are talking about the question of a witness looking at an accused in custody without the accused having a lawyer. Was not this the first case of this kind that you have any acquaintance with?

Judge MARSHALL. Yes, sir.

Senator ERVIN. And this provision of the Constitution has been there—let me see. Judge Friendly's opinion was, I believe, handed down in—

Judge MARSHALL. 1965; about May, was it not?

Senator ERVIN. The case was argued on January 1, 1965, and this provision had been in the Constitution since June 15, 1790, had it not?

Judge MARSHALL. Yes, sir.

Senator ERVIN. This was the first time that any judges had ever discovered that under this provision of the Constitution it was unconstitutional for the victim of a crime to look at an accused in the absence of his lawyer for the purpose of determining whether or not the accused was the perpetrator of the crime that the victim of the crime saw committed.

Judge MARSHALL. I repeat, Senator, we did not decide that. We decided that at arraignment, *Stovall* was entitled to a lawyer and he did not have a lawyer at that time.

Senator ERVIN. This was not at the arraignment. This event did not occur at the arraignment.

Judge MARSHALL. It occurred immediately after the arraignment, which makes it worse in my mind. If they had taken him to, if they had taken him before the arraignment it would have been a different question. I do not know—

Senator ERVIN. Do not the courts exist for the ascertainment of truth? Is that not what we lawyers claim it exists for?

Judge MARSHALL. I would hope so.

Senator ERVIN. Here is a woman immediately after a crime is committed, in a hospital room, which is the only place she could be. She looks at the accused and says, "He is the perpetrator of the crime I saw

committed." Is that not about the finest evidence of truth you can have outside of a voluntary confession?

Judge MARSHALL. In the courtroom?

Senator ERVIN. Yes.

Judge MARSHALL. I would say it is fine. I would say there is nothing wrong with it.

Senator ERVIN. And is it not well for victims of crime to have an opportunity to determine as soon as possible after a crime is committed whether a person charged with the commission of the crime is the person who committed it or not?

Judge MARSHALL. I would say that is true, but all arraignments, Senator, do not fall in that category, because there is a common discussion of arraignments where they put detectives in the lineup and they get picked out every once in a while.

Senator ERVIN. Under your view of this case, if you had a police lineup of 20 or more persons, who had been arrested, to have them viewed by eyewitnesses to the crimes, it would be unconstitutional for the witnesses to look at them unless lawyers were present to represent each one of the persons in the lineup, would it not?

Judge MARSHALL. No, sir, it is not true.

Senator ERVIN. Why is it not?

Judge MARSHALL. I have no quarrel with a lineup. I think a proper lineup is one of the surest ways of getting to the truth of a situation. I did not say you need a lawyer at a lineup. But I think it would be helpful if a lawyer was there for the sole purpose of being sure what kind of a lineup it is.

Senator ERVIN. If the *Escobedo* case is correct in holding that the right to counsel accrues when the officer having a suspect in custody begins to have a substantial suspicion that he committed the crime, would it not require that every one of the people in a lineup, held there as suspects have a lawyer present?

Judge MARSHALL. Well, one question I have, using the lineup, they do not have all criminals. They bring people in off the street.

Senator ERVIN. It is possible to have all criminals, is it not, or persons suspected of crimes?

Judge MARSHALL. Lineups are not used in that way.

Senator ERVIN. They are held in all kinds of ways.

Judge MARSHALL. That I agree with, Senator. But on the abstract question of whether you need a lawyer at a lineup, I do not believe that that has been decided by the courts, any court.

Senator ERVIN. I did not mean to belabor this thing, Mr. Chairman. I would like to put in evidence the proceeding, the original proceedings in the circuit court before Judge Friendly, Judge Moore, and Judge Marshall, beginning on page 24 and ending at page 35 of the transcript of the record of this case in the Supreme Court of the United States. I will furnish photostatic copies of that for the record.

Senator McCCELLAN. Without objection.

Hearing none, it will be received for the record.

(The document referred to follows:)

[fol. 32] In the United States Court of Appeals  
for the Second Circuit

No. 307—September Term, 1964

Argued January 21, 1965

Docket No. 29208

UNITED STATES EX REL. THEODORE R. STOVALL, APPELLANT

v.

HONORABLE WILFRIED DENNO, AS WARDEN OF SING SING PRISON, OSSINING,  
NEW YORK, APPELLEEBefore MOORE, FRIENDLY and MARSHALL, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, denying an application by a state prisoner for a writ of *habeas corpus*. Reversed.

LEON B. POLSKY (Anthony F. Marra, The Legal Aid Society, New York, N.Y.),  
*for Appellant.*

HENRY P. DEVINE, Assistant District Attorney (William Cahn, District Attorney, Nassau County), *for Appellee.*

[fol. 33]

OPINION—March 31, 1965

FRIENDLY, *Circuit Judge:* Theodore Stovall, under sentence of death for the brutal murder of Dr. Paul Behrendt in Nassau County, N.Y., appeals from Judge Wyatt's denial of an application in the District Court for the Southern District of New York, for a writ of *habeas corpus*. The Judge granted a certificate of probable cause, 28 U.S.C. § 2253, and leave to appeal *in forma pauperis*, 28 U.S.C. § 1915(a), and reasigned the Legal Aid Society to represent Stovall on appeal, 28 U.S.C. § 1915(d).

We wish to make clear at the outset that the ground which was principally argued to us and on which we are constrained to reverse, although raised in Stovall's handwritten petition in the district court, was not argued to and consequently was not discussed by Judge Wyatt, counsel having relied on a quite different point mentioned at the end of this opinion. We do not at all approve this method of presentation. But since the case is a capital one, and the relevant facts are sufficiently revealed in the state court record, we shall dispose of the appeal on the merits—as, indeed, the Assistant District Attorney has commendably requested.

Late on the night of August 23–24, 1961, Dr. Paul Behrendt was stabbed to death in the kitchen of his home in Garden City, Long Island. His wife, Dr. Frances Behrendt, vainly coming to his assistance, was grievously wounded. The police, who quickly arrived on the scene as the result of a telephone call for medical aid which Mrs. Behrendt had managed to make, found many pieces of telltale evidence. They discovered a key chain with three keys, one of which was to Stovall's locker in a Brooklyn store where he worked. They also found a bloody shirt with the identification tag of a laundry used by Stovall. Further investigation in the morning of August 24 led [fol. 34] the police to a bar which Stovall had visited the previous night. This, in turn, brought them to a man whom Stovall had called by telephone from the bar; he supplied Stovall's name and the address of Stovall's sister in Hempstead, Long Island. Proceeding to this address around 4 P.M., the police found Stovall and also Dr. Behrendt's blood-stained coat. They arrested him and seized the coat, a pair of trousers owned by Stovall which were stained with blood of Mrs. Behrendt's blood type,

and his pork-pie hat. The shirt left in the Behrendt kitchen was similarly stained, but a piece torn from it, found under Dr. Behrendt's armpit, was colored with blood of the Doctor's type. At the trial Stovall's sister and a man who was living with her testified to Stovall's appearance at her room in Hempstead around 12:30 A.M. on the morning of August 24, without the white shirt he had been wearing earlier that evening but with the white jacket and with bloody pants and a smear of blood on his forehead. Mrs. Behrendt identified Stovall at the trial.

With all this identification evidence—and there was a good deal more—it may be wondered what justification can exist for federal interposition. The answer lies in an episode we shall now recount.

On the evening of August 24, Stovall was questioned by the prosecutor at police headquarters; the statement was almost wholly exculpatory. The next morning he was arraigned, on a detective's charge of first degree murder, before a state district court judge. The judge informed Stovall, as required by § 188 of the New York Code of Criminal Procedure, "You have the right to the aid of a lawyer or counsel in every stage of the proceedings and before any further proceedings are had"; asked, "Do you want to get a lawyer?"; and said, "If you do, I'll give you time to get one before we proceed at this particular time." Stovall answered that he did, and on the judge's further [fol. 35] inquiry, "you're getting your own lawyer; is that right?", responded in the affirmative. The judge then announced that he would "put it over to August 31st, next Thursday, for the purpose of getting an attorney," and directed that Stovall be "remanded pending further pleading."

Section 192 of New York's Code of Criminal Procedure prescribes, so far as here pertinent, that "If an adjournment be had for any cause, the magistrate must commit the defendant for examination."<sup>1</sup> and § 193 adds that the commitment shall be to the sheriff, save in New York City where it is to be to the commissioner of correction. We were told at the argument that the sheriff of Nassau County does not have a representative available in the arraigning courts and that responsibility for placing committed defendants in his hands rests with the police. After the arraignment but apparently before Stovall was handed over to the sheriff, two detectives took him, handcuffed to one of them, to the hospital where Mrs. Behrendt had undergone extensive surgery, and into her room. Three high police officers and two prosecutors were also there. One of the police officers asked Mrs. Behrendt whether Stovall was "the man"; she said he was. At some time one of the officers asked Stovall "to say a few words for voice identification"; he did—just what does not appear.

In opening the case at trial the prosecutor said, outlining the People's evidence:

"There will be further evidence that Mrs. Behrendt observed this defendant while she was in the hospital and the defendant was taken to her. She identified him. I don't believe that she has ever seen him since, and whether she will be able to identify him here in [fol. 36] court I do not know at this time. But she will be called and, gentlemen, in short there will be other evidence that will be produced for your consideration."

Defense counsel made no objection or request for a mistrial. When the two detectives were called, before Mrs. Behrendt was asked to testify, defense counsel cross-examined them as to the hospital identification, bringing out, among other things, that the police chiefs and the prosecutors had been with Mrs. Behrendt before Stovall entered in handcuffs, that there was no line-up, and that Stovall was the only Negro in the room. In the course of her testimony Mrs. Behrendt identified Stovall in court and, without objection, stated she had also seen him in the hospital. N.Y. Code of Criminal Procedure § 393-b.

Stovall contends that use of the hospital identification constituted a denial of his right to counsel and a violation of the privilege against self-incrimination, guaranteed respectively by the Sixth and Fifth Amendments, now held to have been made applicable to the states by the Fourteenth, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964), and also that the procedure employed at the hospital so prejudiced the identification that its use violated the due process clause of the Fourteenth Amendment. We need deal only with the first contention.

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<sup>1</sup> Of course, this means *pending* examination of the charge by the magistrate—not examination of the defendant.

New York does not dispute that Stovall's constitutional right to counsel had come into being when he was brought before a judge for arraignment. *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963). The judge's belief that Stovall was obtaining counsel of his own choosing was understandable, even though, at the adjourned hearing, it turned out that Stovall was without means and wished counsel to be assigned. But a prospect of counsel is not the same as having one, and once the right was attached and has not [fol. 37] been waived, there are means—interrogation being the most obvious—from which, in the absence of waiver, the state no longer can gain incriminating evidence without notice to him, whatever the situation in the "investigatorial" stage. Consistent with this constitutional requirement, New York Code of Criminal Procedure directs that after informing the defendant of "his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had," § 188, the magistrate must "allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose," and, upon defendant's request, must send a peace officer to take a message to counsel, § 189. Here, without awaiting the presence of counsel, New York caused Stovall to be brought before Mrs. Behrendt for identification, and then used that testimony to his detriment at the trial.

The State's first answer is that testimony concerning the hospital identification was initially brought out by the defense in cross-examination, and that at no time did it object to disclosure of the incident to the jury. Normally there could be no valid claim of error if a defendant presented evidence which he could bar and the State followed with a then harmless repetition. However, the prosecutor had unequivocally announced at the start of the trial that Mrs. Behrendt would testify to her earlier identification; in this context, defense counsel's attempt to discredit such evidence in advance, while the detectives were available for cross-examination, rather than having to recall them, cannot fairly be deemed an independent attempt to introduce the identification as part of Stovall's case. The failure to object to the State's announced intention to offer the hospital identification is more troublesome. Although a mistrial could have been sought when the prosecutor first mentioned this in his opening, it would be going too far to insist on so instantaneous [fol. 38] a reaction, with the risk of dramatizing the incident to the jury if the request were denied. But there was time for defense counsel to seek an exclusionary ruling, outside the presence of the jury, before the detectives took the stand. While we see no real excuse for this omission, we doubt that the Supreme Court would permit so demanding a standard in a capital case.<sup>2</sup>

The State also argues that the lack of counsel worked no prejudice since the hospital "show up" did not amount to self-incrimination and therefore counsel could not have prevented it. Quite apart from whether the privilege against self-incrimination covers evidence obtained outside the courtroom and later sought to be introduced, see [fol. 39] 8 Wigmore, Evidence § 2252, at 328 & n. 27 (McNaughton rev. 1961), it is usually said that the privilege does not invest a defendant with immunity from exposing himself to identification, even if this includes some movement, such as going from the jail to the courtroom for trial or rising, if called upon, see *People v. Gardner*, 144 N.Y. 119, 127-30 (1894);

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<sup>2</sup> We have had some concern whether any New York court has ever had an opportunity to consider the objection as to Mrs. Behrendt's identification. Point IV of Stovall's brief in the New York Court of Appeals deals with the hospital identification; in the course of this, it was argued (p. 37) that "What transpired at the hospital was after the defendant had been arraigned, while the defendant was under arrest and while the defendant was without counsel," citing *People v. Meyer*, 11 N.Y. 2d 162, 227, N.Y.S. 2d 427 (1962), and *People v. Rodriguez*, 11 N.Y. 2d 279, 229 N.Y.S. 2d 353 (1962). The People's brief said in answer (p. 48) only that the testimony complained of was elicited at the trial in cross-examination of one of the detectives. After affirming the conviction on the first degree murder count, 13 N.Y. 2d 1094, 246 N.Y.S. 2d 410 (1963), the Court of Appeals amended its remittitur to state that there were presented, and it had necessarily passed upon, various questions under the Federal Constitution, including appellant's contention "that his rights under the Fifth Amendment of the Constitution of the United States were violated in that appellant was compelled to testify against himself after arraignment." 13 N.Y. 2d 1178, 248 N.Y.S. 2d 58, 57 (1964). In the light of Stovall's brief in the Court of Appeals and the cases there cited, this can be charitably read as including the Sixth Amendment contention as to the same episode. If, on the other hand, it be thought that Stovall never did raise the Sixth Amendment claim in the New York courts, and if we should assume that he would be required now to present this by an available state method, there appears to be no way in which he can raise it now, see *People v. Howard*, 12 N.Y. 2d 65, 286 N.Y.S. 2d 89 (1962), cert. denied, 374 U.S. 840 (1963), and *Fay v. Nōta*, 372 U.S. 391, 434-35, 488-40 (1963), would seem applicable.

<sup>8</sup> Wigmore, *supra*, § 2265; Maguire, Evidence of Guilt § 2.04 at 25-33 (1959); and it may well be argued that use of the vocal chords, when these are not employed to produce utterances of testimonial value, stands no differently than that of the arm muscles. See *Holt v. United States*, 2178 U.S. 245, 252 (1910); <sup>8</sup> Wigmore, *supra*, § 2265 at 396 & n. 9. The bulk of decisions on this subject deal with what testimony can be given when the defendant has taken the action directed or what comment can be made when he has refused to take it—not with what counsel can do to prevent the issue from arising or, if unsuccessful in that, to see to it that the episode takes place in the most benign form. Mr. Justice Holmes made this distinction in the *Holt* case, where the defendant, a soldier under arrest, had put on a blouse on the order of officers constituting a board of investigation, and testimony that it fitted was introduced at the trial: "Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent, *Adams v. New York*, 192 U.S. 585," 218 U.S. at 253.<sup>9</sup>

The question whether the lack of counsel was prejudicial to Stovall does not turn on whether forbidden self- [fol. 40] incrimination occurred. Assuming that the trip involved no such violation, there were still many things that counsel might have done. He might have persuaded the prosecutor, in the state's own interest, if not to forgo the hospital identification, at least to assure conditions better designed to avoid suggestion. He might have persuaded the judge to direct that Stovall be immediately sent to and then kept in jail pending trial, or be put before Mrs. Behrendt only under fair conditions such as a line-up, or be accompanied by counsel who might question her. See *Commonwealth v. Brines*, 29 Pa. Dist. 1091 (C. P. 1920). Or, as a last resort, he might have advised Stovall to refuse to go, or to remain silent if taken by force. Granting all this, it remains true that the chance that counsel's presence would have altered events is considerably less here than in the case of voluntary confessions, where a lawyer's advice can almost insure that none would be forthcoming. Nevertheless, Stovall's transportation to the hospital, his modicum of cooperation in the visit and the nature of the identification procedure, each would have offered counsel an opportunity to intervene; taking them all together, in the context of a capital case, we cannot say his probability of success was so slight that the lack of counsel was harmless.<sup>4</sup> Even if Mrs. Behrendt's condition had been such as to make it imperative that Stovall be taken to the hospital when and as he was, which the record does indicate, there was no similar compulsion on the [fol. 41] prosecutor to use the evidence against Stovall, and we think the Sixth Amendment precluded this.

Even with our incomplete statement of the massive evidence showing Stovall to have been the killer of Dr. Behrendt, it would be naive not to recognize that the episode of the hospital identification has been overblown to a significance out of all proportion to anything it could have had at the trial. Indeed, at the argument in this court, counsel for Stovall stated, with complete frankness, that at a new trial the defense primarily relied on would be insanity—an issue which was raised and necessarily found against him at the first trial and on which the hospital identification had no bearing. A blunder by the prosecutor in offering the evidence, which had no probable causal relation in the verdict, is thus to result in a new trial on the defense of insanity which Stovall has already had a fair opportunity to establish.<sup>5</sup> We do not find our role in bringing this about a particularly congenial one. But the only principle upon which the relative unimportance of the hospital identification could justify denial of the writ would be the doctrine of harmless error, applied in *United States v. Guerra*, 334 F. 2d 138, 144-47 (2 Cir.), cert. denied, 379 U. S. 936 (1964). Here, in contrast to that

<sup>8</sup> The *Holt* decision antedated the development, in *Weeks v. United States*, 232 U.S. 383 (1914), of the federal law as to use of illegally obtained evidence. See the comment on *Adams v. New York* in the *Weeks* opinion, 232 U.S. at 394-96.

<sup>9</sup> Our illustrations of what counsel might have done carry no implications whether denial of any such requests would have violated Stovall's federally protected rights. Prejudice exists if lack of counsel resulted in the loss of rights that the state might well have accorded. See *Tomkins v. Missouri*, 323 U.S. 485, 489 (1945). We must await further enlightenment whether, once the right to counsel has attached, all further investigational activity involving some cooperation by the defendant must be with counsel's consent or at least on notice to him.

<sup>5</sup> Stovall in fact made little effort to show insanity, the pertinent evidence coming chiefly from the State; but it remains true that a wholly unrelated error now gives Stovall a fresh chance to present a defense otherwise foreclosed.

case, where the unlawfully obtained statement was "an abortive attempt to impeach" the defendant "on a minor issue," the statement was inculpatory on the central question of his presence on the occasion of the crime; indeed, Mrs. Behrendt's was the only identification that was testimonial rather than circumstantial,<sup>6</sup> and the jury asked that all her testimony be reread. A claim of harmless error as to a conviction must surmount an exceedingly high hurdle, even on collateral attack, when the error was constitutional and the punishment is death. See *Bruno v. United States*, 308 U.S. 287 (1939); *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); *Stewart v. United States*, 366 U.S. 1, 9-10 (1961); *Hamilton v. Alabama*, *supra*, 368 U.S. 52. The hurdle is too high for this case.<sup>7</sup>

In view of this ruling, a brief word on the constitutional point argued to the district judge will suffice. Around 3 P.M. on the afternoon of August 24 police officers, without a search warrant, obtained access to Stovall's own rooms in Jamaica, Long Island, and seized a shirt, a pillow case, and a bed sheet, which had the same laundry marks as the shirt left in Dr. Behrendt's kitchen. Before and during the trial, defense counsel sought a hearing whether these objects, not offered by the People, had led to the seizure of articles of clothing attendant on Stovall's arrest. The trial judge denied such a hearing, erroneously, see *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963), on the basis that the principle of *Mapp v. Ohio*, 367 U.S. 643 (1961), did not extend to fruits of an unlawful search. Judge Wyatt nevertheless overruled the objection since, as he found, "There was a source of information," to wit, the man to whom Stovall had telephoned from the bar, "leading to the arrest of defendant, earlier and entirely independent of the Jamaica search." Not challenging this finding, counsel contends that Stovall was nevertheless prejudiced since a New York judge might have found differently or have been satisfied with a smaller infiltration of poisoned sap, and also because, for reasons not apparent to counsel or to us, Stovall's attorneys in the state trial reacted to the erroneous ruling by themselves displaying to the jury the results of the Jamaica search. We find it unnecessary to resolve these contentions, since we are confident that at a new trial a proper preliminary hearing will be had.

The denial of *habeas corpus* is reversed, with instructions that the writ issue unless, within a reasonable time, New York affords Stovall a new trial.

MOORE, *Circuit Judge* (dissenting): Dr. Frances Behrendt concededly (by the majority) previously wounded was in a hospital where she had undergone extensive surgery. Her husband, Dr. Paul Behrendt, had been killed. The defendant was arraigned on August 25, 1961 and, having requested an opportunity to get his own lawyer, the court without proceeding further postponed the case to August 31st. The only person in the world who could exonerate Stovall and save him from possible execution was Dr. Frances Behrendt. Her words, "He is not the man" could have meant life or death to Stovall. Stovall could wait for six days to retain a lawyer. Whether Dr. Frances Behrendt could wait even six hours was conjectural. No amount of subsequent skillful legal advice could replace the need for action while she yet lived—action which required Stovall's immediate presence in the hospital room.

Every defendant in a criminal case is subjected to identification. Even while he is presumed to be innocent, in the presence of the jury he is called the

<sup>6</sup> The case vividly illustrates how much more probative a multiple strand of circumstantial evidence may be than a testimonial identification. See 1 Wigmore, Evidence § 26 (3d ed. 1940).

<sup>7</sup> As a constitutional matter, there is no obvious reason why a new trial need be held on an issue "distinct and separable" from that vitiated by improper evidence or instructions, see *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 404, 500 (1931); and if New York law permitted a new trial on the issue of commission excluding insanity, which we seriously doubt, cf. Code of Criminal Procedure, §§ 464, 544, we see no reason why that would not meet federal requirements. Compare *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 245-46 (1957); *Jackson v. Denno*, 378 U.S. 303, 305-06 (1964). New York has recently provided that a conviction of first degree murder be followed by further evidence and deliberation by the jury to fix the penalty, and the New York statute provides that error in the latter phase has no effect upon the conviction. N.Y. Penal Law § 1045-a. California now requires that the insanity defense be considered by the jury in murder cases after it has in turn convicted and fixed sentence, but the statute does not speak to the question of partial new trials as between commission and insanity. Cal. Penal Code §§ 190.1, 1026.

defendant. If the crime was of a violent nature, one or more police officers are present. He rises for identification purposes or a witness places a hand on his shoulder to indicate the person concerning whom testimony is being given.

The majority characterize the prosecutor's action as a "blunder." I wonder what word they would have used, assuming that Dr. Behrendt had died later that day, had the police immediately lodged Stovall in jail and failed to take him to her room while there was still time. It is too easy after the event for appellate courts to conjure up all the might-have-been possibilities and the hypothetical steps and maneuvers an attorney might have taken.

I find no error in the identification procedure or the way it was used upon the trial and, hence, would affirm the denial of the writ.

**Senator ERVIN.** After you and Judge Friendly handed down this decision in which Judge Moore dissented the circuit court sat en banc on this case and reviewed your decision, did it not?

**Judge MARSHALL.** I was not on the court then. I was down here.

**Senator ERVIN.** You were down here?

**Judge MARSHALL.** Yes.

**Senator ERVIN.** Well, anyway, the circuit court en banc reviewed the decision which Judge Friendly had originally rendered and which you concurred in?

**Judge MARSHALL.** That is correct.

**Senator ERVIN.** I would like to put in evidence, which I will supply photostatic copies of, the report of the case and the opinions in the case as reported in 355 Federal Court, Second Series, beginning at page 731 and going through page 745.

**Senator McCLELLAN.** Without objection, it is so ordered.

(The document referred to follows:)

UNITED STATES EX REL. THEODORE R. STOVALL, APPELLANT

v.

HONORABLE WILFRED DENNO, AS WARDEN OF SING SING PRISON, OSSINING,  
NEW YORK, APPELLEE

No. 307, Docket 29208

United States Court of Appeals  
Second Circuit

Submitted en banc to this Court on May 26, 1965

Argued Jan. 21, 1965      Decided Jan. 31, 1966

**Habeas corpus.** From order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, J., denying application, state prisoner appealed. The Court of Appeals, Moore, Circuit Judge, held that defendant who had just been arraigned and had advised court that he wished to obtain his own counsel rather than accept court-appointed counsel was properly taken by police to hospital room of victim to ascertain whether or not she recognized him as her attacker.

Affirmed.

Friendly, Waterman and J. Joseph Smith, Circuit Judges, dissented.

1. Criminal Law ~~393~~393(1)

After accused had been arraigned and had advised court that he wished to obtain his own counsel rather than accept court-appointed counsel, police in taking him to hospital room of victim to ascertain whether she recognized him as her attacker did not violate constitutional right against self-incrimination. U.S.C.A. Const. Amend. 5.

**2. Arrest ~~Sec~~ 70**

After accused had been arraigned and court had adjourned any further proceedings for six days for purpose of permitting him to obtain his own counsel, accused remained in lawful custody of police.

**3. Criminal Law ~~Sec~~ 393(1)**

When defendant had been arraigned and court had adjourned for six days for purpose of permitting defendant to obtain his own counsel, it was incumbent upon police, in whose lawful custody accused was, to have victim of assault view him to identify or disavow him as the culprit.

**4. Criminal Law ~~Sec~~ 393(3), 636(1)**

Law requires defendant to be present upon his trial and to exhibit his face for identification purposes. U.S.C.A. Const. Amend. 5.

**5. Criminal Law ~~Sec~~ 741(2)**

Accuracy of identification of accused as attacker of victim made by victim while she was hospitalized was for jury. U.S.C.A. Const. Amend. 5.

**6. Criminal Law ~~Sec~~ 339**

Method of identification inside or outside courtroom would go to weight to be attributed to identification of accused not to admissibility or constitutionality of testimony relating thereto. U.S.C.A. Const. Amend. 5.

**7. Criminal Law ~~Sec~~ 393(3)**

It is legal to require accused to stand up in court for purposes of identification. U.S.C.A. Const. Amend. 5.

**8. Criminal Law ~~Sec~~ 393(1)**

Interests of accused and society alike demand that opportunity for identification of accused by victim be afforded at earliest possible moment and when that moment exists will of necessity be dependent upon facts and circumstances of each particular case. U.S.C.A. Const. Amend. 5.

**9. Criminal Law ~~Sec~~ 393(1)**

Arrested person may be exhibited for identification to person injured by commission of the crime. U.S.C.A. Const. Amend. 5.

**10. Criminal Law ~~Sec~~ 393(1)**

Prohibition of 5th amendment relating to self-incrimination is prohibition of use of physical or moral compulsion to extort communications from accused, not an exclusion of his body as evidence when it may be material. U.S.C.A. Const. Amend. 5.

**11. Habeas Corpus ~~Sec~~ 45.1(1)**

Federal court should be loath to interfere with state court evidentiary matters which go primarily to weight of evidence admitted.

**12. Constitutional Law ~~Sec~~ 257**

State identification procedure could be so unfair as to amount to a violation of 14th Amendment's due process guarantee. U.S.C.A. Const. Amend. 14.

**13. Constitutional Law ~~Sec~~ 266**

Where victim was confined to hospital, her attacker had remained in her full view in brightly lighted kitchen for considerable period after stabbing her and there was no limitation to cross-examination directed toward weight of her hospital identification testimony, accused was not denied due process on his trial or deprived of Fourteenth Amendment rights by admission of evidence that victim had identified defendant in hospital as her attacker. U.S.C.A. Const. Amend. 14.

**14. Criminal Law ~~Sec~~ 641(1)**

Where defendant was advised of right to counsel when brought before magistrate, upon stating that he desired to secure his own counsel he was given an opportunity by adjournment of proceedings for six days and on sixth day he informed magistrate that he had not communicated with any relatives to see if they would get a lawyer for him but he had been told in jail that one would be

assigned and magistrate assigned well-known criminal defense lawyer, defendant was not denied his constitutional rights to counsel. U.S.C.A. Const. Amend. 6, Code Cr. Proc. N.Y. § 188

15. Criminal Law ~~641(1)~~

Defendant was not deprived of right to counsel on basis that after expressing his desire to obtain his own counsel and adjournment of proceedings for that purpose he had been brought by police to hospital for identification by victim. U.S.C.A. Const. Amend. 6, Code Cr. Proc. N.Y. § 188.

16. Arrest ~~63(4)~~

Searches and Seizures ~~7(27)~~

Where articles claimed to have been illegally seized from accused were not offered in evidence against him by people, but were marked for identification by defense after district attorney had announced that he would not offer such items, such items did not lead to his arrest under poison fruit doctrine and articles were voluntarily turned over to police by sister of accused, no constitutional rights of accused were violated. U.S.C.A. Const. Amend. 14.

17. Criminal Law ~~1134(1)~~

Capital case requires most careful scrutiny.

Leon B. Polksky, New York City (Anthony F. Marra, The Legal Aid Society, New York City), for appellant.

Henry P. DeVine, Asst. Dist. Atty. (William Cahn, Dist. Atty., Nassau County, State of New York), for appellee.

Before LUMBARD, Chief Judge, and WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and ANDERSON, Circuit Judges.

MOORE, Circuit Judge (with whom Judges KAUFMAN, HAYS and ANDERSON concur; Judge LUMBARD concurs in a separate opinion with which Judge KAUFMAN also concurs; Judge FRIENDLY dissents in a separate opinion with which Judge WATERMAN concurs; and Judge J. JOSEPH SMITH dissents in a separate opinion):

Theodore Roosevelt Stovall appeals from an order dismissing a writ of habeas corpus. The appeal was argued originally before a panel of this Court (Moore, Friendly and Marshall, C.J.J.), and an opinion was filed on March 31, 1965, reversing the order of the District Court, Moore, C.J., dissenting. Thereafter, this Court *sua sponte* on May 26, 1965, ordered *en banc* consideration of this case and six other cases. Upon such consideration, the order appealed from is affirmed.

Late on the night of August 23-24, 1961, Dr. Paul Behrendt was stabbed to death in the kitchen of his home in Garden City, Long Island. His wife, Dr. Frances Behrendt, vainly coming to his assistance, was grievously wounded. The police, who quickly arrived on the scene as the result of a telephone call for medical aid which Mrs. Behrendt had managed to make, found many pieces of telltale evidence. They discovered a key chain with three keys, one of which was to Stovall's locker in a Brooklyn store where he worked. They also found a bloody shirt with the identification tag of a laundry used by Stovall. Further investigation in the morning of August 24th led the police to a bar which Stovall had visited the previous night. This, in turn, brought them to a man whom Stovall had called by telephone from the bar; he supplied Stovall's name and the address of Stovall's sister in Hempstead, Long Island. Proceeding to this address around 4:00 P.M., the police found Stovall and also Dr. Behrendt's blood-stained white coat. They arrested him and seized the coat, a pair of trousers owned by Stovall which were stained with blood of Mrs. Behrendt's blood type, and his pork-pie hat. The shirt left in the Behrendt kitchen was similarly stained, but a piece torn from it, found under Dr. Behrendt's armpit, was colored with blood of the Doctor's type. At the trial, Stovall's sister and a male friend of the sister testified that when Stovall came to her room in Hempstead at about 12:30 A.M., August 24th, he was not wearing the white shirt he had on earlier but instead appeared with the white jacket, bloody pants and a smear of blood on his forehead.

On the evening of August 24th, Stovall was questioned by the prosecutor at police headquarters; the statement was almost wholly exculpatory. The next morning he was arraigned, on a detective's charge of first degree murder, before a state district court judge. The judge informed Stovall, as required by § 188 of the New York Code of Criminal Procedure, "You have the right to the aid of a lawyer or counsel in every stage of the proceedings and before any further pro-

cedings are had"; he then asked, "Do you want to get a lawyer?"; and said, "If you do, I'll give you time to get one before we proceed at this particular time." Stovall answered that he did, and on the Judge's further inquiry, "you're getting your own lawyer; is that right?", responded in the affirmative. The Judge then announced that he would "put it over to August 31st, next Thursday, for the purpose of getting an attorney," and directed that Stovall be "remanded pending further pleading."

Since Stovall had to remain in police custody pending further proceedings on the adjourned date, he was taken for identification purposes to Mrs. Behrendt's hospital room where Mrs. Behrendt identified Stovall as her attacker. Thereafter he was lodged in jail. Stovall was convicted by the jury of murder in the first degree. The jury did not recommend leniency. Stovall was, therefore, sentenced to death.

The principal point now urged on appeal is the claim (not even presented to the court below) that the taking of Stovall to Mrs. Behrendt's hospital room for possible identification violated his Fifth, Sixth and Fourteenth Amendment rights. No claim is made—nor could any be sustained by the proof—that Stovall's arrest was without probable cause or that there was any delay in his arraignment which occurred the morning following his arrest.

Nor is any claim made that Stovall at any time made a confession or gave any statements which were obtained by coercion, trickery or subterfuge—in fact there were no statements or confessions whatsoever. Thus, the only issue upon this appeal is: can the police, following an arraignment at which the person arraigned advised the court that he was going to get his own lawyer, continue their identification efforts by taking such person to the hospital room of the victim to ascertain whether or not she recognized him as her attacker? Obviously the victim of the crime, if he or she had had an opportunity to see the attacker at the time of the attack, is the person most likely to be able to confirm or refute the identity of the person arrested. Freedom or further detention may well come from a "yes" or "no" to the simple question: is this the man who attacked you?

#### FIFTH AMENDMENT (SELF-INCRIMINATION)

Appellant challenges the admissibility in evidence of Mrs. Behrendt's hospital room identification. However, under section 393-b, New York Code of Criminal Procedure, "a witness who has on a previous occasion identified such person may testify to such previous identification."

[1-3] What was Stovall's status at the time he was taken to Mrs. Behrendt's hospital room? Because of appellant's present argument, the spotlight of inquiry must be focused sharply upon this single period of time. Stovall had just been arraigned and had advised the court that he wished to obtain his own counsel rather than accept court-appointed counsel. To give him adequate opportunity to do so, the court adjourned "any further proceedings" for six days for that purpose. No plea was entered, no motions had to be made or waived, no rights were jeopardized. In the meantime Stovall had to remain in the custody of the police. This was lawful custody. To fulfill properly, their duty to make sure that they had the right man, it was incumbent upon the police to have the victim of the assault view the suspected attacker to identify or disavow him as the culprit.

Had Mrs. Behrendt not been so seriously injured and hospitalized, Stovall would have been lodged in the local jail and Mrs. Behrendt could have viewed him in a line-up or looked at him through the door or gate of his cell. A photograph of Stovall might have been taken and exhibited to her. However, the police have to deal with situations as they find them and act expeditiously in the light of emergencies which confront them. Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, "He is not the man" could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room.<sup>1</sup> Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question.

<sup>1</sup> Undoubtedly, if the police had failed to take Stovall to the hospital and had lodged him immediately in jail and Mrs. Behrendt had died, soon appellate counsel would now be urging the same acts as a ground for reversal, asserting that he had thus been deprived of a constitutional right.

[4, 5] The hospital room identification<sup>2</sup> was not prejudicial to Stovall because Mrs. Behrendt, after she recovered, made positive identification in the courtroom. There is no evidence that her hospital room identification on August 25, 1961, affected or influenced in any way her courtroom identification on May 23, 1962. Any previous identification was but duplicative. She was the only living person who had seen her attacker. Stovall's counsel used his right of cross-examination to the fullest extent in questioning the identification and dwelt upon it in summation. Since the law requires the defendant to be present upon his trial and to exhibit his face for identification purposes, it was for the jury to weigh the accuracy of Mrs. Behrendt's identification.

[6] As a matter of law, the method of identification inside or outside the courtroom would go to the weight to be attributed to the identification; not to the admissibility or constitutionality of testimony relating thereto, *People v. Partram*, 60 Cal. 2d 378, 384 P. 2d 1001 (1963), cert. denied, 377 U.S. 945, 84 S. Ct. 1353, 12 L. Ed. 2d 308 (1964), (defendant forced to try on hat and coat which did not fit others in line-up); *People v. Clark*, 28 Ill. 2d 423, 192 N.E. 2d 851 (1963), (witness saw one of suspects in police station before line-up); *People v. Boney*, 28 Ill. 2d 505, 192 N.E. 2d 920 (1963), (wife raped; husband knew four of five men in line-up were from State's Attorney office); *State v. Hill*, 193 Kan. 512, 394 P. 2d 106 (1964); *Redmon v. Commonwealth*, 321 S.W. 2d 397 (Ky. 1959), (claim that police pointed out suspect before line-up); (*Commonwealth v. Downer*, 159 Pa. Super. 626, 49 A. 2d 516 (1946), (defendant alone shown to witness), although there are some decisions to the contrary, *People v. Conley*, 275 App. Div. 743, 87 N.Y. S. 2d 745 (1949), (defendant appeared alone and was forced to wear clothing corresponding to witness' earlier description); *Johnson v. State*, 44 Okl. Cr. 113, 279 P. 933 (1929) (only defendant produced).

Wigmore on Evidence, Vol. 8, 3d ed., § 2265, p. 374, has written:

"Looking back at the history of the privilege [against compelled self-incrimination] (ante, § 2250) and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence."

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"In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in constitutional definitions, but *testimonial compulsion*." (Italics in original.) Thus "an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, i.e., upon his testimonial responsibility."

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"What is obtained from the accused by such action is not testimony about his body, but his body itself (ante, § 1150). Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."

[7, 8] The law has made and continues to make a definite distinction between testimonial evidence and identification. And for good reason. Physical characteristics such as facial features, color of hair and skin, height, weight and even manner of walk may be observed by all who may be present at the scene of a crime. A person does not become a witness against himself merely by possessing these individual characteristics. When it was discovered that the fingerprints of persons differed one from the other, this form of identification was added to the list of reliable distinguishing features which the police and the prosecution may, without violating the privilege, compel a defendant to reveal. Thus for generations it has been legal to require the accused to stand up in court for purposes of identification, *State v. Carcerano*, 238 Or. 208, 390 P. 2d 923 (1964); *People v. Oliveria*, 127 Cal. 376, 59 P. 772 (1899). However, the opportunity for courtroom identification may well first be presented many months after the occurrence of the crime. Interests of the accused and society alike demand that this opportunity be afforded at the earliest possible moment. When this "moment" exists will of necessity be dependent upon the facts and circumstances of each

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<sup>2</sup> Voice identification was requested and Stovall complied but this form of identification was not used or referred to in the trial and, hence, is not an issue here.

particular case. No ironclad rules can be or should be laid down. But what better guides can there by than common sense?

Helpful guides to decision may be found in other cases, which involved federal prosecutions. Most recently (September 9, 1965) the Court of Appeals for the District of Columbia had to deal with an identification after arrest problem (*Kennedy v. United States*, D.C. Cir. 353 F. 2d 462). There police officers informed by radio of a crime arrived at the scene to find a man being forcibly restrained by two men who had heard womanly screams and had seen two men running from a house. The police took the man (Kennedy) into the house where they found two women handcuffed to a stair rail. The women identified Kennedy as one of their assailants. Upon the trial they identified the accused in open court and testified as to their prior identification even as did Mrs. Behrendt here. Upon appeal Kennedy's counsel urged that the complainants should not have been permitted to testify against him because the identification had derived (1) from an arrest without probable cause; (2) from an illegal detention; and (3) that his Sixth Amendment right to counsel had been infringed because he had been without counsel when identified at the scene of the robbery. The court found probable cause for the arrest and that "Appellant [Kennedy] made no confession and there is nothing to suggest a police purpose to elicit a confession." The court noted, after finding that there was probable cause for the arrest, that it is a policeman's "function to try to minimize the incidence of erroneous detentions and charges; taking Appellant into the presence of the complaining witnesses was entirely appropriate. Had the officers not done this Appellant would have been subjected to continued detention, a trip to the station, to booking and lineup processes, unnecessarily if the complainants had said he was not one of the attackers. The police should not have overlooked the possibility of his exoneration, which could be easily and swiftly resolved by 'quick verification' in a confrontation." 353 F. 2d 462.

In *Copeland v. United States*, 343 F. 2d 287 (D.C. Cir. 1965), the appellant after arrest was taken by the police to the Western Union office where the robbery had occurred to be identified by one of the victims. Then taken to the police station, he was identified there by a victim of a different and previous robbery. The conviction was affirmed.

In *Caldwell v. United States*, 338 F. 2d 385 (8 Cir. 1964), the accused had been put in a line-up and identified by eyewitnesses. The court held that there was no self-incrimination, saying at p. 389: "The mere viewing of a suspect under arrest by eyewitnesses does not violate his constitutional privilege because the prisoner is not required to be an unwilling witness against himself. There is a distinction between bodily view and requiring an accused to testify against himself." And in *People v. Gardner*, 144 N.Y. 119, 128, 38 N.E. 1003, 1005, 28 L.R.A. 699 (1894) the New York Court of Appeals said: "A murderer may be forcibly taken before his dying victim for identification, and the dying declarations of his victim may then be proved upon his trial for his identification."

[9] The principle that an arrested person "may be exhibited for identification to the person injured by the commission of the crime." *Downs v. Swann*, 111 Md. 53, 61, 73 A. 653, 655, 23 L.R.A. N.S., 739 (1909) is so consistent with fundamental fairness both to the accused and society that there is little point in further elaboration except to take notice that the law sanctions many methods of identification which do not invade the field of testimonial compulsion such as the use of fingerprints and photographs, including photographs of body scars. See *Bartletta v. McFeeley*, 107 N.J. Eq. 141, 152 A. 17 (1930); *People v. Smith*, 142 Cal. App. 2d 287, 298 P. 2d 540 (1956); *State v. Emerson*, 266 Minn. 217, 221, 123 N.W. 2d 382 (1963); *O'Brien v. State*, 125 Ind. 38, 25 N.E. 137, 9, I.R.A. (323 (1890).

[10] The accused may even be forced to perform some physical act such as putting on eyeglasses, *People v. Tomaszek*, 54 Ill. App. 2d 254, 204 N.E. 2d 30 (1964); submitting to a physical examination, *McFarland v. United States*, 80 U.S. App. D.C. 196, 150 F.2d 593 (1945); having a handkerchief put over his

<sup>8</sup> Kamisar, *Criminal Justice in Our Time, Magna Charta Essays* (University of Virginia Press 1965), pp. 9-10:

"Here misty ideals collide with the grim 'realities' of law enforcement. Here we are confronted, both with the Constitutional and normative levels, with the most important question, or cluster of questions, in the entire field of criminal procedure today.

"I am not talking about detention for such purposes as fingerprinting, placing in lineups, confronting victims or witnesses and checking out alibis. Assuming the suspect has been lawfully arrested, such station house screening is both necessary and desirable."

face to simulate his appearance at the time of the robbery, see *Ross v. State*, 204 Ind. 281, 182 N.E. 865 (1932) and *Key v. State*, 83 Okl. Cr. 92, 242 P. 582 (1925); or giving a blood sample. See also *Walton v. City of Roanoke*, 204 Va. 678, 133 S.E. 2d 315 (1963). In summary, as Mr. Justice Holmes said in *Holt v. United States*, 218 U.S. 245, 31 S. Ct. 2, 54, L. Ed. 1021 (1910), the prohibition of the Fifth Amendment "is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material" (at 252, 31 S. Ct. at 6).

#### FOURTEENTH AMENDMENT (DUE PROCESS)

[11, 12] Since courtroom identification, which usually takes place many months after the occurrence of the crime, is permissible, interests of the accused and society alike demand that the opportunity to identify be afforded at the earliest possible moment when the likelihood of an accurate identification is greatest. Of course, in the interests of truth and fairness to the suspect, this opportunity should be afforded, where possible, under circumstances most likely to lead to a disinterested decision by the identifier. When a proper moment exists will of necessity be dependent upon the facts and circumstances of each particular case. No ironclad rules can be or should be laid down. Although federal courts should be loath to interfere with state court evidentiary matters which go primarily to the weight of evidence admitted, it may be that an identification procedure could be so unfair as to amount to a violation of the Fourteenth Amendment's due process guarantee.

[13] Here, however, defendant was not deprived of due process. A line-up was out of the question; a show-up could be conducted only where Mrs. Behrendt was then confined—the hospital. She had had more than a fleeting glimpse of the attacker. Although stabbed many times, she was not unconscious and the attacker had remained in full view in the brightly lighted kitchen for a considerable period of time after killing Dr. Behrendt and stabbing her. Upon the trial, there was no limitation to the cross-examination directed towards the weight of her hospital identification testimony. There is no basis for holding that Stovall was not accorded due process on his trial by the State of New York or that he was deprived of Fourteenth Amendment rights.

#### SIXTH AMENDMENT (RIGHT TO COUNSEL)

[14] Appellant's counsel now argues that at the time of arraignment "his [appellant's] constitutional right to counsel had come into being and that failure of the arraigning Magistrate to adequately advise the defendant resulted in the denial of the right." The charge of failure of duty against a judge warrants factual investigation. When Stovall was brought before the Magistrate on August 25th, he was advised of his right to counsel and was asked whether he had counsel or desired to secure his own counsel. He replied that he did so desire. To give him this opportunity, the Magistrate adjourned further proceedings until August 31st. On that day [August 31st], Stovall informed the Magistrate, in response to the question as to whether Stovall had obtained counsel, that he had not communicated with any relatives to see if they would get a lawyer for him, but that he had been told in the jail that "they" said one would be assigned. The Magistrate then again told Stovall of his rights, "the first of which is the right to the aid of a lawyer." Turning to a well-known criminal defense lawyer, the Magistrate asked, "Counsel George Mulry, would you be willing to help this man protect his rights in this Court at this time?" Counsel agreed. The court told Stovall to confer with him and that "He is a lawyer who will volunteer his services to help you now protect your rights." A short recess was declared after which, through counsel, Stovall demanded a hearing which the court set for the following day "so you [Stovall] could be confronted with the witness and the Judge could decide whether or not a crime had been committed." However, on August 31st, Stovall was indicted for first degree murder by the grand jury and the case thereafter came under the jurisdiction of the County Court.

The New York Code of Criminal Procedure § 188 provides that the Magistrate inform the prisoner of "his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had." He must "allow the de-

fendant a reasonable time to send for counsel, and adjourn the examination for that purpose." Id. § 189. The Magistrate followed this statute punctiliously. In the light of this record, the charge of failure to advise is completely unsupported by, and quite contrary to, the facts.

[15] Appellant's reference (in his brief) to his situation as amounting to "the release of the accused to his accusers," is equally unwarranted. Stovall was not so released; he had been arrested by the police; was in their custody; and, because of his expression of desire to obtain his own counsel, would remain in their custody until further proceedings were held. While in such custody, the police could have brought in any potential witness for identification purposes, including the victim, except for the fact that she, seriously injured, could not be moved from the hospital room. The only variation because of the necessity of the situation was the hospital room identification instead of a police station identification.

The record completely refutes appellant's statement (in brief) that "from this denial of right [to counsel] (a premise which may be mildly described as inaccurate) the prosecutor was enabled to create evidence used to secure conviction at the subsequent trial" (italics in original). There was no denial of the right to counsel; the Magistrate in fact honored Stovall's request that he be permitted to obtain his own attorney. Nor did the continuation of police efforts to secure the best evidence of identification before Stovall had an opportunity to engage his own counsel result in any incriminating statements or confessions because he made none.

If Stovall had had counsel, what could counsel have done to thwart the identification? He could not have demanded Stovall's immediate release so that no one might see him. He could not have arranged to have Stovall continuously wear a hood or mask over his face to avoid identification, nor could he have ordered the police forthwith to halt their identification activities. Counsel would not have said "Cease further efforts at identification; Stovall has admitted his guilt" because Stovall had not done so.

Again adverting to the opinion in Kennedy, *supra*, counsel could not have prevented the hospital room identification because "An accused has no right to be viewed in a line-up rather than singly." Here, as in Kennedy, counsel could not "have altered the course of events" as to identification, and since no confession or "any other evidence respecting which counsel could have rightfully advised Appellant to refuse to yield" was obtained, there was no deprivation of Sixth Amendment rights.

Lastly, appellant contends that he was denied a constitutionally adequate hearing on his motion to suppress. In the New York Court of Appeals to which an appeal from Stovall's conviction had been taken, the remittitur was amended to show that that Court had passed upon the contention that he had been convicted on evidence obtained by unlawful search and seizure. The Court held that his constitutional rights had not been violated (*People v. Stovall*, 13 N.Y.2d 1178, 248 N.Y.S.2d 56, 197 N.E.2d 543).

[16] The District Court was well aware of the arguments appellant now makes but found that the articles claimed to have been illegally seized, namely, a white jacket, a pair of trousers and a hat, were not offered in evidence against Stovall by the People but were marked for identification by the defense. This action was entirely voluntary and must be attributed to defense strategy rather than a checkmate move because the District Attorney had announced at the opening of the trial that he would offer no items obtained from the allegedly illegal search. Nor could the "poison fruit" doctrine have led to the arrest because there was more than ample evidence to establish an earlier and independent source of information. Furthermore, since, as the Court found, "The proof is convincing that the articles were voluntarily turned over to the police by the sister of Stovall" and were not used by the People, the conclusion that "The record establishes that no constitutional rights of defendant were violated" is sound.

[17] Although a capital case requires the most careful scrutiny, these requirements have been met. The highest court of New York has reviewed his case (13 N.Y.2d 1094, 246 N.Y.S.2d 410, 196 N.E.2d 65); the District Court considered and weighed the errors complained of, as has this Court. Upon the law and the facts, no infringement of any constitutional right is presented.

**Affirmed.**

LUMBARD, Chief Judge (with whom Judge KAUFMAN concurs), concurring: I concur.

I agree with my brother Moore that the hospital room show-up did not violate any of Stovall's constitutional rights. The police found Mrs. Behrendt grievously wounded and in a state of severe shock at about 1:00 A.M. on August 24. At that time, in an incomplete and somewhat confused statement made to a police officer before she was given medical treatment, Mrs. Behrendt indicated that she had seen her attacker. The police were not allowed to interview Mrs. Behrendt on August 24, the day of her extensive surgery, or to present Stovall to her for identification purposes. They were therefore fully justified in continuing their investigation by bringing Stovall to the hospital at 1:00 P.M. on August 25, after Stovall's morning arraignment.

The type of emergency facing the police is relevant to the question of whether the show-up procedure was so unfair as to amount to a denial of due process. I agree with my brother Moore that the method of an identification normally goes to the weight of the evidence. Given the circumstances surrounding the identification, the full opportunity afforded defense counsel to cross-examine Mrs. Behrendt at trial, and the positive court room identification made by Mrs. Behrendt, I find no violation of Stovall's right to due process. Likewise, Stovall's Sixth Amendment right to counsel argument has no merit, particularly since counsel could have had little or no effect on what took place in the hospital room.<sup>1</sup> And I agree with the majority's disposition of the Fifth Amendment claim.

Unlike my brother Friendly, I see not need to inquire into whether the police violated New York law when they failed to deliver Stovall to a sheriff immediately after arraignment. Whether or not there may have been a technical violation of New York law is no grounds for reversal here. No objection was made to this procedure at trial. Therefore there was no need for the court to inquire into whether it was proper and appropriate for the police to retain custody of Stovall following his production before the district court Judge. Nor is there a federal constitutional right to be committed to a sheriff rather than to the police pending arraignment. Since there was no due process violation in the hospital room identification, the police procedure violated none of Stovall's federal rights.

I differ with my brother Moore's discussion of the prejudicial error issue, although I agree that the use made of hospital room identification at Stovall's trial did not amount to prejudicial error even if that identification procedure itself violated Stovall's rights.

The Supreme Court has prescribed a rigorous standard of prejudicial error when dealing with police activities that violate fundamental constitutional rights. See, e. g., Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171, (1963); United States v. Guerra, 334 F.2d 138, 143-147, (2 Cir.), cert. denied, 379 U.S. 936, 85 S.Ct. 337, 13 L.Ed.2d 346 (1964). Assuming for the moment that the hospital room identification violated Stovall's constitutional rights, testimony as to that identification at trial was reversible error if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Fahy v. State of Connecticut, 375 U.S. at 86-87, 84 S.Ct. at 230.

Mrs. Behrendt made a positive court room identification of Stovall, and she indicated that this identification was the product of her recollection of the night

<sup>1</sup>Indeed, I wonder whether the right to counsel doctrines of Escobedo v. Illinois, 378 U.S. 478, 83 S. Ct. 1758, 12 L. Ed. 2d 977 and Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 apply to circumstances which do not ultimately involve a danger of self-incrimination. A person lawfully arrested and detained has no right to have his lawyer present to supervise all his activities that come within the realm of prison or detention house administration. Likewise, I should think that the police can search the defendant and his effects in the absence of counsel. Only when police conduct threatens to violate a personal right of the defendant that retains vitality during detention—e.g., the privilege against self-incrimination—or when police practices unfairly prevent the defense attorney from preparing his case—a literal deprivation of the right to counsel—must a court interfere to guarantee that the right is properly preserved. Viewed in this light, common sense finds a clear distinction between the case supposed by Judge Friendly in his dissent, where counsel is excluded from a court room identification at trial, and the failure to appoint counsel to accompany an accused to a pre-trial identification. Cf. United States v. Cone, 354 F. 2d 119, n. 13 (2 Cir. 1965).

of the crime.<sup>2</sup> It seems highly probable that the use made of the hospital room procedure at trial did not influence this court room identification.<sup>3</sup> Under these circumstances, the impact of testimony as to the hospital room incident was cumulative.

Nevertheless there remains the possibility that Mrs. Behrendt's ability reliably to identify Stovall at trial was in fact psychologically colored by the impact of the previous confrontation in the hospital room. This "prejudice" does not depend upon whether there was testimony as to the hospital room identification. And the only way to eliminate this aspect of prejudice would have been to exclude the hospital room identification *and* to prohibit Mrs. Behrendt from making any identification at trial. I am unwilling to hold that so broad an exclusionary rule should flow from a constitutionally infirm pre-trial identification because the likelihood that an unbiased court room identification can still be made seems great and because eye witness evidence, despite its human frailties, plays a vital role in criminal prosecutions. I am particularly unwilling to exclude all identification in this case because Mrs. Behrendt's testimony seems reliable and because the alleged police improprieties were unintentional and technical. It was proper to admit this evidence and to allow the jury to weight its reliability.

If Mrs. Behrendt should be permitted to make a court room identification, then use of the hospital room identification becomes cumulative and harmless. More significantly, it is *fairer* to Stovall to *permit* testimony and full cross-examination concerning the hospital room procedure because only then can the jury know that the unequivocal court room identification may be the product of previous police persuasion rather than an accurate recollection of the night of the crime. At Stovall's trial, these considerations are evident; outside of the prosecutor's opening address, the first mention of the hospital incident came during the cross-examination of two policemen who accompanied Stovall to the hospital. And defense counsel concentrated heavily on this incident in his cross-examination of Mrs. Behrendt while the prosecutor only brought it out casually. Consequently, I conclude on the facts of this case that the use made of the hospital room identification not only was harmless error but indeed was the fairest method of handling Stovall's trial.

FRIENDLY, Circuit Judge, with whom WATERMAN, Circuit Judge, joins (dissenting) :

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<sup>2</sup> Relevant portions of Mrs. Behrendt's direct testimony are as follows:

"Q. What did you observe or what did you hear from that point on? A. I saw he was tall and strong and medium color, a medium brown, and I saw his face clearly because I jumped at him head on, and then a moment later when he stabbed me I fell down and I was already on the floor when my husband—when I saw my husband dead. \* \* \*

"Q. Now, this man that you speak of, that you saw, did you ever see him before that night? A. No.

"Q. Have you ever seen him since? A. Yes.

"Q. Are you able to point out who he is? A. Yes.

"Q. Will you do so? A. This Negro sitting there (Indicating).

"The Court: Indicating the defendant. "A. (Continuing) In the light coat.

"The Court: Indicating the defendant.

"The Witness: What?

"The Court: Indicating the defendant, you say?

"The Witness: Yes.

"Q. Did you ever see him anywhere before you saw him here in court today? A. Yes, in the hospital.

"Q. Do you know who he was accompanied by at that time? A. By several detectives, I think.

"Q. Do you know approximately when this was with relation to the time that you went into the hospital? A. I'm not quite sure. It was a few days after the operation when I was fully conscious. [It was in fact one day.]"

This was the only reference in Mrs. Behrendt's testimony to the hospital room identification until defense counsel's thorough cross-examination on that subject.

<sup>3</sup> Mrs. Behrendt testified that she had not seen Stovall since the hospital room identification. Likewise, the prosecutor in his opening statement mentioned the existence of the hospital room incident but he said that he could only speculate as to whether Mrs. Behrendt would be able to make a court room identification. Since Mrs. Behrendt was excluded from the court room (as a witness) when the incident was brought out during the cross-examination of two policemen, and since no mention was made of it during her direct testimony until after her court room identification, it seems doubtful that the use made of the hospital incident at trial colored her court room identification.

The facts giving rise to the issue here<sup>1</sup> were stated as follows in the panel opinion of March 31, 1965:

Section 102 of New York's Code of Criminal Procedure prescribes, so far as here pertinent, that 'If an adjournment be had for any cause, the magistrate must commit the defendant for examination,' and § 193 adds that the commitment shall be to the sheriff, save in New York City where it is to be to the commissioner of correction. We were told at the argument that the sheriff of Nassau County does not have a representative available in the arraigning courts and that responsibility for placing committed defendants in his hands rests with the police. After the arraignment but apparently before Stovall was handed over to the sheriff, two detectives took him, handcuffed to one of them, to the hospital where Mrs. Behrendt had undergone extensive surgery, and into her room. Three high police officers and two prosecutors were also there. One of the police officers asked Mrs. Behrendt whether Stovall was 'the man'; she said he was. At some time one of the officers asked Stovall 'to say a few words for voice identification'; he did—just what does not appear."

The panel recognized that "the privilege [of the Fifth Amendment against self-incrimination] does not invest a defendant with immunity from exposing himself to identification, even if this includes some movement, such as going from the jail to the courtroom for trial or rising, if called upon \* \* \* and it may well be argued that use of the vocal chords, when these are not employed to produce utterances of testimonial value, stands no differently from that of the arm muscles."<sup>2</sup> But this truism does not settle whether Stovall was deprived of his Sixth Amendment right to counsel; although the two rights often overlap, they are not congruent. No one would suppose, for example, that because the Fifth Amendment does not protect a defendant from being compelled to stand up in court and try on a garment found at the scene of the crime, the prosecutor could require defense counsel to absent himself during such an episode. It is beyond dispute that the preliminary hearing was part of a "criminal prosecution," that Stovall had become an "accused," and that he was thus entitled "to have the Assistance of Counsel for his defence." *Hamilton v. State of Alabama*, 368 U.S. 62, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961); *White v. Maryland*, 378 U.S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 108 (1963). This distinguishes *Kennedy v. United States*, 353 F. 2d 462 (D.C. Cir. 1965), and other cases of identification during the investigative stage, on which the majority rely. I fail to understand why, in the interval between preliminary hearing and trial, a defendant is not entitled to the assistance of counsel when the state wishes to make use of him to obtain evidence that will have independent testimonial value—particularly when *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1100, 12 L. Ed. 2d 246 (1964), has obliterated any distinction between judicial and extra-judicial action by the police once the "criminal prosecution" has begun.<sup>3</sup>

<sup>1</sup> The statement of the majority that this claim was "not even presented to the court below" is not wholly accurate. As the panel opinion explained, it was raised in Stovall's hand-written petition but was not considered by Judge Wyatt since in the district court counsel had relied entirely on the point dealt with in the final paragraphs of this court's opinion. The panel opinion also noted that the Assistant District Attorney commendably had not relied on the failure of Stovall's counsel to argue the point to Judge Wyatt and sought disposition by us on the merits.

<sup>2</sup> The reference to moving the arm muscles was followed by citation of Mr. Justice Holmes' well-known opinion in *Holt v. United States*, 218 U.S. 245, 252, 81 S.Ct. 2, 54 L.Ed. 1021 (1910).

<sup>3</sup> I see no basis for Chief Judge Lumbard's "wonder whether the right to counsel doctrines of *Escobedo v. Illinois* and *Massiah v. United States* apply to circumstances which do not ultimately involve a danger of self-incrimination." Once it has been held, as these cases clearly did, that the Sixth Amendment may apply outside the courtroom and when, as in *Massiah*, the accused did not even know of the presence of the police or the prosecutor, I see no escape from the conclusion that, if the right has attached, the accused is entitled to the assistance of counsel when the prosecutor attempts to use him as a means of procuring evidence to be offered at the trial. I cannot believe my brothers would go to the extent of saying that, after arraignment or indictment, counsel could be excluded while the defendant was being subjected to medical examination or blood or handwriting tests. If counsel cannot be excluded from such procedures, common sense does not supply me with a satisfactory answer why he can be barred from an identification which his client is compelled to attend—although no one would dream of excluding him from a less meaningful one in the courtroom; the argument that, although excluded from the former, he will have an opportunity to attack both identifications at trial, does not seem sufficient for preventing him from rendering all possible assistance to the accused before the witness' impression hardens. I fear that my brothers simply have not been able to adjust their sights to the Supreme Court's new concept that the right to the assistance of counsel embraces activities outside the courtroom.

The majority say that after Stovall's appearance before the state judge he "had to remain in [police] custody" and that his custody was lawful. I see no basis for these statements. New York properly recognizes that, after the preliminary hearing, the prisoner comes under a new legal regime and his lawful custodian is the sheriff, not the police; the only thing the police could properly do with Stovall at that time, see § 193 of the New York Code of Criminal Procedure, was to place him in the hands of the custodial authorities just as soon as possible. Those authorities would have been bound not only to prevent Stovall from removing himself but also to prevent his being removed or molested by anyone else. The assumption, implicit in the court's opinion, that such a prisoner is subject to the beck and call of the police is surely wrong, see Judge Finletter's fine opinion in *Commonwealth v. Brihes*, 29 Pa.Dist. 1091 (C.P.1920). Once Stovall was in the sheriff's custody, the latter could not lawfully release him to the police without an order of the court; if the prosecution had sought such an order, counsel could have been appointed and the difficulty that has here arisen would have been avoided.<sup>4</sup>

Other arguments advanced by the majority are equally unconvincing. They say the police could have taken Stovall to the hospital for identification before arraignment despite the absence of counsel, so why not thereafter? But many things can be done in the absence of counsel in the investigative stage before the "criminal prosecution" begins which cannot lawfully be done later, as *Massiah v. United States*, *supra*, plainly shows. The rhetorical question as to what counsel could have done was answered in the panel opinion many months ago:

"He might have persuaded the prosecutor, in the state's own interest, if not to forego the hospital identification, at least to assure conditions better designed to avoid suggestion. He might have persuaded the judge to direct that Stovall be immediately sent to and then kept in jail pending trial, or be put before Mrs. Behrendt only under fair conditions such as a line-up, or be accompanied by counsel who might question her \* \* \*. Or, as a last resort, he might have advised Stovall to refuse to go, or to remain silent if taken by force."

The case thus bears no resemblance to the recent decision in *Rigney v. Hendricks*, 365 F.2d 710 (3 Cir. 1965), with which I am in accord, where counsel were notified of the intention to place an accused prisoner in a line-up held under scrupulously fair conditions and with counsel present. We have been told in no uncertain terms that, in dealing with a capital charge, as Stovall's was at the time, we are not to speculate on whether prejudice resulted from the absence of counsel, *Hamilton v. State of Alabama*, *supra*, 368 U.S. at 55, 82 S.Ct. 157, at 159; here, as there, "the degree of prejudice can never be known."

My brothers also intimate that the police and the prosecutor were confronted with an emergency and that they may have thought the visit to the hospital to be in Stovall's own interest. The latter argument ignores the huge amount of circumstantial identification the excellent police investigation had produced; moreover, if the state officials were motivated by such solicitude, the natural course would have been to ask Stovall whether he wanted to go. The emergency argument fails both on the facts and on the law. Grievous as Mrs. Behrendt's injuries had been, nothing in the record indicates that her life was any longer considered to be in peril when Stovall was brought before her; the presence of five police officers and prosecutors in her hospital room would argue to the contrary—and also tends to negate the suggestion that Stovall had to be brought in alone. If Mrs. Behrendt's condition had been as serious as my brothers suppose, nothing prevented the prosecutor from informing the state district judge at the preliminary hearing that Stovall had to be taken immediately before her, and suggesting that counsel be assigned forthwith for the limited purpose of advising him in that regard—rather than standing silent when Stovall told the judge of his desire when Stovall told the judge of his desire to have counsel and then carting him off to a confrontation by the victim which counsel might have done something to mitigate.

My brothers also assert that in any event admission of the hospital identification was cumulative and therefore not prejudicial to Stovall, although they do not altogether agree on the grounds. Addressing itself to this point the panel said:

<sup>4</sup> It is unnecessary to decide in this case the manner and extent to which Stovall could have been exposed to viewing in the course of normal jail routine. Cf. *Morris v. Crumlish*, 289 F.Supp. 498, 499 (E.D.Pa.1965).

"The statement was inculpatory on the central question of his presence on the occasion of the crime; indeed, Mrs. Behrendt's was the only identification that was testimonial rather than circumstantial, and the jury asked that all her testimony be reread. A claim of harmless error as to a conviction must surmount an exceedingly high hurdle, even on collateral attack, when the error was constitutional and the punishment is death. See *Bruno v. United States*, 308 U.S. 287 [60 S.Ct. 198, 84 L.Ed. 257] (1939); *Kotteakos v. United States*, 328 U.S. 750, 764-65 [66 S.Ct. 1239, 90 L.Ed. 1557] (1946); *Stewart v. United States*, 306 U.S. 1, 9-10 [81 S.Ct. 941, 6 L.Ed.2d 84] (1961); *Hamilton v. State of Alabama*, *supra*, 308 U.S. 52 [82 S.Ct. 157]. The hurdle is too high for this case."

Despite the labored attempt to prove the contrary, the hospital identification, featured in the prosecutor's opening, must have had a far greater effect on the jury than the identification in court some months later; common sense supports Dean Wigmore's observation, "After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity." 4 Evidence § 1130 at 208 (3d ed. 1940). The self-created dilemma of the concurring opinion, that exclusion of the hospital identification would prevent identification at the trial, is illusory; exclusion of the former would simply have required the prosecutor to rest on Mrs. Behrendt's memory of the night of the dreadful crime and on her courtroom identification. If, in this posture, defense counsel had brought out the hospital identification, as no experienced counsel would, he would have had only himself to blame.

Although there can assuredly be a waiver of the right to counsel between arraignment and trial, no one had seriously suggested that we could find that, when, without any previous discussion, this Negro, of low mental capacity, was taken to the hospital by a detective to whom he was handcuffed. I scarcely regard Stovall as a sympathetic character, and I am glad that the crime was recent enough to permit an effective retrial. But I continue to believe that, in the absence of overriding necessity or consent, a man who has been brought before a judge on a charge of a capital crime, and has expressed his desire for counsel, is entitled under the Constitution to be let alone until he gets one. That is all Judge Marshall and I decided last March, and I adhere to it.

J. JOSEPH SMITH, Circuit Judge (dissenting):

I dissent. I agree with Judge Friendly that "in the absence of overriding necessity or consent, a man who has been brought before a judge on a charge of a capital crime, and has expressed his desire for counsel, is entitled under the Constitution to be let alone until he gets one."

Senator ERVIN. Did not the circuit court, sitting en banc, reverse the ruling of Judge Friendly in which you had concurred and hold that the evidence she gave at the trial, was perfectly competent?

Judge MARSHALL. With a dissenting opinion.

Senator ERVIN. It sustained the dissenting opinion of Judge Moore, did it not?

Judge MARSHALL. That is right, but this—

Senator ERVIN. And they said that the question of whether or not this evidence of Mrs. Behrendt identifying the defendant at the trial, whether it was true or false, was a question for the jury and not for the court?

Judge MARSHALL. I think that is correct. I do not remember.

Senator ERVIN. And it also said that from time immemorial evidence of identification of the accused had been admissible in evidence, did it not?

Judge MARSHALL. I think that is true.

Senator ERVIN. Now, this case went on up to the Supreme Court, did it not?

Judge MARSHALL. Yes, sir.

Senator ERVIN. And on June 12, 1967, the opinion in it was handed down.

Judge MARSHALL. I think so.

Senator ERVIN. And at the same time the Supreme Court handed down two other decisions, did it not?

Judge MARSHALL. Yes, sir.

Senator ERVIN. *Gilbert* and *Wade*?

Judge MARSHALL. Yes, sir.

Senator ERVIN. In the *Gilbert* and *Wade* cases, the majority of the Supreme Court held that where an eyewitness was permitted to look at an accused in the absence of the accused's counsel, the eyewitness could not testify in the courtroom to the identification of the accused unless the trial judge first conducted a preliminary inquiry and ascertained by clear and convincing evidence that the look which the eyewitness took at the accused in the absence of accused's counsel did not ever in any degree enter into the testimony of the witness given at the trial, that the witness positively identified the accused as a perpetrator of the crime.

Judge MARSHALL. I think that is correct.

Senator ERVIN. Do you not think that that ruling is in violation of the fundamental principle that the credibility of witnesses is for juries and not for judges?

Judge MARSHALL. Not necessarily, sir. The usual result, when you are about to testify to a confession, the court holds an in camera hearing before you testify before the jury.

Senator ERVIN. That is for the purpose of determining whether it is voluntary or involuntary.

Judge MARSHALL. That is right.

Whether it is admissible or not they hold it in camera.

Senator ERVIN. Do you not know the majority opinion in the circuit court in the *Stovall* case, where it said that the best rule to follow in this is commonsense?

Judge MARSHALL. That is what they said.

Senator ERVIN. When a witness sits on the witness stand and testifies positively that this witness was present when the accused was alleged to have committed the crime and saw the accused commit it, do you not think commonsense would say whether that witness is telling the truth is a question for the jury?

Judge MARSHALL. I do not know whether it is commonsense, but the Supreme Court has said that is what the Constitution requires.

Senator ERVIN. Yes; but it never said that until the 12th day of June 1967, did it?

Judge MARSHALL. I think you are substantially correct.

Senator ERVIN. And that provision of the Constitution, as I said before, has been in the Constitution since June 15, 1790. Do you not think it is rather queer that nobody else had ever found it there?

Judge MARSHALL. I cannot comment one way or the other.

Senator TYDINGS. Is the Senator assuming that the witness has not been coached?

Senator ERVIN. I have not said anything about the witness being coached.

Senator TYDINGS. There is a big difference between whether a witness has been coached for hours, as to whether the accused was going to be—

Senator ERVIN. There is no evidence that Mrs. Behrendt had been coached for hours.

Senator TYDINGS. The jury should know that.

Senator ERVIN. That is right, and they should bring that out.

Senator TYDINGS. And there should be a protection against coaching, so there should be a true identification.

Senator ERVIN. The reason the majority of Supreme Court assigned for making this newly invented rule on the 12th day of last month was because officers might suggest the identification. If that is so, then the Constitution requires that counsel for the accused be present when the prosecuting attorney talks to the prosecution's witnesses, because the prosecution attorney might suggest something.

Whether there was any suggestion or not would be a question for cross-examination?

Judge MARSHALL. I do not think so. I agree with the fact that the Supreme Court considered the point and came out with that as the answer.

Senator ERVIN. Do you think that the judge should have to, as Judge Black says, assume the role of psychologist and invade the innermost recesses of the witness' mind for the purpose of determining whether or not the witness' identification is influenced in part by the view which the witness took of the accused in the absence of the accused's lawyer?

Judge MARSHALL. No, sir; I do not agree.

Senator ERVIN. That is the result of the decision that we have been discussing.

Mr. Chairman, I would like to have printed in the body of the record these newly invented rules, these rules that were invented by the majority of the Supreme Court of the United States for the first time on June 12, 1967, in the *Wade*, the *Gilbert*, and the *Stovall* cases. I will furnish photostatic copies of them.

Senator McCLELLAN. Without objection they will be printed in the record.

(The documents referred to follow:)

Supreme Court of the United States

No. 384.—October Term, 1968

UNITED STATES, PETITIONER

v.

BILLY JOE WADE

On writ of certiorari to the United States Court of Appeals for the Fifth Circuit

[June 12, 1967]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question here is whether courtroom identification of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel.

The federally insured bank in Eustace, Texas, was robbed on September 21, 1964. A man with a small strip of tape on each side of his face entered the bank, pointed a pistol at the female cashier and the vice president, the only persons in the bank at the time, and forced them to fill a pillowcase with the bank's money. The man then drove away with an accomplice waiting in a stolen car

outside the bank. On March 23, 1965, an indictment was returned against respondent Wade and two others for conspiring to rob the bank, and against Wade and the accomplice for the robbery itself. Wade was arrested on April 2, and counsel was appointed to represent him on April 26. Fifteen days later an FBI agent, without notice to Wade's lawyer, arranged to have the two bank employees observe a lineup made up of Wade and five or six other prisoners and conducted in a courtroom of the local county courthouse. Each person in the line wore strips of tape such as allegedly worn by the robber and upon direction each said something like "put the money in the bag." the words allegedly uttered by the robber. Both bank employees identified Wade in the lineup as the bank robber.

At trial, the two employees, when asked on direct examination if the robber was in the courtroom, pointed to Wade. The prior lineup identification was then elicited from both employees on cross-examination. At the close of testimony, Wade's counsel moved for a judgment of acquittal or, alternatively, to strike the bank officials' courtroom identifications on the ground that conduct of the lineup, without notice to and in the absence of his appointed counsel, violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to the assistance of counsel. The motion was denied, and Wade was convicted. The Court of Appeals for the Fifth Circuit reversed the conviction and ordered a new trial at which the in-court identification evidence was to be excluded, holding that, though the lineup did not violate Wade's Fifth Amendment rights, "the lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights \* \* \*." 358 F. 2d 557, 560. We granted certiorari, 385 U.S. 811, and set the case for oral argument with No. 223, *Gilbert v. California*, post, and No. 254, *Stovall v. Denno*, post, which present similar questions. We reverse the judgment of the Court of Appeals and remand to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

## I

Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination. We have only recently reaffirmed that the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature \* \* \*." *Schmerber v. California*, 384 U.S. 757, 761. We there held that compelling a suspect to submit to a withdrawal of a sample of his blood for analysis for alcohol content and the admission in evidence of the analysis report was not compulsion to those ends. That holding was supported by the opinion in *Holt v. United States*, 218 U.S. 245, in which case a question arose as to whether a blouse belonged to the defendant. A witness testified at trial that the defendant put on the blouse and it had fit him. The defendant argued that the admission of the testimony was error because compelling him to put on the blouse was a violation of his privilege. The Court rejected the claim as "an extravagant extension of the Fifth Amendment," Mr. Justice Holmes saying for the Court:

"[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." 218 U.S., at 252-253.

The Court in *Holt*, however, put aside any constitutional questions which might be involved in compelling an accused, as here, to exhibit himself before victims of or witnesses to an alleged crime; the Court stated, "[w]e need not now consider how far a court would go in compelling a man to exhibit himself." *Id.*, at 253.<sup>1</sup>

We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion

<sup>1</sup> *Holt* was decided before *Weeks v. United States*, 232 U.S. 388, fashioned the rule excluding illegally obtained evidence in a federal prosecution. The Court therefore followed *Adams v. New York*, 192 U.S. 685, in holding that, in any event, "[w]hen he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent." 218 U.S., at 253.

of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, it is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a "testimonial" nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt. We held in *Schmerber, supra*, at 761, that the distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's "communications" in whatever form, vocal or physical, and "compulsion which makes a suspect or accused the source of 'real or physical evidence,'" *Schmerber, supra*, at 704. We recognized that "both federal and state courts have usually held that \* \* \* [the privilege] offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.*, at 764. None of these activities becomes testimonial within the scope of the privilege because required of the accused in a pretrial lineup.

Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege. The Government offered no such evidence as part of its case, and what came out about the lineup proceedings on Wade's cross-examination of the bank employees involved no violation of Wade's privilege.

## II

The fact that the lineup involved no violation of Wade's privilege against self-incrimination does not, however, dispose of his contention that the court room identifications should have been excluded because the lineup was conducted without notice to and in the absence of his counsel. Our rejection of the right to counsel claim in *Schmerber* rested on our conclusion in that case that "no issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented." 384 U.S., at 766. In contrast, in this case it is urged that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.

The Framer of the Bill of Rights envisaged a broader role for counsel than under the practice then, prevailing in England of merely advising his client in "matters of law," and eschewing any responsibility for "matters of fact."<sup>2</sup> The constitutions in at least 11 of the 13 States expressly or impliedly abolished this distinction. *Powell v. Alabama*, 287 U.S. 45, 60-60; Note 73 Yale L.J. 1000, 1030-1033 (1964). "Though the colonial provisions about counsel were in accord on few things, they agreed on the necessity of abolishing the facts-law distinction; the colonists appreciated that if a defendant were forced to stand alone against the State, his case was foredoomed." 73 Yale L.J., *supra*, at 1033-1034. This background is reflected in the scope given by our decisions to the Sixth Amendment's guarantee to an accused of the assistance of counsel for his defense. When the Bill of Rights was adopted, there were no organized police forces as we know them today.<sup>3</sup> The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads: "In all criminal prosecutions, the accused shall enjoy the right \* \* \* to have the Assistance of Counsel for his defence." The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defence."

As early as *Powell v. Alabama, supra*, we recognized that the period from arraignment to trial was "perhaps the most critical period of the proceed-

<sup>2</sup> See *Powell v. Alabama*, 287 U.S. 45, 60-65; Beaney, Right to Counsel 8-26.

<sup>3</sup> See Note, 73 Yale L.J. 1000, 1040-1042 (1964); Note, 58 Calif. L. Rev. 337, 347-348 (1966).

ings \* \* \*, " *id.*, at 57, during which the accused "requires the guiding hand of counsel \* \* \*, " *id.*, at 69, if the guarantee is not to prove an empty right. That principle has since been applied to require the assistance of counsel at the type of arraignment, for example, that provided by Alabama, where certain rights might be sacrificed or lost: "What happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted, \* \* \*" *Hamilton v. Alabama*, 368 U.S. 52, 54. See *White v. Maryland*, 373 U.S. 59. The principle was also applied in *Massiah v. United States*, 377 U.S. 201, where we held that incriminating statements of the defendant should have been excluded from evidence when it appeared that they were overheard by federal agents who, without notice to the defendant's lawyer, arranged a meeting between the defendant and an accomplice turned informant. We said, quoting the concurring opinion in *Spano v. New York*, 360 U.S. 315, 326, that "anything less \* \* \* might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help them.'" 377 U.S., at 204.

In *Escobedo v. Illinois*, 378 U.S. 478, we drew upon the rationale of *Hamilton* and *Massiah* in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer. We again noted the necessity of counsel's presence if the accused were to have a fair opportunity to present a defense at the trial itself:

"The rule sought by the state here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination' \* \* \*. 'One can imagine a cynical prosecutor saying: Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing counsel can do for them at the trial.' " 378 U.S., at 487-488.

Finally in *Miranda v. Arizona*, 384 U.S. 436, the rules established for custodial interrogation included the right to the presence of counsel. The result was rested on our finding that this and the other rules were necessary to safeguard the privilege against self-incrimination from being jeopardized by such interrogation.

Of course, nothing decided or said in the opinions in the cited cases links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions "no more than reflect a constitutional principle established as long ago as *Powell v. Alabama* \* \* \*." *Massiah v. United States*, *supra*, at 205. It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial.<sup>4</sup> The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution. Cf. *Pointer v. Texas*, 380 U.S. 400.

In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

### III

The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution's evidence, not different—for Sixth Amendment

<sup>4</sup> See, e.g., *Powell v. Alabama*, 287 U.S. 45; *Hamilton v. Alabama*, 368 U.S. 52; *White v. Maryland*, 373 U.S. 59; *Escobedo v. Illinois*, 378 U.S. 478; *Massiah v. United States*, 377 U.S. 201.

<sup>5</sup> See cases cited note 4, *supra*; *Avery v. Alabama*, 308 U.S. 444, 446.

purposes—from various other preparatory steps, such as systematized or scientific analyses of the accused's fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate his right to a fair trial.

## IV

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.<sup>6</sup> Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure." The Case of Sacco and Vanzetti 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined." Wall, *Eyewitness Identification in Criminal Cases* 26. Suggestion can be created intentionally or unintentionally in many subtle ways.<sup>7</sup> And the dangers for the suspect are particularly grave when the witness' opportunity for observation was unsubstantial, and thus his susceptibility to suggestion the greatest.

Moreover, "it is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial."<sup>8</sup>

The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an "identification parade" or "showup," as in the present case, or presentation of the suspect alone to the witness, as in *Stovall v. Denno*, *post*. It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification.<sup>9</sup> But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. "Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on \* \* \*. *Miranda v. Arizona*, *supra*, at 448. For the same reasons, the defense can seldom reconstruct the manner and mode of

<sup>6</sup> Borchard, *Convicting the Innocent*; Frank & Frank, *Not Guilty*; Wall, *Eyewitness Identification in Criminal Cases*; 8 Wigmore, *Evidence* § 786(a) (8d ed. 1940); Ralph, *Personal Identity*; Gross, *Criminal Investigation* 47-54 (Jackson ed. 1962); Williams, *Proof of Guilt* 83-88 (1952); Willis, *Circumstantial Evidence* 192-205 (7th ed. 1987); Wigmore, *The Science of Judicial Proof* §§ 250-258.

<sup>7</sup> See Wall, *supra*, note 6, 26-35; Murray, *The Criminal Lineup at home and Abroad*, 1968 Utah L. Rev. 610; Napley, *Problems of Effecting the Presentation of the Case for a Defendant*, 66 Col. L. Rev. 94, 98-99 (1966); Williams, *Identification Parades*, [1955] Crim. L. Rev. (Eng.) 525; Paul, *Identification of Accused Persons*, 12 Aust. L. J. 42 (1938); Houts, *From Evidence to Proof* 25; Williams & Hammelmann, *Identification Parades, Parts I & II*, [1968] Crim. L. Rev. 479-490, 545-555; Gorpke, *Showing Prisoners to Witnesses for Identification*, 1 Am. J. Police Sci. 79 (1930); Wigmore, *The Science of Judicial Proof*, *supra*, n. 6, at § 258; Devlin, *The Criminal Prosecution in England* 70; Williams, *Proof of Guilt*, 95-97.

<sup>8</sup> Williams & Hammelmann, *Identification Parades, Part I*, [1968] Crim. L. Rev. 470, 482.

<sup>9</sup> Williams & Hammelmann, *Identification Parades, Part I*, *supra*, n. 8.

lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers;<sup>10</sup> in any event, the participants' names are rarely recorded or divulged at trial.<sup>11</sup> The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives.<sup>12</sup> In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences.<sup>13</sup> Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers.<sup>14</sup> Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover, any protestations by the suspect of the unfairness of the lineup made at trial are likely to be in vain;<sup>15</sup> the jury's choice is between the accused's unsupported version and that of the police officers present.<sup>16</sup> In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

What facts have been disclosed in specific cases about the conduct of pretrial confrontations for identification illustrate both the potential for substantial prejudice to the accused at that stage and the need for its revelation at trial. A commentator provides some striking examples:

"In a Canadian case \* \* \* the defendant had been picked out of a line-up of six men, of which he was the only Oriental. In other cases, a blackhaired suspect was placed upon a group of light-haired persons, tall suspects have been made to stand with short non-suspects, and, in a case where the perpetrator of the crime was known to be a youth, a suspect under twenty was placed in a lineup with five other persons, all of whom were forty or over."<sup>17</sup>

<sup>10</sup> See *Wall*, *supra*, n. 6, 57-50; see, e.g., *People v. Doney*, 28 Ill. 2d 505, 102 N.E. 2d 920 (1963); *People v. James*, 218 Cal. App. 2d 166, 32 Cal. Rptr. 288 (1963).

<sup>11</sup> See *Rolph*, *Personal Identity* 50: "The bright burden of identity, at these parades, is lifted from the innocent participants to hover about the suspects, leaving the rest featureless and unknown and without interest."

<sup>12</sup> See *Williams & Hammelmann*, *Identification Parades*, Part II, [1963] *Crim. L. Rev.* 545, 548; *Horchard*, *Convicting the Innocent*, 307.

<sup>13</sup> An additional impediment to the detection of such influences by participants, including the suspect, is the physical conditions often surrounding the conduct of the lineup. In many, lights shine on the stage in such a way that the suspect cannot see the witness. See *Gilbert v. United States*, 306 F. 2d (C.A. 9th Cir. 1962). In some a one-way mirror is used and what is said on the witness' stand cannot be heard. See *Rigney v. Hendrick*, 355 F. 2d 710, 711, n. 2 (C. A. 3d Cir. 1965); *Aaron v. State*, 273 Ala. 837, 139 So. 2d 809 (1961).

<sup>14</sup> *Williams & Hammelmann*, Part I, *supra*, n. 8, at 489; *Napley*, *supra*, n. 8, at 90.

<sup>15</sup> See *In re Groban*, 352 U.S. 330, 340 (BLACK, J., dissenting). The difficult position of defendants in attempting to protest the manner of pretrial identification is illustrated by the many state court cases in which contentions of blatant abuse rested on their unsupported allegations, usually controverted by the police officers present. See, e.g., *People v. Shields*, 70 Cal. App. 2d 628, 634-635, 161 P. 2d 475, 478-479 (1945); *People v. Hicks*, 22 Ill. 2d 804, 178 N.E. 2d 810 (1961); *State v. Hill*, 193 Kan. 612, 804 P. 2d 106 (1984); *Redmon v. Commonwealth*, 821 S.W. 2d 307 (Ky. Ct. App. 1989); *Lubinski v. State*, 180 Md. 1, 8, 22 A. 2d 459 (1941). For a striking case in which hardly anyone agreed upon what occurred at the lineup, including who identified whom, see *Johnson v. State*, 287 Md. 288, 208 A. 2d 138 (1965).

<sup>16</sup> An instructive example of the defendant's predicament may be found in *Proctor v. State*, 223 Md. 804, 164 A. 2d 708 (1960). A prior identification is admissible in Maryland only under the salutary rule that it cannot have been made "under conditions of unfairness or unreliability." *Id.* at 401, 164 A. 2d, at 712. Against the defendant's contention that these conditions had not been met, the Court stated:

"In the instant case, there are no such facts as, in our judgment, would call for a finding that the identification \* \* \* was made under conditions of unfairness or unreliability. The relatively large number of persons put into the room together for [the victim] to look at is one circumstance indicating fairness, and the fact that the police officer was unable to remember the appearances of the others and could not recall if they had physical characteristics similar to [the defendant's] or not is at least suggestive that they were not of any one type or that they all differed markedly in looks from the defendant. There is no evidence that the Police Sergeant gave the complaining witness any indication as to which of the thirteen men was the defendant; the Sergeant's testimony is simply that he asked [the victim], if he could identify [the defendant] after having put the thirteen men in the courtroom."

<sup>17</sup> *Wall*, *Eyewitness Identification in Criminal Cases* 53. For other such examples see *Houts*, *From Evidence to Proof* 25; *Frankfurter*, *The Case of Sacco and Vanzetti*, 12-14, 30-32; 8 *Wigmore*, *Evidence* § 786(a), at 164, n. 2; *Paul*, *Identification of Accused Persons*, 12 *Aust. L. J.* 42, 44 (1988); *Rolph*, *Personal Identity*, 34-43.

Similarly state reports, in the course of describing prior identifications admitted as evidence of guilt, reveal numerous instances of suggestive procedures, for example, that all in the lineup but the suspect were known to the identifying witness,<sup>18</sup> that the other participants in a lineup were grossly dissimilar in appearance from the suspect,<sup>19</sup> that only the suspect was required to wear distinctive clothing which the culprit allegedly wore,<sup>20</sup> that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail,<sup>21</sup> that the suspect is pointed out before or during a lineup,<sup>22</sup> and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect.<sup>23</sup>

The potential for improper influence is illustrated by the circumstances, insofar as they appear, surrounding the prior identifications in the three cases we decide today. In the present case, the testimony of the identifying witnesses elicited on cross-examination revealed that those witnesses were taken to the courthouse and seated in the courtroom to await assembly of the lineup. The courtroom faced on a hallway observable to the witnesses through an open door. The cashier testified that she saw Wade "standing in the hall" within sight of an FBI agent. Five or six other prisoners later appeared in the hall. The vice president testified that he saw a person in the hall in the custody of the agent who "resembled the person that we identified as the one that entered the bank."<sup>24</sup>

The lineup in *Gilbert, post*, was conducted in an auditorium in which some 100 witnesses to several alleged state and federal robberies charged to Gilbert made wholesale identifications of Gilbert as the robber in each others' presence, a procedure said to run counter to the most elemental precepts of the psychology of suggestion.<sup>25</sup> And the vice of suggestion created by the identification in *Stovall, post*, was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying to the suggestion to the witness that the one presented is believed guilty by the police. See Frankfurter, *The Case of Sacco and Vanzetti* 31-32.

The few cases that have surfaced therefore reveal the existence of a process attended with hazards of serious unfairness to the criminal accused and strongly suggest the plight of the more numerous defendants who are unable to ferret out suggestive influences in the secrecy of the confrontation. We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification. Glanville Williams, in one of the most comprehensive studies of such forms of identification, said, "[T]he fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief preoccupation is with the problem of getting sufficient proof, because he has not 'come clean,' involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way \* \* \*." Williams & Hammelmann, *Identification Parades*, Part I, [1963] Crim. L. Rev. 479, 483.

Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-

<sup>18</sup> See *People v. James*, 218 Cal. App. 2d 166, 170-171, 32 Cal. Rptr. 288, 286 (1963); *People v. Boney*, 28 Ill. 2d 505, 192 N.E. 2d 920 (1963).

<sup>19</sup> See *Fredrickson v. United States*, 105 U.S. App. D.C. 262, 266 F. 2d 463 (C.A.D.C. Cir. 1959); *People v. Adell*, 75 Ill. App. 2d 885, 221 N.E. 2d 72 (1966); *State v. Hill*, 198 Kan. 512, 894 P. 2d 106 (1984); *People v. Seppi*, 221 N.Y. 62, 116 N.E. 793 (1917); *State v. Duggan*, 215 Ore. 151, 162, 388 P. 2d 907, 912 (1958).

<sup>20</sup> See *People v. Gresham*, 15 Ill. 2d 458, 460, 155 N.E. 2d 699, 602 (1959); *Presley v. State*, 224 Md. 550, 108 A. 2d 510 (1961); *State v. Ramirez*, 76 N.M. 72, 412 P. 2d 246 (1966); *State v. Basemore*, 198 N.C. 836, 187 S.E. 172 (1927); *Barrett v. State*, 190 Tenn. 866, 229 S.W. 2d 516 (1950).

<sup>21</sup> See *Aaron v. State*, 273 Ala. 887, 189 So. 2d 309 (1961); *Bishop v. State*, 286 Ark. 12, 364 S.W. 2d 676 (1968); *People v. Thompson*, 406 Ill. 555, 94 N.E. 2d 849 (1950); *People v. Berne*, 884 Ill. 834, 51 N.E. 2d 578 (1948); *People v. Martin*, 804 Ill. 494, 136 N.E. 711 (1922); *Barrett v. State*, 190 Tenn. 866, 229 S.W. 2d 516 (1950).

<sup>22</sup> See *People v. Clark*, 28 Ill. 2d 428, 192 N.E. 2d 851 (1963); *Gillespie v. State*, 355 P. 2d 451, 454 (Okla. Cr. 1960).

<sup>23</sup> See *People v. Parham*, 60 Cal. 2d 878, 884 P. 2d 1001 (1968).

<sup>24</sup> See *Wall*, *supra*, n. 6, at 48; *Napley*, *supra*, n. 8, at 99: "[W]hile many identification parades are conducted by the police with scrupulous regard for fairness, it is not unknown for the identifying witness to be placed in a position where he can see the suspect before the parade forms \* \* \*."

<sup>25</sup> Williams & Hammelmann, Part I, *supra*, n. 8, at 480; *Burtt*, *Applied Psychology* 254-255.

examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer v. Texas*, 380 U. S. 400. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—"that's the man."

Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial,<sup>28</sup> there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel] \* \* \* as at the trial itself." *Powell v. Alabama*, *supra*, at 57. Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an "intelligent waiver." See *Carnley v. Cochran*, 369 U. S. 506. No substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel. Concern is expressed that the requirement will forestall prompt identifications and result in obstruction of the confrontations. As for the first, we note that in the two cases in which the right to counsel is today held to apply, counsel had already been appointed and no argument is made in either case that notice would have prejudicially delayed the confrontations. Moreover, we leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay.<sup>29</sup> And to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Sixth Amendment cases. We rejected similar logic in *Miranda v. Arizona* concerning presence of counsel during custodial interrogation, 384 U. S., at 480:

"[A]n attorney is merely exercising the good professional judgement he has been taught. This is not cause for considering the attorney a menace to law enforcement."

<sup>28</sup> One commentator proposes a model statute providing not only for counsel, but other safeguards as well:

"Most, if not all, of the attacks on the lineup process could be averted by a uniform statute modeled upon the best features of the civilian codes. Any proposed statute should provide for the right to counsel during any lineup or during any confrontation. Provision should be made that any person, whether a victim or a witness, must give a description of the suspect before he views any arrested person. A written record of this description should be required, and the witness should be made to sign it. This written record would be available for inspection by defense counsel for copying before the trial and for use at the trial in testing the accuracy of the identification made during the lineup and during the trial.

"This ideal statute would require at least six persons in addition to the accused in a lineup, and these persons would have to be of approximately the same height, weight, coloration of hair and skin, and bodily types as the suspect. In addition, all of these men should, as nearly as possible, be dressed alike. If distinctive garb was used during the crime, the suspect should not be forced to wear similar clothing in the lineup unless all of the other persons are similarly garbed. A complete written report of the names, addresses, descriptive details of the other persons in the lineup, and of everything which transpired during the identification would be mandatory. This report would include everything stated by the identifying witness during this step, including any reasons given by him as to what features, etc., have sparked his recognition.

"This statute should permit voice identification tests by having each person in the lineup repeat identical innocuous phrases, and it would be impermissible to force the use of words allegedly used during a criminal act.

"The statute would enjoin the police from suggesting to any viewer that one or more persons in the lineup had been arrested as a suspect. If more than one witness is to make an identification, each witness should be required to do so separately and should be forbidden to speak to another witness until all of them have completed the process.

"The statute could require the use of movie cameras and tape recorders to record the lineup process in those states which are financially able to afford these devices. Finally, the statute should provide that any evidence obtained as the result of a violation of this statute would be inadmissible." Murray, *The Criminal Lineup at Home and Abroad*, 1968 Utah L. Rev. 610, 627-628.

<sup>29</sup> Although the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's own counsel.

forcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution."

In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence.<sup>21</sup> That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice.<sup>22</sup>

Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical."<sup>23</sup> But neither Congress nor the federal authorities has seen fit to provide a solution. What we hold today "in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect." *Miranda v. Arizona, supra*, at 407.

## V

We come now to the question whether the denial of Wade's motion to strike the courtroom identification by the bank witnesses at trial because of the absence of his counsel at the lineup required, as the Court of Appeals held, the grant of a new trial at which such evidence is to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification. See *Murphy v. Waterfront Commission*, 378 U.S. 52, 79, n. 18.<sup>24</sup> Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a *per se* rule of exclusion of courtroom identification would be unjustified.<sup>25</sup> See *Nardone v. United States*, 308 U.S. 338, 341. A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the court identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference. We have already noted that the lineup identification will have that effect. The State may then rest upon the witnesses' unequivocal courtroom identification, and not men-

<sup>21</sup> Concern is also expressed that the presence of counsel will force divulgence of the identity of government witnesses whose identity the Government may want to conceal. To the extent that this is a valid or significant state interest there are police practices commonly used to effect concealment, for example, masking the face.

<sup>22</sup> Most other nations surround the lineup with safeguards against prejudice to the suspect. In England the suspect must be allowed the presence of his solicitor or a friend. *Napley, supra*, n. 7, at 98-99; Germany requires the presence of retained counsel; France forbids the confrontation of the suspect in the absence of his counsel; Spain, Mexico, and Italy provide detailed procedures prescribing the conditions under which confrontation must occur under the supervision of a judicial officer who sees to it that the proceedings are officially recorded to assure adequate scrutiny at trial. Murray, *The Criminal Lineup at Home and Abroad*, 1950 Utah L. Rev. 610, 621-627.

<sup>23</sup> Thirty years ago Wigmore suggested a "scientific method" of pretrial identification "to reduce the risk of error hitherto inherent in such proceedings." Wigmore, *The Science of Judicial Proof* 541 (3d ed. 1937). Under this approach, at least 100 talking films would be prepared of men from various occupations, races, etc. Each would be photographed in a number of stock movements, with and without hat and coat, and would read aloud a standard passage. The suspect would be filmed in the same manner. Some 25 of the films would be shown in succession in a special projection room in which each witness would be provided an electric button which would activate a board backstage when pressed to indicate that the witness had identified a given person. Provision would be made for the degree of hesitancy in the identification to be indicated by the number of presses. *Id.*, at 540-541. Of course, the more systematic and scientific a process or proceeding, including one for purposes of identification, the less the impediment to reconstruction of the conditions bearing upon the reliability of that process or proceeding at trial. See discussion of fingerprint and like tests, Part III, *supra*, and of handwriting exemplars in *Gilbert v. California, post*.

<sup>24</sup> See *Goldstein v. United States*, 316 U. S. 114, 124, n. 1 (*Murphy, J.*, dissenting). "[A]fter an accused sustains the initial burden, imposed by *Nardone v. United States*, 308 U. S. 338, of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the Government to convince the trial judge that the proof had an independent origin."

<sup>25</sup> We reach a contrary conclusion in *Gilbert v. California, post*, as to the admissibility of the witness' testimony that he also identified the accused at the lineup.

tion the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the lineup itself disregards a critical element of that right.

We think it follows that the proper test to be applied in these situations is that quoted in *Wong Sun v. United States*, 371 U.S. 471, 488, "Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt 221 (1959). See also *Hoffa v. United States*, 383 U.S. 293, 309. Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.<sup>33</sup>

We doubt that the Court of Appeals applied the proper test for exclusion of the in-court identification of the two witnesses. The court stated that "It cannot be said with any certainty that they would have recognized appellant at the time of trial if this intervening lineup had not occurred," and that the testimony of the two witnesses "may well have been colored by the illegal procedure and was prejudicial." 358 F. 2d, at 360. Moreover, the court was persuaded, in part, by the "compulsory verbal responses made by Wade at the instance of the Special Agent." *Ibid.* This implies the erroneous holding that Wade's privilege against self-incrimination was violated so that the denial of counsel required exclusion.

On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. This was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error, *Chapman v. California*, 386 U.S. 18, and for the District Court to reinstate the conviction or order a new trial, as may be proper. See *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 245-246.

The judgment of the Court of Appeals is vacated and the case is remanded to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

*It is so ordered.*

THE CHIEF JUSTICE joins the opinion of the Court except for Part I, from which he dissents for the reasons expressed in the opinion of MR. JUSTICE FORTAS.

MR. JUSTICE DOUGLAS joins the opinion of the Court except for Part I. On that phase of the case he adheres to the dissenting views in *Sohmerber v. California*, 384 U.S. 757, 772-779, that compulsory lineup violates the privilege against self-incrimination contained in the Fifth Amendment.

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<sup>33</sup> Thus it is not the case that "[i]t matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime." Such factors will have an important bearing upon the true basis of the witness' in-court identification. Moreover, the State's inability to bolster the witness' courtroom identification by introduction of the lineup identification itself, see *Gilbert v. California*, *post*, will become less significant the more the evidence of other opportunities of the witness to observe the defendant. Thus where the witness is a "kidnap victim who has lived for days with his abductor" the value to the State of admission of the lineup identification is indeed marginal, and such identification would be a mere formality.

## Supreme Court of the United States

No. 334.—October Term, 1966

UNITED STATES, PETITIONER

*v.*

BILLY JOE WADE

*On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

[June 12, 1967]

MR. JUSTICE CLARK, concurring.

With reference to the lineup point involved in this case I cannot, for the life of me, see why a lineup is not a critical stage of the prosecution. Identification of the suspect—a prerequisite to establishment of guilt—occurs at this stage, and with *Miranda v. Arizona*, 384 U.S. 436 (1966), on the books, the requirement of the presence of counsel arises, unless waived by the suspect. I dissented in *Miranda* but I am bound by it now, as we all are. *Schmerber v. California*, 384 U.S. 757 (1966), precludes petitioner's claim of self-incrimination. I therefore join the opinion of the Court.

## Supreme Court of the United States

No. 334.—October Term, 1966

UNITED STATES, PETITIONER

*v.*

BILLY JOE WADE

*On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

[June 12, 1967]

MR. JUSTICE BLACK, dissenting in part and concurring in part.

On March 23, 1965, respondent Wade was indicted for robbing a bank; on April 2, he was arrested; and on April 26, the court appointed a lawyer to represent him. Fifteen days later, while Wade was still in custody, an FBI agent took him and several other prisoners into a room at the courthouse, directed each to participate in a lineup wearing strips of tape on his face and to speak the words used by the robber at the bank. This was all done in order to let the bank employee witnesses look at Wade for identification purposes. Wade's lawyer was neither notified of nor present at the lineup to protect his client's interests. At Wade's trial, two bank employees identified him in the courtroom. Wade objected to this testimony, when, on cross-examination, his counsel elicited from these witnesses the fact that they had seen Wade in the lineup. He contended that by forcing him to participate in the lineup, wear strips of tape on his face, and repeat the words used by the robber, all without counsel, the Government had (1) compelled him to be a witness against himself in violation of the Fifth Amendment, and (2) deprived him of the assistance of counsel for his defense in violation of the Sixth Amendment.

The Court in Part I of its opinion rejects Wade's Fifth Amendment contention. From that I dissent. In Parts II-IV of its opinion, the Court sustains Wade's claim of denial of right to counsel in the out-of-court lineup, and in that I concur. In Part V, the Court remands the case to the District Court to consider whether the courtroom identification of Wade was the fruit of the illegal lineup, and if it were, to grant him a new trial unless the court concludes that the courtroom identification was harmless error. I would reverse the Court of Appeals' reversal of Wade's conviction, but I would not remand for further proceedings. Since the prosecution did not use the out-of-court lineup identification against Wade at his trial, I believe the conviction should be affirmed.

## I

In rejecting Wade's claim that his privilege against self-incrimination was violated by compelling him to appear in the lineup wearing the tape and uttering the words given him by the police, the Court relies on the recent holding in *Schmerber v. California*, 384 U.S. 757. In that case the Court held that taking blood from a man's body against his will in order to convict him of a crime did not compel him to be a witness against himself. I dissented from that holding, 384 U.S., at 773, and still dissent. The Court's reason for its holding was that the sample of Schmerber's blood taken in order to convict him of crime was neither "testimonial" nor "communicative" evidence. I think it was both. It seems quite plain to me that the Fifth Amendment's Self-incrimination Clause was designed to bar the Government from forcing any person to supply proof of his own crime, precisely what Schmerber was forced to do when he was forced to supply his blood. The Government simply took his blood against his will and over his counsel's protest for the purpose of convicting him of crime. So here, having Wade in its custody awaiting trial to see if he could or would be convicted of crime, the Government forced him to stand in a lineup, wear strips on his face, and speak certain words, in order to make it possible for government witnesses to identify him as a criminal. Had Wade been compelled to utter these or any other words in open court, it is plain that he would have been entitled to a new trial because of having been compelled to be a witness against himself. Being forced by Government to help convict himself and to supply evidence against himself by talking outside the courtroom is equally violative of his constitutional right not to be compelled to be a witness against himself. Consequently, because of this violation of the Fifth Amendment, and not because of my own personal view that the Government's conduct was "unfair," "prejudicial," or "improper," I would prohibit the prosecution's use of lineup identification at trial.

## II

I agree with the Court, in large part because of the reasons it gives, that failure to notify Wade's counsel that Wade was to be put in a lineup by government officers and to be forced to talk and wear tape on his face denied Wade the right to counsel in violation of the Sixth Amendment. Once again, my reason for this conclusion is solely the Sixth Amendment's guarantee that "the accused shall enjoy the right \* \* \* to have the assistance of counsel for his defence." As this Court's opinion points out, "[t]he plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" And I agree with the Court that a lineup is a "critical stage" of the criminal proceedings against an accused, because it is a stage at which the Government makes use of his custody to obtain crucial evidence against him. Besides counsel's presence at the lineup being necessary to protect the defendant's specific constitutional rights to confrontation and the assistance of counsel at the trial itself, the assistance of counsel at the lineup is also necessary to protect the defendant's in-custody assertion of his privilege against self-incrimination, *Miranda v. Arizona*, 384 U.S. 436, for contrary to the Court, I believe that counsel may advise the defendant not to participate in the lineup or to participate only under certain conditions.

I agree with the Court that counsel's presence at the lineup is necessary to protect the accused's right to a "fair trial," only if by "fair trial" the Court means a trial in accordance with the "law of the land" as specifically set out in the Constitution. But there are implications in the Court's opinion that by a "fair trial" the Court means a trial which a majority of this Court deems to be "fair" and that a lineup is a "critical stage" only because the Court, now assessing the "innumerable dangers" which inhere in it, thinks it is such. That these implications are justified is evidenced by the Court's suggestion that "legislative or other regulations \* \* \* which eliminate the abuse \* \* \* at lineup proceedings \* \* \* may also remove the basis for regarding the stage as 'critical.'" And it is clear from the Court's opinion in *Gilbert v. California*, post, that it is willing to make the Sixth Amendment's guarantee of right to counsel dependent on the Court's own view of whether a particular stage of the proceedings—though "critical" in the sense of the prosecution's gathering of evidence—is "critical" to the Court's own view of a "fair trial." I am wholly unwilling to make the specific constitutional right of counsel dependent on judges' vague and transitory notions of fairness and their equally transitory, though "practical," assessment of the "risk that \* \* \* counsel's absence \* \* \* might derogate from a fair trial." See *Pointer v. Texas*, 380 U.S. 400, 412 (concurring opinion of Goldberg, J.).

## III

I would reverse Wade's conviction without further ado had the prosecution at trial made use of his lineup identification either in place of courtroom identification or to bolster in a harmful manner crucial courtroom identification. But the prosecution here did neither of these things. After prosecution witnesses under oath identified Wade in the courtroom, it was the defense, and not the prosecution, which brought out the prior lineup identification. While stating that "a *per se* rule of exclusion of courtroom identification would be unjustified," the Court, nevertheless, remands this case for "a hearing to determine whether the in-court identifications had an independent source," or were the tainted fruits of the invalidly conducted lineup. From this holding I dissent.

In the first place, even if this Court has power to establish such a rule of evidence, I think the rule fashioned by the Court is unsound. The "taint"- "fruit" determination required by the Court involves more than considerable difficulty. I think it is practically impossible. How is a witness capable of probing the recesses of his mind to draw a sharp line between a courtroom identification due exclusively to an earlier lineup and a courtroom identification due to memory not based on the lineup? What kind of "clear and convincing evidence" can the prosecution offer to prove upon what particular events memories resulting in an in-court identification rest? How long will trials be delayed while judges turn psychologists to probe the subconscious minds of witnesses? All these questions are posed but not answered by the Court's opinion. In my view, the Fifth and Sixth Amendments are satisfied if the prosecution is precluded from using lineup identification as either an alternative to or corroboration of courtroom identification. If the prosecution does neither and its witnesses under oath identify the defendant in the courtroom, then I can find no justification for stopping the trial in midstream to hold a lengthy "taint"- "fruit" hearing. The fact of and circumstances surrounding a prior lineup identification might be used by the defense to impeach the credibility of the in-court identifications, but not to exclude them completely.

But more important, there is no constitutional provision upon which I can rely that directly or by implication gives this Court power to establish what amounts to a constitutional rule of evidence to govern, not only the Federal Government, but the States in their trial of state crimes under state laws in state courts. See *Gilbert v. California*, *post*. The Constitution deliberately reposed in States very broad power to create and to try crimes according to their own rules and policies. *Spencer v. Texas*, 385 U. S. 554. Before being deprived of this power, the least that they can ask is that we should be able to point to a federal constitutional provision that either by express language or by necessary implication grants us the power to fashion this novel rule of evidence to govern their criminal trials. Cf. *Berger v. New York*, —U.S.— (BLACK, J., dissenting). Neither *Nardone v. United States*, 308 U. S. 338, nor *Wong Sun v. United States*, 371 U. S. 471, both federal cases and both decided "in other contexts," support what the Court demands of the States today.

Perhaps the Court presumes to write this constitutional rule of evidence on the Fourteenth Amendment's Due Process Clause. This is not the time or place to consider that claim. Suffice it for me to say briefly that I find no such authority in the Due Process Clause. It undoubtedly provides that a person must be tried in accordance with the "Law of the Land." Consequently, it violates due process to try a person in a way prohibited by the Fourth, Fifth, or Sixth Amendments of our written Constitution. But I have never been able to subscribe to the dogma that the Due Process Clause empowers this Court to declare any law, including a rule of evidence, unconstitutional which it believes is contrary to tradition, decency, fundamental justice, or any of the other wide-meaning words used by judges to claim power under the Due Process Clause. See, e. g., *Rochin v. California*, 342 U. S. 165. I have an abiding idea that if the Framers had wanted to let judges write the Constitution on any such day-to-day beliefs of theirs, they would have said so instead of so carefully defining their grants and prohibitions in a written constitution. With no more authority than the Due Process Clause I am wholly unwilling to tell the state or federal courts that the United States Constitution forbids them to allow courtroom identification without the prosecution first proving that the identification does not rest in whole or in part on an illegal lineup. Should I do so, I would feel that we are deciding what the Consti-

tution is, not from what it says, but from what we think it would have been wise for the Framers to put in it. That to me would be "judicial activism" at its worst. I would leave the States and Federal Government free to decide their own rules of evidence. That, I believe, is their constitutional prerogative.

I would affirm Wade's conviction.

Supreme Court of the United States

No. 334.—October Term, 1966

UNITED STATES, PETITIONER

v.

BILLY JOE WADE

*On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

[June 12, 1967]

Mr. JUSTICE WHITE, whom Mr. JUSTICE HARLAN and Mr. JUSTICE STEWART join, dissenting in part and concurring in part.

The Court has again propounded a broad constitutional rule barring use of a wide spectrum of relevant and probative evidence, solely because a step in its ascertainment or discovery occurs outside the presence of defense counsel. This was the approach of the Court in *Miranda v. Arizona*. I objected then to what I thought was an uncritical and doctrinaire approach without satisfactory factual foundation. I have much the same view of the present ruling and therefore dissent from the judgment and from Parts II, IV, and V of the Court's opinion.

The Court's opinion is far reaching. It proceeds first by creating a new *per se* rule of constitutional law: a criminal suspect cannot be subjected to a pretrial identification process in the absence of his counsel without violating the Sixth Amendment. If he is, the State may not buttress a later courtroom identification of the witness by any reference to the previous identification. Furthermore, the courtroom identification is not admissible at all unless the State can establish by clear and convincing proof that the testimony is not the fruit of the earlier identification made in the absence of defendant's counsel—admittedly a heavy burden for the State and probably an impossible one. For all intents and purposes, courtroom identifications are barred if pretrial identifications have occurred without counsel being present.

The rule applies to any lineup, to any other techniques employed to produce an identification and a *fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information. It matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime. The kidnap victim who has lived for days with his abductor is in the same category as the witness who had had only a fleeting glimpse of the criminal. Neither may identify the suspect without defendant's counsel being present. The same strictures apply regardless of the number of other witnesses who positively identify the defendant and regardless of the corroborative evidence showing that it was the defendant who has committed the crime.

The premise for the Court's rule is not the general unreliability of eyewitness identifications nor the difficulties inherent in observation, recall, and recognition. The Court assumes a narrower evil as the basis for its rule—improper police suggestion which contributes to erroneous identifications. The Court apparently believes that improper police procedures are so widespread that a broad prophylactic rule must be laid down, requiring the presence of counsel at

all pertrall identifications, in order to detect recurring instances of police misconduct.<sup>1</sup> I do not share this pervasive distrust of all official investigations. None of the materials the Court relies upon supports it.<sup>2</sup> Certainly, I would bow to solid fact, but the Court quite obviously does not have before it any reliable, comprehensive survey of current police practices on which to base its new rule. Until it does, the Court should avoid excluding relevant evidence from state criminal trials. Cf. *Washington v. Texas*, — U.S. —.

The Court goes beyond assuming that a great majority of the country's police departments are following improper practices at pretrial identifications. To find the lineup a "critical" stage of the proceeding and to exclude identifications made in the absence of counsel, the Court must also assume that police "suggestion," if it occurs at all, leads to erroneous rather than accurate identifications and that reprehensible police conduct will have an unavoidable and largely undiscoverable impact on the trial. This in turn assumes that there is now no adequate source from which defense counsel can learn about the circumstances of the pretrial identification in order to place before the jury all of the considerations which should enter into an appraisal of courtroom identification evidence. But these are treacherous and unsupported assumptions,<sup>3</sup> resting as they do on the notion that the defendant will not be aware, that the police and the witnesses will forget or prevaricate, that defense counsel will be unable to bring out the truth and that neither jury, judge, nor appellate court is a sufficient safeguard against unacceptable police conduct occurring at a pretrial identification procedure. I am unable to share the Court's view of the willingness of the police and the ordinary citizen-witness to dissemble, either with respect to the identification of the defendant or with respect to the circumstances surrounding a pretrial identification.

There are several striking aspects to the Court's holding. First, the rule does not bar courtroom identifications where there have been no previous identifications in the presence of the police, although when identified in the courtroom, the defendant is known to be in custody and charged with the commission of a crime. Second, the Court seems to say that if suitable legislative standards were adopted for the conduct of pretrial identifications, thereby lessening the hazards in such confrontations, it would not insist on the presence of counsel. But if this is true, why does not the Court simply fashion what it deems to be constitutionally acceptable procedures for the authorities to follow? Certainly the Court is correct in suggesting that the new rule will be wholly inapplicable where police departments themselves have established suitable safeguards.

Third, courtroom identification may be barred, absent counsel at a prior identification, regardless of the extent of counsel's information concerning the circumstances of the previous confrontation between witness and defendant—apparently even if there were recordings or sound-movies of the events as they occurred. But if the rule is premised on the defendant's right to have his counsel know, there seems little basis for not accepting other means to inform. A disinterested observer, recordings, photographs—any one of them would seem adequate to furnish the basis for a meaningful cross-examination of the eye-witness who identifies the defendant in the courtroom.

<sup>1</sup> Yet in *Stovall v. Denno*, — U.S. —, the Court recognizes that improper police conduct in the identification process has not been so widespread as to justify full retroactivity for its new rule.

<sup>2</sup> In *Miranda v. Arizona*, 384 U.S. 436, 449, the Court noted that O'Hara, *Fundamentals of Criminal Investigation* (1956) is a text that has enjoyed extensive use among law enforcement agencies and among students of police science. The quality of the work was said to rest on the author's long service as observer, lecturer in police science, and work as a federal crime investigator. O'Hara does not suggest that the police should or do use identification machinery improperly; instead he argues for techniques that would increase the reliability of eyewitness identifications, and there is no reason to suggest that O'Hara's views are not shared and practiced by the majority of police departments throughout the land.

<sup>3</sup> The instant case and its companions, *Gilbert v. California*, — U.S. —, and *Stovall v. Denno*, — U.S. —, certainly lend no support to the Court's assumptions. The police conduct deemed improper by the Court in the three cases seems to have come to light at trial in the ordinary course of events. One can ask what more counsel would have learned at the pretrial identifications that would have been relevant for truth determination at trial. When the Court premises its constitutional rule on police conduct so subtle as to defy description and subsequent disclosure it deals in pure speculation. If police conduct is intentionally veiled, the police will know about it, and I am unwilling to speculate that defense counsel at trial will be unable to reconstruct the known circumstances of the pretrial identification. And if the "unknown" influence on identifications is "innocent," the Court's general premise evaporates and the problem is simply that of the inherent shortcomings of eyewitness testimony.

I share the Court's view that the criminal trial, at the very least, should aim at truthful factfinding, including accurate eyewitness identifications. I doubt, however, on the basis of our present information, that the tragic mistakes which have occurred in criminal trials are as much the product of improper police conduct as they are the consequence of the difficulties inherent in eyewitness testimony and in resolving evidentiary conflicts by court or jury. I doubt that the Court's new rule will obviate these difficulties, or that the situation will be measurably improved by inserting defense counsel into the investigative processes of police departments everywhere.

But, it may be asked, what possible state interest militates against requiring the presence of defense counsel at lineups? After all, the argument goes, he *may* do some good; he *may* upgrade the quality of identification evidence in state courts and he can scarcely do any harm. Even if true, this is a feeble foundation for fastening an ironclad constitutional rule upon state criminal procedures. Absent some reliably established constitutional violation, the processes by which the States enforce their criminal laws are their own prerogative. The States do have an interest in conducting their own affairs, an interest which cannot be displaced simply by saying that there are no valid arguments with respect to the merits of a federal rule emanating from this Court.

Beyond this, however, requiring counsel at pretrial identifications as an invariable rule trenches on other valid state interests. One of them is its concern with the prompt and efficient enforcement of its criminal laws. Identifications frequently take place after arrest but before indictment or information is filed. The police may have arrested a suspect on probable cause but may still have the wrong man. Both the suspect and the State have every interest in a prompt identification at that stage, the suspect in order to secure his immediate release and the State because prompt and early identification enhances *accurate* identification and because it must know whether it is on the right investigative track. Unavoidably, however, the absolute rule requiring the presence of counsel will cause significant delay and it may very well result in no pretrial identification at all. Counsel must be appointed and a time arranged convenient for him and the witnesses. Meanwhile, it may be necessary to file charges against the suspect who may then be released on bail, in the federal system very often on his own recognition, with neither the State nor the defendant having the benefit of a properly conducted identification procedure.

Nor do I think the witnesses themselves can be ignored. They will now be required to be present at the convenience of counsel rather than their own. Many may be much less willing to participate if the identification stage is transformed into an adversary proceeding not under the control of a judge. Others may fear for their own safety if their identity is known at an early date, especially when there is no way of knowing until the lineup occurs whether or not the police really have the right man.<sup>4</sup>

Finally, I think the Court's new rule is vulnerable in terms of its own unimpeachable purpose of increasing the reliability of identification testimony.

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.<sup>5</sup> To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in not convicting the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or

<sup>4</sup> I would not have thought that the State's interest regarding its sources of identification is any less than its interest in protecting informants, especially those who may aid in identification but who will not be used as witnesses. See *McGray v. Illinois*, \_\_\_\_ U. S. \_\_\_\_.

<sup>5</sup> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 296 U. S. 78, 88. See also *Mooney v. Holohan*, 294 U. S. 108; *Pyle v. Kansas*, 317 U. S. 218; *Alcoora v. Texas*, 355 U. S. 28; *Napue v. Illinois*, 360 U. S. 264; *Brady v. Maryland*, 373 U. S. 83; *Giles v. Maryland*, \_\_\_\_ U. S. \_\_\_\_; *Miller v. Pate*, \_\_\_\_ U. S. \_\_\_\_.

guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need furnish no witnesses to the police, reveal any confidences of his client, nor furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.<sup>6</sup> Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe<sup>7</sup> but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

I would not extend this system, at least as it presently operates, to police investigations and would not require counsel's presence at pretrial identification procedures. Counsel's interest is in not having his client placed at the scene of the crime, regardless of his whereabouts. Some counsel may advise their clients to refuse to make any movements or to speak any words in a lineup or even to appear in one. To that extent the impact on truthful factfinding is quite obvious. Others will not only observe what occurs and develop possibilities for later cross-examination but will hover over witnesses and begin their cross-examination then, menacing truthful fact-finding as thoroughly as the Court fears the police now do. Certainly there is an implicit invitation to counsel to suggest rules for the lineup and to manage and produce it as best he can. I therefore doubt that the Court's new rule, at least absent some clearly defined limits on counsel's role, will measurably contribute to more reliable pretrial identifications. My fears are that it will have precisely the opposite result. It may well produce fewer convictions, but that is hardly a proper measure of its long-run acceptability. In my view, the State is entitled to investigate and develop its case outside the presence of defense counsel. This includes the right to have private conversations with identification witnesses, just as defense counsel may have his own consultations with these and other witnesses without having the prosecutor present.

Whether today's judgment would be an acceptable exercise of supervisory power over federal courts is another question. But as a constitutional matter, the judgment in this case is erroneous and although I concur in Parts I and III of the Court's opinion I respectfully register this dissent.

\* One point of view about the role of the courtroom lawyer appears in Frank, Courts on Trial 82-83. "What is the role of the lawyers in bringing the evidence before the trial court? As you may learn by reading any one of a dozen or more handbooks on how to try a law-suit, an experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony." \* \* \* If such a witness happens to be timid, frightened by the unfamiliarity of court-room ways, the lawyer, in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts. Longenecker, in his book *Hints On The Trial of a Law Suit* (a book endorsed by the great Wigmore), in writing of the 'truthful, honest, over-cautious' witness, tells how 'a skilful advocate by a rapid cross-examination may ruin the testimony of such a witness.' The author does not even hint any disapproval of that accomplishment. Longenecker's and other similar books recommend that a lawyer try to prod an irritable but honest 'adverse' witness into displaying his undesirable characteristics in their most unpleasant form, in order to discredit him with the judge or jury. 'You may,' writes Harris, 'sometimes destroy the effect of an adverse witness by making him appear more hostile than he really is. You may make him exaggerate or unsay something and say it again.' Taft says that a clever cross-examiner, dealing with an honest but egotistic witness, will 'deftly tempt the witness to indulge in his propensity for exaggeration, so as to make him "hang himself." And thus,' adds Taft, 'it may happen that not only is the value of his testimony lost, but the side which produces him suffers for seeking aid from such a source'—although, I would add, that may be the only source of evidence of a fact on which the decision will turn.

"An intimidating manner in putting questions," writes Wigmore, "may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also, questions which in form or subject cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanor or utterances that the impression produced by his statements does not do justice to its real testimonial value."

<sup>7</sup> See the materials collected in c. 8 of Countryman and Finman, *The Lawyer in Modern Society*; Joint Committee on Continuing Legal Education of American Law Institute and the American Bar Association, *The Problem of a Criminal Defense* (1961), pp. 1-46; Stovall, *Aspects of the Advocate's Dual Responsibility*, 22 *The Alabama Lawyer* 66; Gold, *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer*, 14 *Clev.-Mar. L. Rev.* 65; Symposium on Professional Ethics, 64 *Mich. L. Rev.* 1469-1498.

## SUPREME COURT OF THE UNITED STATES

No. 334.—October Term, 1966

UNITED STATES, PETITIONER v. BILLY JOE WADE

*On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.*

[June 12, 1967]

Mr. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and Mr. JUSTICE DOUGLAS join, concurring in part and dissenting in part.

1. I agree with the Court that the exhibition of the person of the accused at a lineup is not itself a violation of the privilege against self-incrimination. In itself, it is no more subject to constitutional objection than the exhibition of the person of the accused in the courtroom for identification purposes. It is an incident of the State's power to arrest, and a reasonable and justifiable aspect of the State's custody resulting from arrest. It does not require that the accused take affirmative, volitional action, but only that, having been duly arrested he may be seen for identification purposes. It is, however, a "critical stage" in the prosecution, and I agree with the Court that the opportunity to have counsel present must be made available.

2. In my view, however, the accused may not be compelled in a lineup to speak the words uttered by the person who committed the crime. I am confident that it could not be compelled in court. It cannot be compelled in a lineup. It is more than passive, mute assistance to the eyes of the victim or of witnesses. It is the kind of volitional act—the kind of forced cooperation by the accused—which is within the historical perimeter of the privilege against compelled self-incrimination.

Our history and tradition teach and command that an accused may stand mute. The privilege means just that; not less than that. According to the Court, an accused may be jailed—indefinitely—until he is willing to say, for an identifying audience, whatever was said in the course of the commission of the crime. Presumably this would include, "Your money or your life"—or perhaps, words of assault in a rape case. This is intolerable under our constitutional system.

I completely agree that the accused must be advised of and given the right to counsel before a lineup—and I join in that part of the Court's opinion; but this is an empty right unless we mean to insist upon the accused's fundamental constitutional immunities. One of these is that the accused may not be compelled to speak. To compel him to speak would violate the privilege against self-incrimination, which is incorporated in the Fifth Amendment.

This great privilege is not merely a shield for the accused. It is also a prescription of technique designed to guide the State's investigation. History teaches us that self-accusation is an unreliable instrument of detection, apt to inculpate the innocent-but-weak and to enable the guilty to escape. But this is not the end of the story. The privilege historically goes to the roots of democratic and religious principle. It prevents the debasement of the citizen which would result from compelling him to "accuse" himself before the power of the state. The roots of the privilege are deeper than the rack and the screw used to extort confessions. They go to the nature of a free man and to his relationship to the state.

An accused cannot be compelled to utter the words spoken by the criminal in the course of the crime. I thoroughly disagree with the Court's statement that such compulsion does not violate the Fifth Amendment. The Court relies upon *Schmerber v. California*, 384 U.S. 757 (1966), to support this. I dissented in *Schmerber*, but if it were controlling here, I should, of course, acknowledge its binding effect unless we were prepared to overrule it. But *Schmerber* which authorized the forced extraction of blood from the veins of an unwilling human being, did not compel the person actively to cooperate—to accuse himself by a volitional act which differs only in degree from compelling him to act out the crime, which, I assume, would be rebuffed by the Court. It is the latter feature which places the compelled utterance by the accused squarely within the history and noble purpose of the Fifth Amendment's commandment.

To permit *Schmerber* to apply in any respect beyond its holding is, in my opinion, indefensible. To permit its insidious doctrine to extend beyond the invasion of the body, which it permits, to compulsion of the will of a man, is to deny and defy a precious part of our historical faith and to discard one of the most

profoundly cherished instruments by which we have established the freedom and dignity of the individual. We should not so alter the balance between the rights of the individual and of the state, achieved over centuries of conflict.

3. While the Court holds that the accused must be advised of and given the right to counsel at the lineup, it makes the privilege meaningless in this important respect. Unless counsel has been waived or, being present, has not objected to the accused's utterance of words used in the course of committing the crime, to compel such an utterance is constitutional error.\*

Accordingly, while I join the Court in requiring vacating of the judgment below for a determination as to whether the identification of respondent was based upon factors independent of the lineup, I would do so not only because of the failure to offer counsel before the lineup but also because of the violation of respondent's Fifth Amendment rights.

**Supreme Court of the United States**

**No. 283.—October Term, 1966**

**JESSE JAMES GILBERT, PETITIONER**

v.

**STATE OF CALIFORNIA**

**On Writ of Certiorari to the Supreme Court of California**

[June 12, 1967]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case was argued with *United States v. Wade*, *ante*, and presents the same alleged constitutional error in the admission in evidence of in-court identifications there considered. In addition, petitioner alleges constitutional errors in the admission of evidence of testimony of some of the witnesses that they also identified him at the lineup, in the admission of handwriting exemplars taken from him after his arrest, and in the admission of a co-defendant's out-of-court statement mentioning petitioner's part in the crimes, which statement, on the co-defendant's appeal decided with petitioner's, was held to have been improperly admitted against the co-defendant. Finally, he alleges that his Fourth Amendment rights were violated by a police seizure of photographs of him from his locked apartment after entry without a search warrant, and the admission of testimony of witnesses that they identified him from those photographs within hours after the crime.

Petitioner was convicted in the Superior Court of California of the armed robbery of the Mutual Savings and Loan Association of Alhambra and the murder of a police officer who entered during the course of the robbery. There were separate guilt and penalty stages of the trial before the same jury, which rendered a guilty verdict and imposed the death penalty. The California Supreme Court affirmed, 63 Cal. 2d 690, 408 P. 2d 865. We granted certiorari, 384 U.S. 985, and set the case for argument with *Wade* and with *Stovall v. Denno*, *post*. If our holding today in *Wade* is applied to this case, the issue whether admission of the in-court and lineup identifications is constitutional error which requires a new trial could be resolved on this record only after further proceedings in the California courts. We must therefore first determine whether petitioner's other contentions warrant any greater relief.

**I. THE HANDWRITTEN EXEMPLARS**

Petitioner was arrested in Philadelphia by an FBI agent and refused to answer questions about the Alhambra robbery without the advice of counsel. He later did answer questions of another agent about some Philadelphia robberies in which the robber used a handwritten note demanding that money be

\*While it is conceivable that legislation might provide a meticulous lineup procedure which would satisfy constitutional requirements, I do not agree with the Court that this would "remove the basis for regarding the [line-up] stage as 'critical.'"

handed over to him, and during that interrogation gave the agent the handwriting exemplars. They were admitted in evidence at trial over objection that they were obtained in violation of petitioner's Fifth and Sixth Amendment rights. The California Supreme Court upheld admission of the exemplars on the sole ground that petitioner had waived any rights that he might have had not to furnish them. "[The agent] did not tell Gilbert that the exemplars would not be used in any other investigation. Thus, even if Gilbert believed that his exemplars would not be used in California, it does not appear that the authorities improperly induced such belief." 63 Cal. 2d, at 708, 408 P. 2d, at 376. The court did not, therefore, decide petitioner's constitutional claims.

We pass the question of waiver since we conclude that the taking of the exemplars violated none of petitioner's constitutional rights.

*First.* The taking of exemplars did not violate petitioner's Fifth Amendment privilege against self-incrimination. The privilege reaches only compulsion of "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers," and not "compulsion which makes a suspect or accused the source of 'real or physical evidence' \* \* \*." *Sohmerber v. California*, 384 U. S. 757, 763-764. One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection. *United States v. Wade*, ante, at \_\_\_\_\_. No claim is made that the content of the exemplars was testimonial or communicative matter. Cf. *Boyd v. United States*, 116 U. S. 616.

*Second.* The taking of the exemplars was not a "critical" stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate his right to a fair trial. Cf. *United States v. Wade*, ante. If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, "the accused had the opportunity for a meaningful confrontation of the [State's] case at trial through the ordinary processes of cross-examination of the [State's] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts." *United States v. Wade*, ante, at \_\_\_\_\_.

## II. ADMISSION OF CO-DEFENDANT'S STATEMENT

Petitioner contends that he was denied due process of law by the admission during the guilt stage of the trial of his accomplice's pretrial statement to the police which referred to petitioner 150 times in the course of reciting petitioner's role in the robbery and murder. The statement was inadmissible hearsay as to petitioner, and was held on King's account of this appeal to be improperly obtained from him and therefore to be inadmissible against him under California law, 63 Cal. 2d, at 899-901; 408 P. 2d, at 370-371.

Petitioner would have us reconsider *Della Paoli v. United States*, 352 U.S. 232 (where the Court held that appropriate instructions to the jury would suffice to prevent prejudice to a defendant from the references to him in a co-defendant's statement), at least as applied to a case, as here, where the co-defendant gained a reversal because of the improper admission of the statement. We have no occasion to pass upon this contention. The California Supreme Court has rejected the *Della Paoli* rationale, and relying at least in part on the reasoning of the *Della Paoli* dissent, regards cautionary instructions as inadequate to cure prejudice. *People v. Aranda*, 68 Cal. 2d 518, 407 P. 2d 265. The California court applied *Aranda* in this case but held that any error as to Gilbert in the admission of King's statement was harmless. The harmless error standard applied was that "there is no reasonable possibility that the error in admitting King's statements and testimony might have contributed to Gilbert's conviction," a standard derived by the court from our decision in *Fahy v. Connecticut*, 375 U.S. 85.<sup>1</sup> *Fahy*

<sup>1</sup> The California Supreme Court also held that "\* \* \* the erroneous admission of King's statements at the trial on the issue of guilt was not prejudicial on the question of Gilbert's penalty," again citing *Fahy*, 63 Cal. 2d, at 702, 408 P. 2d, at 372.

was the basis of our holding in *Chapman v. California*, 386 U.S. 18, and the standard applied by the California court satisfies the standard as defined in *Chapman*.

It may be that the California Supreme Court will review the application of its harmless error standard to King's statement if on the remand the State presses harmless error also in the introduction of the in-court and lineup identifications. However, this at best implies an ultimate application of *Aranda* and only confirms that petitioner's argument for reconsideration of *Della Paoli* need not be considered at this time.

### III. THE SEARCH AND SEIZURE CLAIM

The California Supreme Court rejected Gilbert's challenge to the admission of certain photographs taken from his apartment pursuant to a warrantless search. The court justified the entry into the apartment under the circumstances on the basis of so-called "hot pursuit" and "exigent circumstances" exceptions to the warrant requirement. We granted certiorari to consider the important question of the extent to which such exceptions may permit warrantless searches without violation of the Fourth Amendment. A closer examination of the record than was possible when certiorari was granted reveals that the facts do not appear with sufficient clarity to enable us to decide that question. See Appendix to this opinion; compare *Warden v. Hayden*, \_\_\_\_ U.S. \_\_\_\_\_. We therefore vacate certiorari on this issue as improvidently granted. *The Monrovia v. Carbon Black Export, Inc.*, 359 U.S. 180, 184.

### IV. THE IN-COURT AND LINEUP IDENTIFICATIONS

Since none of the petitioner's other contentions warrant relief, the issue becomes what relief is required by application to this case of the principles today announced in *United States v. Wade, ante*.

Three eyewitnesses to the Alhambra crimes who identified Gilbert at the guilt stage of the trial had observed him at a lineup conducted without notice to his counsel in a Los Angeles auditorium 16 days after his indictment and after appointment of counsel. The manager of the apartment house in which incriminating evidence was found, and in which Gilbert allegedly resided, both identified Gilbert in the courtroom and testified, in substance, to her prior lineup identification on examination by the State. Eight witnesses who identified him in the courtroom at the penalty stage were not eyewitnesses to the Alhambra crimes but to other robberies allegedly committed by him. In addition to their in-court identifications, these witnesses also testified that they identified Gilbert at the same lineup.

The lineup was on a stage behind bright lights which prevented those in the line from seeing the audience. Upwards of 100 persons were in the audience, each an eyewitness to one of the several robberies charged to Gilbert. The record is otherwise virtually silent as to what occurred at the lineup.<sup>2</sup>

<sup>2</sup> The record in *Gilbert v. United States*, 366 F. 2d 923, involving the federal prosecutions of Gilbert, apparently contains many more details of what occurred at the lineup. The opinion of the Court of Appeals for the Ninth Circuit states, 366 F. 2d, at 935:

"The lineup occurred on March 26, 1964, after Gilbert had been indicted and had obtained counsel. It was held in an auditorium used for that purpose by the Los Angeles police. Some ten to thirteen prisoners were placed on a lighted stage. The witnesses were assembled in a darkened portion of the room, facing the stage and separated from it by a screen. They could see the prisoners but could not be seen by them. State and federal officers were also present and one of them acted as 'moderator' of the proceedings.

"Each man in the lineup was identified by number, but not by name. Each man was required to step forward into a marked circle, to turn, presenting both profiles as well as a face and back view, to walk, to put on or take off certain articles of clothing. When a man's number was called and he was directed to step into the circle, he was asked certain questions: where he was picked up, whether he owned a car, whether, when arrested, he was armed, where he lived. Each was also asked to repeat certain phrases, both in a loud and in a soft voice, phrases that witnesses to the crime had heard the robbers use: 'Freeze, this is a stick up; this is a holdup; empty your cash drawer; this is a heist; don't anybody move.'

"Either while the men were on the stage, or after they were taken from it, it is not clear which, the assembled witnesses were asked if there were any that they would like to see again, and told that if they had doubts, now was the time to resolve them. Several gave the numbers of men they wanted to see, including Gilbert's. While the other prisoners were no longer present, Gilbert and 2 or 3 others were again put through a similar procedure. Some of the witnesses asked that a particular prisoner say a particular phrase, or walk a particular way. After the lineup, the witnesses talked to each other; it is not clear that they did so during the lineup. They did, however, in each other's presence, call out the numbers of men they could identify."

At the guilt stage, after the first witness, a cashier of the savings and loan, identified Gilbert in the courtroom, defense counsel moved out of the presence of the jury to strike her testimony on the ground that she identified Gilbert at the pretrial lineup conducted in the absence of counsel in violation of the Sixth Amendment made applicable to the States by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335. He requested a hearing outside the presence of the jury to present evidence supporting his claim that her in-court identification was, and others to be elicited by the State from other eyewitnesses would be, "predicated at least in large part upon their identification or purported identification of Mr. Gilbert at the showup \* \* \*." The trial judge denied the motion as premature. Defense counsel then elicited the fact of the cashier's lineup identification on cross-examination and again moved to strike her identification testimony. Without passing on the merits of the Sixth Amendment claim, the trial judge denied the motion on the ground that, assuming a violation, it would not in any event entitle Gilbert to suppression of the in-court identification. Defense counsel thereafter elicited the fact of lineup identifications from two other eyewitnesses who on direct examination identified Gilbert in the courtroom. Defense counsel unsuccessfully objected at the penalty stage, to the testimony of the eight witnesses to the other robberies that they identified Gilbert at the lineup.

The admission of the in-court identification without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error. *United States v. Wade*, ante. We there held that a post indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup. However, as in *Wade*, the record does not permit an informed judgment whether the in-court identifications at the two stages of the trial had an independent source. Gilbert is therefore entitled only to a vacation of his conviction pending the holding of such proceedings as the California Supreme Court may deem appropriate to afford the State the opportunity to establish that the in-court identifications had an independent source, or that their introduction in evidence was in any event harmless error.

Quite different considerations are involved as to the admission of the testimony of the manager of the apartment house at the guilt phase and of the eight witnesses at the penalty stage that they identified Gilbert at the lineup.<sup>8</sup> That testimony is the direct result of the illegal lineup "come at by exploitation of [the primary] illegality." *Wong Sun v. United States*, 371 U.S. 471, 488. The State is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability

<sup>8</sup> There is a split among the States concerning the admissibility of prior extrajudicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR 2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial. See 5 ALR 2d Later Case Service 1225-1228. That is the California rule. In *People v. Gould*, 54 Cal. 2d 921, 626, 354 P. 2d 865, 867, the Court said:

"Evidence of an extrajudicial identification is admissible, not only to corroborate an identification made at the trial (*People v. Slobodion*, 81 Cal. 2d 555, 560 [101 P. 2d 1]), but as independent evidence of identity. Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached \* \* \*, evidence of an extrajudicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind \* \* \*. The failure of the witness to repeat the extrajudicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at trial for cross-examination."

New York deals with the subject in a statute. See N.Y. Code Crim. Proc. § 378-b.

of excluding relevant evidence. Cf. *Mapp v. Ohio*, 367 U.S. 643. That conclusion is buttressed by the consideration that the witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial. Therefore, unless the California Supreme Court is "able to declare a belief that it was harmless beyond a reasonable doubt," *Chapman v. California*, 386 U.S. 18, 24, Gilbert will be entitled on remand to a new trial or, if no prejudicial error is found on the guilt stage but only in the penalty stage, to whatever relief California law affords where the penalty stages must be set aside.

The judgment of the California Supreme Court and the conviction are vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

*It is so ordered.*

THE CHIEF JUSTICE joins this opinion except for Part III, from which he dissents for the reasons expressed in the opinion of MR. JUSTICE DOUGLAS.

#### APPENDIX

Photographs of Gilbert introduced at the guilt stage of the trial had been viewed by eyewitnesses within hours after the robbery and murder. Officers had entered his apartment without a warrant and found them in an envelope on the top of a bedroom dresser. The envelope was of the kind customarily used in delivering developed prints, with the words "Marlboro Photo Studio" imprinted on it. The officers entered the apartment because of information given by an accomplice which led them to believe that one of the suspects might be inside the apartment. Assuming that the warrantless entry into the apartment was justified by the need immediately to search for the suspect, the issue remains whether the subsequent search was reasonably supported by those same exigent circumstances. If the envelope were come upon in the course of a search for the suspect, the answer might be different from that where it is come upon, even though in plain view, in the course of a general, indiscriminate search of closets, dressers, etc., after it is known that the occupant is absent. Still different considerations may be presented where officers, pursuing the suspect, find that he is absent from the apartment but conduct a limited search for suspicious objects in plain view which might aid in the pursuit. The problem with the record in the present case is that it could reasonably support any of these factual conclusions upon which our constitutional analysis should rest, and the trial court made no findings on the scope of search. The California Supreme Court, which had no more substantial basis upon which to resolve the conflict than this Court, stated that the photos were come upon "while the officers were looking through the apartment for their suspect \* \* \*." As will appear, a contrary conclusion is equally as reasonable.

(1) Agent Schlatter testified that immediately upon entering the apartment which he put at "approximately 1:05," the officers made a quick search for the occupant, which took at most a minute, and that the continued presence of the officers became "a matter of stake-out under the assumption that the person or persons involved would come back." He testified that the officer who found the photographs, Agent Crowley, had entered the apartment with him. Agent Schlatter's testimony might support the California Supreme Court's view of the scope of search; (2) Agent Crowley testified that he arrived within five minutes after Agent Schlatter, "around 1:30, give or take a few minutes either way," that the apartment had already been searched for the suspects, and that he was instructed "to look through the apartment for anything we could find that we could use to identify or continue the pursuit of this person without conducting a detailed search." Crowley's further testimony was that the search, pursuant to which the photos were found, was limited in this manner, and that he merely inspected objects in plain sight which would aid in identification. He stated that a detailed search for guns and money was not conducted until after a warrant had issued over three hours later. (3) Agent Townsend said he arrived at the apartment "sometime between perhaps 1:30 and 2:00," and that "well within an hour" he, Agent Crowley, another agent and a local officer conducted a detailed search of the bedroom. He stated that they "looked through the bedroom closet and dresser and I think \* \* \* the headstand." A substantial sum of money was found in the dresser. Townsend could not "specifically say" whether Crowley was in the bedroom at the time the money was found. This testimony

might support a finding that the officers were engaged in a general search of the bedroom at the time the photos were found.

The testimony of the agents concerning their time of arrival in the apartment is not inconsistent with any of the three possible conclusions as to the scope of search. Taking Townsend's testimony together with Crowley's, it can be concluded that the two arrived at about the same time. Agent Schlatter's testimony that Crowley arrived with him at 1:10, however, supports a conclusion that Crowley had begun his activities before Townsend arrived. Then there is the testimony of Agent Kiel, who did not enter the apartment, that he obtained the photos while talking with the landlady "approximately 1:25 to 1:30," about the same time that both Crowley and Townsend testified they arrived. In sum, the testimony concerning the timing of the events surrounding the search is both approximate and itself contradictory.

Supreme Court of the United States

No. 223.—October Term, 1966

JESSE JAMES GILBERT, PETITIONER

v.

STATE OF CALIFORNIA

*On Writ of Certiorari to the Supreme Court of California*

[June 12, 1967]

MR. JUSTICE DOUGLAS, concurring.

While I agree with the Court's opinion except for Part I,\* I would reverse and remand for a new trial on the search and seizure point. The search of the petitioner's home is sought to be justified by the doctrine of "hot pursuit," even though the officers conducting the search knew that petitioner, the suspected criminal, was not at home.

At about 10:30 a.m. on January 3, a California bank was robbed by two armed men; a police officer was killed by one of the robbers. Another officer shot one of the robbers, Weaver, who was captured a few blocks from the scene of the crime. Weaver told the police that he had participated in the robbery and that a person known to him as "Skinny" Gilbert was his accomplice. He told the officers that Gilbert lived in Apartment 28 of "a Hawaiian sounding named apartment house" on Los Feliz Boulevard. This information was given to the Federal Bureau of Investigation and was broadcast to a field agent, Kiel, who was instructed to find the apartment. Kiel located the "Lanai," an apartment on Los Feliz Boulevard, at about 1 p.m., informed the radio control, and engaged the apartment manager in conversation. While they were talking, a man gave a key to the manager and told her that he was going to San Francisco for a few days. Agent Kiel learned from the manager that Flood, one of the two men who had rented Apartment 28 the previous day, was the man who had just turned in the key and left by the rear exit. The agent ran out into the alleyway but saw no one.

In the meantime, the federal officers learned from Weaver that Gilbert was registered under the name of Flood. They also learned that three men many have been involved in the robbery—the two who entered the bank and a third driving the getaway car. About 1:10 p.m., additional federal agents arrived at the apartment, in response to agent Kiel's radio summons. Kiel told them that the resident of Apartment 28 was a Robert Flood who had just left. The agents obtained a key from the manager, entered the apartment and searched for a person or a hiding place for a person. They found no one. But they did find an envelope containing pictures of petitioner; the pictures were seized and shown to bank employees for identification. The agents also found a notebook containing a diagram of the area surrounding the bank, a clip from an automatic pistol, and a bag containing rolls of coins bearing the marking of the robbed bank. On the basis of this information, a search warrant was issued, and the

\*On that phase of the case I agree with MR. JUSTICE BLACK and MR. JUSTICE FORTAS.

automatic clip, notebook, and coin rolls were seized. Petitioner was arrested in Pennsylvania on February 26. The evidence seized during the search of his apartment was introduced in evidence at his trial for murder.

The California Supreme Court justified the search on the ground that the police were in hot pursuit of the suspected bank robbers. The entry of the apartment was lawful. The subsequent search and seizure were lawful since the officers were trying to further identify suspects and to facilitate continued pursuit. 63 Cal. 2d 690, 47 Cal. Rptr. 909.

I have set forth the testimony relating to the search more fully in the Appendix to this opinion. For the reasons stated there, I cannot agree that "the facts do not appear with sufficient clarity to enable us to decide" the serious question presented.

Since the search and seizure took place without a warrant, it can stand only if it comes within one of the narrowly defined exceptions to the rule that a search and seizure must rest upon a validly executed search warrant. See, e.g., *United States v. Jeffers*, 342 U.S. 48, 51; *Jones v. United States*, 357 U.S. 493; *Rios v. United States*, 364 U.S. 253, 261; *Stoner v. California*, 376 U.S. 483, 486. One of these exceptions is that officers having probable cause to arrest may enter a dwelling to make the arrest and conduct a contemporaneous search of the place of arrest "in order to find and seize things connected with the crime as its fruits or as the means by which it is committed, as well as weapons and other things to effect an escape from custody." *Agnello v. United States*, 269 U.S. 20, 30. This, of course, assumes that an arrest has been made, and that the search "is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest" *Stoner v. California*, *supra*, at 486. In this case, the exemption is not applicable since the arrest was made many days after the search and at a location far removed from the search.

Here, the officers entered the apartment, searched for petitioner and did not find him. Nevertheless, they continued searching the apartment and seized the pictures; the inescapable conclusion is that they were searching for evidence linking petitioner to the bank robbery, not for the suspected robbers. The court below said that, having legally entered the apartment, the officers "could properly look through the apartment for anything that could be used to identify the suspects or to expedite the pursuit." 63 Cal. 2d, at 707; 47 Cal. Rptr., at 916.

Prior to this case, police could enter and search a house without a warrant only incidental to a valid arrest. If this judgment stands, the police can search a house for evidence, even though the suspect is not arrested. The purpose of the search is, in the words of the California Supreme Court, "limited to and incident to the purpose of the officers' entry"—that is, to apprehend the suspected criminal. Under that doctrine, the police are given license to search for any evidence linking the homeowner with the crime. Certainly such evidence is well calculated "to identify the suspects," and will "expedite the pursuit" since the police can then concentrate on the person whose home has been ransacked.

Affirmance on the search and seizure point violates another limitation, which concededly the ill-starred decision in *Harris v. United States*, 331 U.S. 145, flouted, viz., that a general search for evidence, even when the police are in "hot pursuit" or have a warrant of arrest, does not make constitutional a general search of a room or of a house (*United States v. Lefkowitz*, 285 U.S. 452, 463-464). If it did, then the police, acting without a search warrant, could search more extensively than when they have a warrant. For the warrant must, as prescribed by the Fourth Amendment, "particularly" describe the "things to be seized." As stated by the Court in *United States v. Lefkowitz*, *supra*, p. 464:

"The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

Indeed, if at the very start, there had been a search warrant authorizing the seizure of the automatic clip, notebook, and coin rolls, the envelope containing pictures of petitioner could not have been seized. "The requirement that warrants shall particularly describe the things to be seized \* \* \* prevents the seizure of one thing under a warrant describing another. As to what is to be taken,

nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196.

The modern police technique of ransacking houses, even to the point of seizing their entire content as was done in *Kremen v. United States*, 353 U.S. 346, is a shocking departure from the philosophy of the Fourth Amendment. For the kind of search conducted here was indeed a general search. And if the Fourth Amendment was aimed at any particular target it was aimed at that. When we take that step, we resurrect one of the deepest-rooted complaints that gave rise to our Revolution. As the Court stated in *Boyd v. United States*, 116 U.S. 616, 625:

"The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book'; since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'

I would not allow the general search to reappear on the American scene.

#### APPENDIX

As the Court notes, there is some confusion in the record respecting the timing of events surrounding the search and the breadth of purpose with which the search was conducted. The confusion results from the testimony of the agents involved.

Agent Kiel testified that Agents Schlatter and Onsgard arrived at the apartment at about 1:10 and entered the apartment a minute or two after their arrival. Kiel received the photographs from Agent Schlatter between 1:25 and 1:30.

Agent Schlatter testified that he, Agent Onsgard and some local police arrived at the apartment about 1:05 and that Agent Crowley and one or two local police officers arrived in another car at the same time. Schlatter briefly talked to Kiel and the apartment manager and then entered the apartment. Upon entering he saw no one. He "made a very fast search of the apartment for a person or a hiding place of a person and \* \* \* found none." This search took "a matter of seconds or a minute at the outside" and "[a]fter we had searched for a person or persons, and no one was there, it then became a matter of a stake-out under the assumption that the person or persons involved would come back." It "seem[ed] to [Schlatter that] an agent had [the photograph] in his hand," when he first saw it, that it "was in the hands of an agent or officers," and Schlatter had "a vague recollection that [the agent or officer told him he had found it] in the bedroom. \* \* \*" There were a number of photographs. Schlatter took the photographs out to Kiel and instructed him to take one of them to the savings and loan and see if anyone there could recognize the photograph. Schlatter testified that he was in the apartment for about 30 minutes after making the search and left other agents behind when he left.

Agent Crowley testified that he entered the apartment "around 1:30, give or take a few minutes either way" and that he would say that the other officers had been in the apartment less than five minutes before he entered. He believed that "the officers and the other agent who had been with [him] at the rear of the building when the first entry was made, entered with [him]." When Crowley entered the apartment it "had already been searched for people." He received "instructions \* \* \* to look through the apartment for anything we could find that we could use to identify or continue the pursuit of this person without conducting a detailed search." In the bedroom, on the dresser, Crowley saw an envelope bearing the name "Marlboro Photo Studio"; it appeared to him to be an envelope containing photos and he could see that there was something inside. Crowley opened the envelope and saw several copies of photographs. He discussed the matter with "Onsgard who was in charge in the building and he instructed [Crowley] to give it to another agent for him to utilize in pursuing the investigation, and [he] was reasonably certain that that agent was Schlatter." This was about 1:30 according to Crowley. In the course of his search which turned up the photographs, Crowley "turned over [items] to see what was on the reverse, such as business cards, sales slips from local stores, that sort of item which might have been folded and would appear to possibly contain in-

formation of value to pursuit." He relayed the information obtained in this manner to the man coordinating the operation. Crowley remained in the apartment until the next morning.

Agent Townsend testified that he arrived at the apartment "sometime between perhaps 1:30 and 2:00." Within an hour of his arrival, he began a search. Townsend testified that he, Agent Crowley, another agent and a local officer "looked through the bedroom closet and dresser and I think \* \* \* the headstand." This was after it was known that no one, other than agents and police officers, was in the apartment. Townsend stated that the agents and officers were "[i]n and out of the bedroom," that he found money in the bedroom dresser about an hour after he arrived in the apartment, and that he could not "specifically say" whether Crowley was there at that time.

Thus, there is some conflict regarding the times at which the events took place and with respect to the nature of the searches conducted by the various officers. The way I read the record, however, it is not in such a state "that the facts do not appear with sufficient clarity to enable us to decide" the question presented. Crowley's testimony that he came upon the photographs while searching "for anything \* \* \* that we could use to identify or continue the pursuit" stands uncontradicted, as does his testimony that the apartment had already been searched for a person prior to his search uncovering the photographs. Schlatter's testimony that the operation "became a matter of a stake-out" after the unsuccessful search for a person does not contradict Crowley's testimony. A search for identifying evidence is certainly compatible with a "stake-out." And Crowley best knew what he was doing when he discovered the photographs. Nor does Townsend's testimony that he and others, perhaps including Crowley, conducted a detailed search conflict with Crowley's testimony. First, the record indicates that the detailed search was conducted after the photographs had been found. According to the testimony of Kiel and Schlatter, Schlatter gave the photographs to Kiel at about 1:30; according to Townsend, he arrived sometime between 1:30 and 2. Second, even if the detailed search took place before Crowley found the photographs and Crowley participated in that search, that does not indicate that Crowley's search which turned up the photographs was more limited than Crowley claimed. If anything, it would indicate that his search was more general than he stated. Finally, Townsend's testimony as to the general search does not conflict with Schlatter's testimony that the operation became a "stake-out" after the suspect was not found. As I have said, a "stake-out" does not preclude a detailed search for evidence. And, the record indicates that Schlatter was not in the apartment when Townsend and the others conducted the detailed search.

The way I read the record, the photographs were discovered in the course of a general search for evidence. But even if Crowley is not believed and his testimony relating to the nature of his search is thrown out and it is simply assumed that he came upon the envelope in the course of a search for the suspect, there was no reason to pry into the envelope and seize the pictures—other than to obtain evidence. An envelope would contain neither the suspect nor the weapon.

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Supreme Court of the United States

No. 223.—October Term, 1968

JESSE JAMES GILBERT, PETITIONER

v.

STATE OF CALIFORNIA

*On Writ of Certiorari to the Supreme Court of California*

[June 12, 1967]

MR. JUSTICE BLACK, concurring in part and dissenting in part.

Petitioner was convicted of robbery and murder partially on the basis of handwriting samples he had given to the police while he was in custody without counsel and partially on evidence that he had been identified by eyewitnesses at a lineup identification ceremony held by California officers in a Los Angeles auditorium without notice to his counsel. The Court's opinion shows that the officers took Gilbert to the auditorium while he was a prisoner, formed a lineup of Gilbert and other persons, required each one to step forward, asked them certain questions, and required them to repeat certain phrases, while eyewitnesses to this

and other crimes looked at them in efforts to identify them as the criminals. At his trial, Gilbert objected to the handwriting samples and to the identification testimony given by witnesses who saw him at the auditorium lineup on the ground that the admission of this evidence would violate his Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel. It is well-established now that the Fourteenth Amendment makes both the Self-incrimination Clause of the Fifth Amendment and the Right-to-counsel Clause of the Sixth Amendment obligatory on the States. See e.g., *Malloy v. Hogan*, 378 U.S. 1; *Gideon v. Wainwright*, 372 U.S. 355.

## I

(a) Relying on *Schmerber v. California*, 384 U.S. 757, the Court rejects Gilbert's Fifth Amendment contention as to both the handwriting exemplars and the lineup identification. I dissent from that holding. For reasons set out in *United States v. Wade*, ante, as well as for reasons set out in my dissent to *Schmerber*, 384 U.S. at 773, I think that case wholly unjustifiably detracts from the protection against compelled self-incrimination the Fifth Amendment was designed to afford. It rests on the ground that compelling a suspect to submit to or engage in conduct the sole purpose of which is to supply evidence against himself nonetheless does not compel him to be a witness against himself. Compelling a suspect or an accused to be "the source of real or physical evidence \* \* \*," so says *Schmerber*, 384 U.S., at 764, is not compelling him to be a witness against himself. Such an artificial distinction between things that are in reality the same is in my judgment wholly out of line with the liberal construction which should always be given to the Bill of Rights. See *Boyd v. United States*, 116 U.S. 616.

(b) The Court rejects Gilbert's right-to-counsel contention in connection with the handwriting exemplars on the ground that the taking of the exemplars "was not a 'critical' stage of the criminal proceedings entitling petitioner to the assistance of counsel." In all reality, however, it was one of the most "critical" stages of the government proceedings that ended in Gilbert's conviction. As to both the State's case and Gilbert's defense, the handwriting exemplars were just as important as the lineup and perhaps more so, for handwriting analysis, being, as the Court notes, "scientific and systematic," may carry much more weight with the jury than any kind of lineup identification. The Court, however, suggests that absence of counsel when handwriting exemplars are obtained will not impair the right of cross-examination at trial. But just as nothing said in our previous opinions "links the right of counsel only to protection of Fifth Amendment rights," *United States v. Wade*, ante, at —, nothing has been said which justifies linking the right to counsel only to the protection of other Sixth Amendment rights. And there is nothing in the Constitution to justify considering the right to counsel as a second-class, subsidiary right which attaches only when the Court deems other specific rights in jeopardy. The real basis for the Court's holding that the stage of obtaining handwriting exemplars is not "critical," is its statement that "there is minimal risk that the absence of counsel might derogate his right to a fair trial." The Court considers the "right to a fair trial" to be the overriding "aim of the right to counsel," *United States v. Wade*, ante, at —, and somehow believes that this Court has the power to balance away the constitutional guarantee of right to counsel when the Court believes it unnecessary to provide what the Court considers a "fair trial." But I think this Court lacks constitutional power thus to balance away a defendant's absolute right to counsel which the Sixth and Fourteenth Amendments guarantee him. The Framers did not declare in the Sixth Amendment that a defendant is entitled to a "fair trial," nor that he is entitled to counsel on the condition that this Court thinks there is more than a "minimal risk" that without a lawyer his trial will be "unfair." The Sixth Amendment settled that a trial without a lawyer is constitutionally unfair, unless the court-created balancing formula has somehow changed it. *Johnson v. Zerbst*, 304 U.S. 458, and *Gideon v. Wainwright*, 372 U.S. 335, I thought finally established the right of an accused to counsel without balancing of any kind.

The Court's holding here illustrates the danger to Bill of Rights guarantees in the use of words like a "fair trial" to take the place of the clearly specified safeguards of the Constitution. I think it far safer for constitutional rights for this Court to adhere to constitutional language like "the accused shall \* \* \* have the Assistance of Counsel for his defence" instead of substituting the words not mentioned, "the accused shall have the assistance of counsel only if the Supreme Court thinks it necessary to assure a fair trial." In my judgment the guarantees of the Constitution with its Bill of Rights provide the kind of "fair trial" the Framers sought to protect. Gilbert was entitled to have the "assistance

"of counsel" when he was forced to supply evidence for the Government to use against him at his trial. I would reverse the case for this reason also.

## II

I agree with the Court that Gilbert's case should not be reversed for state error in admitting the pretrial statement of an accomplice which referred to Gilbert. But instead of squarely rejecting petitioner's reliance on the dissent in *Della Paoli v. United States*, 352 U.S. 232, 246, the Court avoids the issue by pointing to the fact that the California Supreme Court, even assuming the error to be a federal constitutional one, applied a harmless-error test which measures up to the one we subsequently enunciated in *Chapman v. California*, 386 U.S. 18. And the Court then goes on to suggest that the California Supreme Court may desire to reconsider whether that is so upon remand.

I think the Court should clearly indicate that neither *Della Paoli* nor *Chapman* have any relevance here. *Della Paoli* rested on the admissibility of evidence in federal, not state, courts. The introduction of evidence in state courts is exclusively governed by state law unless its introduction would violate some federal constitutional provision and there is no such federal provision here. See *Spencer v. Texas*, 385 U.S. 554. That being so, any error in admitting the accomplice's pretrial statement is only an error of state law, and *Chapman*, providing a federal constitutional harmless-error rule, has absolutely no relevance here. Instead of looking at the harmless-error test applied by the California Supreme Court in order to ascertain whether it comports with *Chapman*, I would make it clear that this Court is leaving to the States their unbridled power to control their own state courts in the absence of conflicting federal constitutional provision.

## III

One witness who identified Gilbert at the guilt stage of his trial and eight witnesses who identified him at the penalty stage testified on direct examination that they had identified him in the auditorium lineup. I agree with the Court that the admission of this testimony was constitutional error and that Gilbert is entitled to a new trial unless the state courts, applying *Chapman*, conclude that this error was harmless. However, these witnesses also identified Gilbert in the courtroom and two other witnesses at the guilt stage identified him solely in the courtroom. As to these, the Court holds that "the admission of the in-court identification without first determining that they were not the fruit of the illegal lineup was constitutional error." I dissent from this holding in this case and in *Wade v. United States*, post, for the reasons there given.

For the reasons here stated, I would vacate the judgment of the California Supreme Court and remand for consideration of whether the admission of the handwriting exemplars and the out-of-court lineup identification was harmless error.\*

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\*The Court dismisses as improvidently granted the Fourth Amendment search and seizure question raised by Gilbert in this case. I dissent from this, because I would decide that question against Gilbert. However, since the Court refuses to decide that question, I see no reason for expressing my views at length.

## Supreme Court of the United States

No. 223.—October Term, 1966

JESSE JAMES GILBERT, PETITIONER

v.

STATE OF CALIFORNIA

*On Writ of Certiorari to the Supreme Court of California*

[June 12, 1967]

Mr. JUSTICE WHITE, whom Mr. JUSTICE HARLAN and Mr. JUSTICE STEWART join, concurring in part and dissenting in part.

I concur in Parts I, II, and III of the Court's opinion, but for the reasons stated in my dissenting opinion in *United States v. Wade*, — U. S. —, I dissent from Part IV of the Court's opinion and would therefore affirm the judgment of the Supreme Court of California.

## Supreme Court of the United States

No. 223.—October Term, 1968

JESSE JAMES GILBERT, PETITIONER

v.

STATE OF CALIFORNIA

*On Writ of Certiorari to the Supreme Court of California*

[June 12, 1967]

Mr. JUSTICE FORTAS, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I concur in the result—the vacating of the judgment of the California Supreme Court and the remand of the case—but I do not believe that it is adequate. I would reverse and remand for a new trial on the additional ground that petitioner was entitled by the Sixth and Fourteenth Amendments to be advised that he had a right to counsel before and in connection with his response to the prosecutor's demand for a handwriting exemplar.

1. The giving of the handwriting exemplar is a "critical stage" of the proceeding, as my Brother BLACK states. It is a "critical stage" as much as is a lineup. See *United States v. Wade*, *ante*. Depending upon circumstances, both may be inoffensive to the Constitution, totally fair to the accused, and entirely reliable for the administration of justice. On the other hand, each may be constitutionally offensive, totally unfair to the accused, and prejudicial to the ascertainment of truth. An accused whose handwriting exemplar is sought needs counsel: Is he to write "Your money or your life?" Is he to emulate the holdup note by using red ink, brown paper, large letters, etc.? Is the demanded handwriting exemplar, in effect, an inculpation—a confession? Cf. the eloquent arguments as to the need for counsel, in the Court's opinion in *United States v. Wade*, *ante*.

2. The Court today appears to hold that an accused may be compelled to give a handwriting exemplar. Cf. *Schmerber v. California*, 384, U. S. 757 (1966). Presumably, he may be punished if he adamantly refuses. Unlike blood, handwriting cannot be extracted by a doctor from an accused's veins while the accused is subjected to physical restraint, which *Schmerber* permits. So presumably, on the basis of the Court's decision, trial courts may hold an accused in contempt and keep him in jail—indefinitely—until he gives a handwriting exemplar.

This decision goes beyond *Schmerber*. Here the accused, in the absence of any warning that he has a right to counsel, is compelled to cooperate, not merely to submit; to engage in a volitional act, not merely to suffer the inevitable consequences of arrest and state custody; to take affirmative action which may not merely identify him, but tie him directly to the crime. I dissented in *Schmerber*. For reasons stated in my dissent in *United States v. Wade*, *ante*, I regard the extension of *Schmerber* as impermissible.

In *Wade*, the accused, who is compelled to utter the words used by the criminal in the heat of his act, has at least the comfort of counsel—even if the Court denies that the accused may refuse to speak the words—because the compelled utterance occurs in the course of a lineup. In the present case, the Court deprives him of even his source of comfort and whatever protection counsel's ingenuity could provide in face of the Court's opinion. This is utterly insupportable, in my respectful opinion. This is not like fingerprinting, measuring, photographing—or even blood-taking. It is a process involving the use of discretion. It is capable of abuse. It is in the stream of inculpation. Cross-examination can play only a limited role in offsetting false inference or misleading coincidence from a "stacked" handwriting exemplar. The Court's reference to the efficacy of cross-examination in this situation is much more of a comfort to an appellate court than a source of solace to the defendant and his counsel.

3. I agree with the Court's condemnation of the lineup identifications here and the consequent in-court identifications, and I join in this part of its opinion. I would also reverse and remand for a new trial because of the use of the handwriting exemplar which was unconstitutionally obtained in the absence of advice to the accused as to the availability of counsel. I could not conclude that the violation of the privilege against self-incrimination implicit in the facts relating to the exemplar was waived in the absence of advice as to counsel. *In the Matter of Gault*, — U.S. —, — (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966).

## SUPREME COURT OF THE UNITED STATES

No. 254.—October Term, 1966.

THEODORE STOVALL, PETITIONER

v.

WILFRED DENNO, WARDEN

*On Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

[Juno 12, 1967]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This federal habeas corpus proceeding attacks collaterally a state criminal conviction for the same alleged constitutional errors in the admission of allegedly tainted identification evidence that were before us on direct review of the convictions involved in *United States v. Wade*, *ante*, and *Gilbert v. California*, *ante*. This case therefore provides a vehicle for deciding the extent to which the rules announced in *Wade* and *Gilbert*—requiring the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel—are to be applied retroactively. See *Linkletter v. Walker*, 381 U. S. 618; *Tchan v. Shott*, 382 U. S. 406; *Johnson v. New Jersey*, 384 U. S. 710.<sup>1</sup> A further question is whether in any event, on the facts of the particular confrontation involved in this case, petitioner was denied due process of law in violation of the Fourteenth Amendment. Cf. *Davis v. North Carolina*, 384 U. S. 737.

Dr. Paul Behrendt was stabbed to death in the kitchen of his home in Garden City, Long Island, about midnight August 23, 1961. Dr. Behrendt's wife, also a physician, had followed her husband to the kitchen and jumped at the assailant. He knocked her to the floor and stabbed her 11 times. The police found a shirt on the kitchen floor and keys in a pocket which they traced to petitioner. They arrested him on the afternoon of August 24. An arraignment was promptly held but was postponed until petitioner could retain counsel.

Mrs. Behrendt was hospitalized for major surgery to save her life. The police, without affording petitioner time to retain counsel, arranged with her surgeon to permit them to bring petitioner to her hospital room about noon of August 25, the day after the surgery. Petitioner was handcuffed to one of five police officers who, with two members of the staff of the District Attorney, brought him to the hospital room. Petitioner was the only Negro in the room. Mrs. Behrendt identified him from her hospital bed after being asked by an officer whether he "was the man" and after petitioner repeated at the direction of an officer a "few words for voice identification." None of the witnesses could recall the words that were used. Mrs. Behrendt and the officers testified at the trial to her identification of the petitioner in the hospital room, and she also made an in-court identification of petitioner in the courtroom.

Petitioner was convicted and sentenced to death. The New York Court of Appeals affirmed without opinion, 13 N. Y. 2d 1084, 196 N. E. 2d 65. Petitioner *pro se* sought federal habeas corpus in the District Court for the Southern District of New York. He claimed that among other constitutional rights allegedly denied him at his trial, the admission of Mrs. Behrendt's identification testimony violated his rights under the Fifth, Sixth, and Fourteenth Amendments because he had been compelled to submit to the hospital room confrontation without the help of counsel and under circumstances which unfairly focussed the witness' attention on him as the man believed by the police to be the guilty person. The District Court dismissed the petition after hearing argument on an unrelated claim of an alleged invalid search and seizure. On appeal to the Court of Appeals for the Second Circuit a panel of that court initially reversed the dismissal after reaching the issue of the admissibility of Mrs. Behrendt's identification evidence and holding it inadmissible on the ground that the hospital room identification violated petitioner's constitutional right to the assistance of counsel. The Court of Appeals thereafter heard the case *en banc*, vacated the panel decision, and affirmed the District Court, 355 F. 2d 731. We granted certiorari, 384 U. S. 1000, and set the case for argument with *Wade* and *Gilbert*. We hold that *Wade* and

<sup>1</sup> Although respondents did not raise the bar of retroactivity, the Attorney General of the State of New York, as *amicus curiae*, extensively briefed the issue of retroactivity and petitioner, in his reply brief, addressed himself to this question. Compare *Mapp v. Ohio*, 367 U. S. 643, 646, n. .

*Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date. The rulings of *Wade* and *Gilbert* are therefore inapplicable in the present case. We think also that on the facts of this case petitioner was not deprived of due process of law in violation of the Fourteenth Amendment. The judgment of the Court of Appeals is, therefore, affirmed.

## I

Our recent discussions of the retroactivity of other constitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. *Linkletter v. Walker*, *supra*; *Tehan v. Shott*, *supra*; *Johnson v. New Jersey*, *supra*. "These cases establish the principle that in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective \* \* \* where the exigencies of the situation require such an application' \* \* \*." *Johnson, supra*, 384 U.S., at 726-727. The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards. "[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Johnson, supra*, at 728.

*Wade* and *Gilbert* fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel. A conviction which rests on a mistaken identification is a gross miscarriage of justice. The *Wade* and *Gilbert* rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial. Does it follow that the rules should be applied retroactively? We do not think so.

It is true that the right to the assistance of counsel has been applied retroactively at stages of the prosecution where denial of the right must almost invariably deny a fair trial, for example, at the trial itself, *Gideon v. Wainwright*, 372 U.S. 335, or at some forms of arraignment, *Hamilton v. Alabama*, 368 U.S. 52, or on appeal, *Douglas v. California*, 372 U.S. 353. "The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan v. Shott*, *supra*, at 416. We have also retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial. See for example *Jackson v. Denno*, 378 U.S. 368. Although the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." *Johnson v. New Jersey*, *supra*, at 728-729. The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a "question of probabilities," *Ibid.* Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice.

We have outlined in *Wade* the dangers and unfairness inherent in confrontations for identification. The possibility of unfairness at that point is great, both because of the manner in which confrontations are frequently conducted, and because of the likelihood that the accused will often be precluded from reconstructing what occurred and thereby from obtaining a full hearing on the identification issue at trial. The presence of counsel will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification. We have, therefore, concluded that the confrontation is a "critical stage," and that counsel is required at all confrontations. It must be recognized, however, that, unlike cases in which counsel is absent at trial or on appeal, it may confidently be assumed that confrontations for identification can be and often have been conducted in the absence of counsel with scrupulous fairness and without prejudice to the accused at trial. Therefore, while we feel that the exclusionary rules set forth in *Wade* and *Gilbert* are justified by the need to

assure the integrity and reliability of our system of justice, they undoubtedly will affect cases in which no unfairness will be present. Of course, we should also assume there have been injustices in the past which could have been averted by having counsel present at the confrontation for identification, just as there are injustices when counsel is absent at trial. But the certainty and frequency with which we can say in the confrontation cases that no injustice occurred differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situations as different in kind for the purpose of retroactive application, especially in light of the strong countervailing interests outlined below, and because it remains open to all persons to allege and prove, as Stovall attempts to do in this case, that the confrontation resulted in such unfairness that it infringed his right to due process of law. See *Palmer v. Peyton*, 359 F. 2d 199 (C.A. 4th Cir. 1966).

The unusual force of the countervailing considerations strengthen our conclusion in favor of prospective application. The law enforcement officials of the Federal Government and of all 50 States have heretofore proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification. Today's rulings were not foreshadowed in our cases; no court announced such a requirement until *Wade* was decided by the Court of Appeals for the Fifth Circuit, 358 F. 2d 577. The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury. Wall, *Eyewitness Identification in Criminal Case 38*. Law enforcement authorities fairly relied on this virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontations in the absence of counsel. It is, therefore, very clear that retroactive application of *Wade* and *Gilbert* "would seriously disrupt the administration of our criminal laws." *Johnson v. New Jersey*, *supra*, at 731. In *Tehan v. Shott*, *supra*, we thought it persuasive against retroactive application of the no-comment rule of *Griffin v. California*, 380 U.S. 609, that such application would have a serious impact on the six States that allowed comment on an accused's failure to take the stand. We said, "To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact on the administration of their criminal law so devastating as to need no elaboration." 382 U.S., at 419. That impact is insignificant compared to the impact to be expected from retroactivity of the *Wade* and *Gilbert* rules. At the very least, the processing of current criminal calendars would be disrupted while hearings were conducted to determine taint, if any, in identification evidence, and whether in any event the admission of the evidence was harmless error. Doubtless, too, inquiry would be handicapped by the unavailability of witnesses and dim memories. We conclude, therefore, that the *Wade* and *Gilbert* rules should not be made retroactive.

We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable. We recognize that *Wade* and *Gilbert* are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies,<sup>2</sup> and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law,<sup>3</sup> militate against denying *Wade* and *Gilbert* the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue.<sup>4</sup> But we regard

<sup>2</sup> Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907, 930-933 (1962).

<sup>3</sup> See Mishkin, Forward, The Supreme Court 1964 Term, 79 Harv. L. Rev. 56, 60-61 (1965).

<sup>4</sup> See Mishkin, n. 3, *supra*, at 61, n. 23; Bender, The Retroactive Effect of an Overruling Constitutional Decision: *Mapp v. Ohio*, 110 U. Pa. L. Rev. 650, 675-678 (1932); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719, 764 (1966).

the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

## II

We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. *Palmer v. Peyton*, 359 F. 2d 199 (C. A. 4th Cir. 1966). The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.<sup>8</sup> However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative. The Court of Appeals, *en banc*, stated, 355 F. 2d, at 735,

"Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, 'He is not the man' could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station lineup, which Stovall now argues he should have had, was out of the question."

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

MR. JUSTICE DOUGLAS is of the view that the deprivation of the right to counsel in the setting of this case should be given retroactive effect as it was in *Gideon v. Wainwright*, 372 U.S. 335, and *Douglas v. California*, 372 U.S. 356, and see *Linkletter v. Walker*, 381 U.S. 618, 640 (dissenting opinion); *Johnson v. New Jersey*, 384 U.S. 719, 736 (dissenting opinion).

MR. JUSTICE FORTAS would reverse and remand for a new trial on the ground that the State's reference at trial to the improper hospital identification violated petitioner's Fourteenth Amendment rights and was prejudicial. We could not reach the question of retroactivity of *Wade* and *Gilbert*.

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Supreme Court of the United States

No. 254.—October Term, 1966

THEODORE STOVALE, PETITIONER

v.

WILFRED DENNO, WARDEN

*On Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

[June 12, 1967]

MR. JUSTICE WHITE, whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, concurring in the result.

For the reasons stated in my dissenting opinion in *United States v. Wade*, — U.S. —, I perceive no constitutional error in the identification procedure to which the petitioner was subjected. I concur in the result and in that portion of the Court's opinion which limits application of the new Sixth Amendment rule.

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<sup>8</sup> See Wall, *Eyewitness Identification in Criminal Cases* 26–40; Paul, *Identification of Accused Persons*, 12 Aust. L.J. 42, 44 (1988); Williams & Hammelmann, *Identification Parades*, Part I, [1963] Crim. L. Rev. 480–481; Frankfurter, *The Case of Sacco and Vanzetti* 31–32.

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[June 12, 1967]

MR. JUSTICE BLACK, dissenting.

In *United States v. Wade*, *ante*, and *Gilbert v. California*, *ante*, the Court holds that lineup identification testimony should be excluded if it was obtained by exhibiting an accused to identifying witnesses before trial in the absence of his counsel. I concurred in those holdings as to out-of-court lineup identification on the ground that the right to counsel is guaranteed in federal courts by the Sixth Amendment and in state courts by the Sixth and Fourteenth Amendments. The first question in this case is whether other defendants, already in prison on such unconstitutional evidence, shall be accorded the benefit of the rule. In this case the Court holds that the petitioner here, convicted on such unconstitutional evidence, must remain in prison, and that besides Wade and Gilbert, who are "chance beneficiaries," no one can invoke the rule except defendants exhibited in lineups in the future. I dissent from that holding. It keeps people serving sentences who were convicted through the use of unconstitutional evidence. This is sought to be justified on the ground that retroactive application of the holding in *Gilbert* and *Wade* would somehow work a "burden on the administration of justice" and would not serve the Court's purpose "to deter law enforcement authorities." It seems to me that to deny this petitioner and others like him the benefit of the new rule deprives them of a constitutional trial and perpetuates a rank discrimination against them. Once the Court determines what the Constitution says, I do not believe it has the power, by weighing "countervailing interests," to legislate a timetable by which the Constitution's provisions shall become effective. For reasons stated in my dissent in *Linkletter v. Walker*, 381 U.S. 618, 640, I would hold that the petitioner here and every other person in jail under convictions based on unconstitutional evidence should be given the advantage of today's newly announced constitutional rules.

The Court goes on, however, to hold that even though its new constitutional rule about the Sixth Amendment's right to counsel cannot help this petitioner, he is nevertheless entitled to a consideration of his claim, "independent of any right to counsel claim," that his identification by one of the victims of the robbery was made under circumstances so "unfair" that he was denied "due process of law" guaranteed by the Fourteenth Amendment. Although the Court finds petitioner's claim without merit, I dissent from its holding that a general claim of "unfairness" at the lineup is "open to all persons to allege and prove." The term "due process of law" is a direct descendant of Magna Charta's promise of a trial according to the "law of the land" as it has been established by the lawmaking agency, constitutional or legislative. No one has ever been able to point to a word in our constitutional history that shows the Framers ever intended that the Due Process Clause of the Fifth or Fourteenth Amendment was designed to mean any more than that defendants charged with crimes should be entitled to a trial governed by the laws, constitutional and statutory, that are in existence at the time of the commission of the crime and the time of the trial. The concept of due process under which the Court purports to decide this question, however, is that this Court looks at "the totality of circumstances" of a particular case to determine on its own judgment whether they comport with the Court's notion of decency, fairness, and fundamental justice, and if so, declares they comport with the Constitution, and if not, declares they are forbidden by the Constitution. See, e.g., *Rochin v. United States*, 342 U.S. 165. Such a constitutional formula substitutes this Court's judgment of what is right for what the Constitution declares

shall be the supreme law of the land. This due process notion proceeds as though our written Constitution, designed to grant limited powers to government, had neutralized its limitations by using the Due Process Clause to authorize this Court to override its written limiting language by substituting the Court's view of what powers the Framers should have granted government. Once again I dissent from any such view of the Constitution. Where accepted, its result is to make this Court not a Constitution-interpreter, but a day-to-day Constitution-maker.

But even if the Due Process Clause could possibly be construed as giving such latitudinal powers to the Court, I would still think the Court goes too far in holding that the courts can look at the particular circumstances of each identification lineup to determine at large whether they are too "suggestive and conducive to irreparable mistaken identification" to be constitutional. That result is to freeze as constitutional or as unconstitutional the circumstances of each case, giving the States and the Federal Government no permanent constitutional standards. It also transfers to this Court power to determine what the Constitution should say, instead of performance of its undoubted constitutional power to determine what the Constitution does say. And the result in this particular case is to put into a constitutional mould a rule of evidence which I think is plainly within the constitutional powers of the States in creating and enforcing their own criminal laws. I must say with all deference that for this Court to hold that the Due Process Clause gives it power to bar state introduction of lineup testimony on its notion of fairness, not because it violates some specific constitutional prohibition, is an arbitrary, wholly capricious action.

I would not affirm this case but would reverse and remand for consideration of whether the out-of-court lineup identification of petitioner was, under *Chapman v. California*, — U.S. —, harmless error. If it was not, petitioner is entitled to a new trial because of a denial of the right to counsel guaranteed by the Sixth Amendment which the Fourteenth Amendment makes obligatory on the States.

**Senator McCLELLAN.** Now, the Chair has in mind to advise the members present that we do not have permission to sit while the Senate is in session. However, we have a few minutes of the morning hour. I intend to continue for another 15 or 20 minutes. And at that time I will recess until tomorrow morning.

**Senator HART.** I wonder if you could modify that, even to permit your leaving and let Senator Ervin preside? In order to sit during the morning hour we do not require permission.

**Senator McCLELLAN.** I was going to sit another few minutes, I may say to Members of the Senate present that I was not scheduled to preside this morning. I had no notice of it until just a few minutes before I came in here. I had other plans which I sacrificed, rearranged, or deferred. I do recall that this afternoon at some time—I have forgotten the hour—there is a Democratic caucus.

**Senator TYDINGS.** That is at 3:30, Mr. Chairman.

**Senator McCLELLAN.** You also have a conference being scheduled and I just wondered about the propriety of trying to hold hearings this afternoon. I understand that Chairman Eastland sent his request to adjourn over until tomorrow morning.

We will proceed for a few minutes more.

**Senator ERVIN.** The reason I am conducting this examination is because I have a solemn responsibility as a Member of the Senate in passing on and determining whether or not I shall vote for the confirmation of the nominee to the Supreme Court. My personal opinion is, and I say it with reluctance, but I say it because I believe it to be true, that the road to destruction of constitutional government in the United States is being paved by the good intentions of the judicial

activists, who, all too often, constitute a majority of the Supreme Court. A judicial activist, in my book, is a man who has good intentions but who is unable to exercise the self-restraint which is inherent in the judicial process when it is properly understood and applied, and who is willing to add to the Constitution things that are not in it and to subtract from the Constitution things which are in it. I am much concerned, because the easiest way to destroy the Constitution of the United States is to have it manned by judges who will not exercise judicial self-restraint. As Chief Justice Stone said, the members of the Supreme Court have the power under the Constitution to restrain the President and the Congress in their actions, but there is really no power on earth to restrain the members of the Supreme Court in their action except their own self-restraint.

That is not exactly his words, but that is the substance of what he said.

Senator HART. Mr. Chairman, could I inquire of the Senator from North Carolina if this concludes his interrogation of the witness, subject only to the development of other aspects?

Senator ERVIN. I think this is the last question I will ask of this nominee.

Senator HART. Thank you.

Senator McCLELLAN. Mr. Nominee, may I ask you this question? I want to develop this one point, and I will hurry on, because I know others want to question.

Something that gives me a little concern—this does not pertain to you directly any more than to other members of the Court. We regard Supreme Court decisions interpreting the Constitution as being the law of the land; do we not?

Judge MARSHALL. Yes, sir.

Senator McCLELLAN. Whatever they say the Constitution is, we insist that is the law of the land?

Judge MARSHALL. I think that is correct; yes, sir.

Senator McCLELLAN. And we hold, too, that all citizens should be amenable to the law of the land?

Judge MARSHALL. Absolutely.

Senator McCLELLAN. Now, do you feel that that applies to everybody except Supreme Court Justices?

Judge MARSHALL. I think that the Supreme Court Justices must be more responsive to their oath than any other judge because of that.

Senator McCLELLAN. Then how can they consistently overrule a former decision holding an act constitutional or an act unconstitutional and then say they have been amenable to the law of the land?

Judge MARSHALL. I believe, if you are speaking of stare decisis as such, that the Supreme Court and every member of it has a responsibility, when there is a decision that is up for reconsideration, a sort of a flag to slow down and take a real good look and realize what you are actually doing.

Senator McCLELLAN. Then may I ask you, Do you feel that they are free to reverse previous decisions that involve constitutional questions?

Judge MARSHALL. Yes, they are free to do it.

Senator McCLELLAN. If you feel they are free, would you have any hesitancy in overruling the *Miranda* decision when it came up for consideration if you became convinced that that decision was wrong?

Judge MARSHALL. If I became convinced that the *Miranda* decision was wrong, I would, of course, vote my conscience, which would say yes.

Senator McCLELLAN. Then the previous court decision does not bind you, although it is the law of the land?

Judge MARSHALL. It binds the Supreme Court as well as it binds everybody else in the land.

Senator McCLELLAN. That is an inconsistency, is it not? Is that not an inconsistency? I have to obey it because the Supreme Court says so, but tomorrow, when you reconsider that decision, in your capacity you do not have to conform to it; you can overrule it and you can change the law of the land. Is that not so?

Judge MARSHALL. I think that is the job of the Supreme Court.

Senator McCLELLAN. To change the law of the land?

Judge MARSHALL. No, sir. You did not let me finish. I think—

Senator McCLELLAN. I do not think so. I think it is indulging it too frequently and too often.

Judge MARSHALL. But, Senator—

Senator McCLELLAN. I think that changing the law of the land in the fashion it is doing it is bringing chaos and confusion to our system of justice. One judge—I think it is Judge Lumbard—

Judge MARSHALL. Chief Judge Lumbard.

Senator McCLELLAN. Yes, Chief Judge Lumbard testified before another subcommittee of this committee, the Subcommittee on Criminal Laws and Procedures that today when he is trying a criminal case, he feels like he is in a topsy-turvy world because he does not know what the law is and what the Supreme Court is going to say it may be, and he is absolutely in a state of confusion. The correspondence and testimony received by that subcommittee shows that Judge Lumbard's feeling is shared by many courts of the land.

It is a tragic situation. The instability, the unreliability on what the Court said yesterday as being the law of today.

Judge MARSHALL. I can say this, Senator: No. 1, I hope you do not interpret me to say it is the duty of the Court to reverse decisions. It is the duty of the Court to keep stability of the law.

Senator McCLELLAN. To what?

Judge MARSHALL. To keep stability of the law.

Senator McCLELLAN. How do you keep it when one year you hold one thing in the Court and next year hold something else? Is there any stability in that?

Judge MARSHALL. It happens often in the exact same Court.

Senator McCLELLAN. That is not stability, is it? You do not interpret that as stability, do you?

Judge MARSHALL. Yes, sir.

Senator McCLELLAN. Then your interpretation and definition of the word "stability" is that one day it is one thing and another day it is something else.

Judge MARSHALL. You would not need the Supreme Court any more.

Senator McCLELLAN. Unless it reversed itself?

Judge MARSHALL. Sir?

Senator McCLELLAN. Except that it reverses itself you would not need it?

Judge MARSHALL. No, sir; I think the Constitution as a living document needs somebody to interpret it.

Senator McCLELLAN. But once you interpret it, it becomes the law of the land, when the Supreme Court interprets it. You admitted that.

Judge MARSHALL. Yes, sir.

Senator McCLELLAN. Now you say you can change the interpretation at will and give it another interpretation.

Judge MARSHALL. Yes, sir; and that becomes the law of the land.

Senator ERVIN. If the gentleman will yield, I am always intrigued by this statement that the Constitution is a living document and, therefore, must change. That statement does not mean to me that the Constitution is a living document; it means that the Constitution is dead and we are ruled by the personal notions of the temporary occupants of the Supreme Court.

Judge MARSHALL. I do not agree with your constantly referring to the Judges' personal views.

Senator McCLELLAN. I have concluded for the moment. I yield to you gentlemen.

Senator HART. Just this comment, that also involved here is a realization that the assignment of the Court is not the pursuit of certainty but of justice, and sometimes justice requires overruling of previous decisions.

Senator McClellan.

Senator McCLELLAN. Will the Senator yield?

Senator HART. Yes.

Senator McCLELLAN. Can you make any justice out of turning a criminal loose because some policeman failed to give him a lawyer?

Senator HART. If he is found to be a criminal by reason of ignoring the constitutional safeguards, yes; just as we say we do not like the rack because—

Senator McCLELLAN. Why not punish the officer who violated the Constitution instead of turning the criminal loose?

Senator HART. I am for both.

Senator ERVIN. I think the beautiful words inscribed over the Supreme Court Building say "Equal Justice Under the Law," not justice according to the personal notions of the temporary occupants of the building.

Senator McCLELLAN. Very well, gentlemen.

Do you have any questions, Senator?

Senator HART. No.

Senator McCLELLAN. Then we are recessed until 10:30 tomorrow morning.

(Whereupon, at 12:30 p.m. the subcommittee recessed to reconvene at 10:30 a.m., Wednesday, July 19, 1967.)

## NOMINATION OF THURGOOD MARSHALL

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WEDNESDAY, JULY 19, 1967

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The committee met, pursuant to call at 10:45 o'clock a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland (presiding), McClellan, Ervin, Hart, Kennedy, Tydings, and Thurmond.

Also present: John H. Holloman, chief clerk.

The CHAIRMAN. The committee will come to order.

Judge—

### STATEMENT OF HON. THURGOOD MARSHALL, SOLICITOR GENERAL OF THE UNITED STATES—Resumed

Judge MARSHALL. Yes, sir.

The CHAIRMAN (continuing). Do you think the Supreme Court is an instrument of social change?

Judge MARSHALL. Do I think that the Supreme Court is undergoing a social change? No, sir.

The CHAIRMAN. And you don't think that a judge, a Justice of the Supreme Court, should be controlled by his own personal opinions—

Judge MARSHALL. I don't think any judicial officer should be—

The CHAIRMAN (continuing). In rendering a decision?

Judge MARSHALL. I don't think any judicial officer should.

The CHAIRMAN. Now, the American Bar News—you know what the American Bar News is?

Judge MARSHALL. Yes, sir.

The CHAIRMAN. Volume 11, No. 5, dated May 15, 1966, gives some quotations from you at a speech which they said was made by you at the University of Miami on Law Day, 1966.

Did you make a speech at the University of Miami on Law Day?

Judge MARSHALL. Yes, sir; I made a speech in 1965. It was the University of Miami and the bar association, whole group together.

The CHAIRMAN. You are quoted in this article as having said that your concern was not with those who "resist any change in the status quo with fury," but those "whose criticism of recent Supreme Court doctrine stems from a more intellectual level."

You are quoted as having stated that this "intellectual or professional criticism reflects a profound element of misunderstanding. It reflects a refusal to accept a new concept of law, to shake free of the

19th century moorings and to view law, not as a set of abstract and socially unrelated commands of the sovereign, but as effective instruments of social policy."

Judge MARSHALL. Now, did you make that statement?

Judge MARSHALL. I think that's accurate—

The CHAIRMAN. Yes.

Judge MARSHALL (continuing). As I remember it.

The CHAIRMAN. Well, then, doesn't that reflect that—isn't the meaning of that that the U.S. Supreme Court is an instrument and should be an instrument of social change?

Judge MARSHALL. I don't think I was talking about the Supreme Court. I was talking about the people in general and especially the bar.

The CHAIRMAN. I see.

Judge MARSHALL. The lawyers of the bar.

The CHAIRMAN. Now, you have stated that you have no objection to telling the committee about your judicial philosophy.

I wish you would state your philosophy of the Constitution of the United States and the general principles which will guide you in your interpretation thereof.

Judge MARSHALL. Well, I would make my every effort to read the Constitution of the United States, to read it all, and to apply it to the facts as I get them with emphasis on applying the law to the facts without regard to any personal predilections one way or the other.

The CHAIRMAN. And do you agree that you can't have any—that the Constitution of the United States meant in the 19th century just what it means in the 20th century?

Judge MARSHALL. The words means the same; yes, sir.

The CHAIRMAN. In deciding cases will you make a selection between constitutional principle based on your own sense of right and wrong?

Judge MARSHALL. Well, my own sense of right and wrong is the Constitution itself.

The CHAIRMAN. In other words, what you say is that you would follow the real meaning of the Constitution of the United States as you see it?

Judge MARSHALL. As I interpret it as an individual, after careful study of the briefs and argument and the consultation with the other members of the Court in conference.

The CHAIRMAN. Will you decide cases on the basis of asking yourself the question, "Is this a fair proposition?"

Judge MARSHALL. Not my own—I would—let me put it this way, Senator.

I would hope that my own ideas of fairness are based entirely on the Constitution, and I would not under any circumstances find—where the Constitution says this and my "personal feelings" say that, I would go with the Constitution. I am obliged to.

The CHAIRMAN. You would go with this.

Judge MARSHALL. Sir?

The CHAIRMAN. You would go with what you said is this, the Constitution.

Judge MARSHALL. The Constitution, absolutely.

The CHAIRMAN. Now, you have been in al ot of institutions in the Southern States.

Judge MARSHALL. Yes, sir.

The CHAIRMAN. Are you prejudiced against white people in the South?

Judge MARSHALL. Not at all. I was brought up, what I would say way up South in Baltimore, Md. And I worked for white people all my life until I got in college. And from there most of my practice, of course, was in the South, and I don't know, with the possible exception of one person that I was against in the South, that I have any feeling about them.

The CHAIRMAN. Now, if you are approved, you will give people in that area of the country and the States in that area of the country the same fair and square treatment that you give people in other areas of the country?

Judge MARSHALL. No question whatsoever.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Judge Marshall, in view of the fact that your law practice, for the many years, before you came with the Federal Government, was concerned with the 13th and 14th amendments, primarily, I would like to ask you some questions in your area of expertise.

Do you know who drafted the 13th amendment to the U.S. Constitution?

Judge MARSHALL. No, sir; I don't remember. I have looked it up time after time, but I just don't remember.

Senator THURMOND. Do you know from what provision of the prior law the language of this amendment was copied?

Judge MARSHALL. I do not.

Senator THURMOND. Of what legal significance is it that this amendment was copied from a prior legal provision?

Judge MARSHALL. I don't know which prior legal provision you are talking about, Senator.

Senator THURMOND. Turning to the provision of the 13th amendment forbidding involuntary servitude, are you familiar with any pre-1860 cases which interpreted this language?

Judge MARSHALL. Well, Senator, I might say, frankly, I don't know of any case I had that involved the 13th amendment. My research on it would be very limited, on the 13th amendment.

Senator THURMOND. Does the provision against involuntary servitude, in your view, abolish all compulsory labor for the benefit of a private person, and if not, what limitations would you read into this language, and on what legal basis would you establish such limitation?

Judge MARSHALL. If such a question came before me, I would research the background of the 13th amendment, the language of the 13th amendment, and apply it to the facts. I haven't had an opportunity to do that.

Senator THURMOND. Do you agree with an article by Prof. Alfred Avins in the Cornell Law Quarterly of 1964 that the provision against involuntary servitude in the 13th amendment prevents either Federal or State legislation which requires any person to render personal services to any other private person, whether the refusal to render such services is motivated by racial or religious discrimination or for any other reason, and if you do not agree with this view, why do you

think that the provision against involuntary servitude does not forbid legislation requiring personal services?

Judge MARSHALL. I am not familiar with the article, and I am not at this time ready to give an opinion because I haven't researched it.

Senator THURMOND. What kind of legislation would, in your estimation, be forbidden by the provision against involuntary servitude?

Judge MARSHALL. I don't know.

Senator THURMOND. Are you familiar with the initial difficulties in obtaining a two-thirds vote in the House of Representatives in favor of the proposal of the 13th amendment?

Judge MARSHALL. No, sir.

Senator THURMOND. What is the significance, if there is any in your view, in the interpretation of the 13th amendment, that it was first rejected by the House of Representatives, which did not have a two-thirds Republican majority, and finally proposed only because of a switch of votes of a group of Union Democrats?

Judge MARSHALL. I am not familiar with whether the facts are correct, and I have no opinion on it.

Senator THURMOND. Do you believe that the Civil Rights Act of 1866 was constitutional before the ratification of the 14th amendment?

Judge MARSHALL. I am in the middle on that. I researched that when the school cases were up, and I consider it unimportant because the amendment was adopted and they were reenacted. But there was an argument made that—that your statement was true. It was made on the floor of the Congress.

Senator THURMOND. Under what legal theories was the constitutionality of the Civil Rights Act of 1866 supported by its proponents?

Judge MARSHALL. I think it was based on the 13th amendment, if I remember correctly. I could be wrong. That I don't remember. My last real digging on that was more than 10 years ago.

Senator THURMOND. To what extent was the constitutionality of this act supported by reference to the privileges and immunities clause of article IV, section 2 of the original Constitution?

Judge MARSHALL. It was argued.

Senator THURMOND. I didn't catch your answer.

Judge MARSHALL. It was so argued on the floors of Congress.

Senator THURMOND. What theories were then current in the Republican Party which gave support to the position that the Civil Rights Act of 1866 could be constitutionally passed by Congress to enforce the privileges and immunities clause of article IV, section 2 of the original Constitution?

Judge MARSHALL. I don't remember.

Senator THURMOND. Of what significant do you believe it is that in deciding the constitutional basis of the Civil Rights Act of 1866, Congress copied the enforcement provisions of this legislation from the fugitive slave law of 1850?

Judge MARSHALL. Senator, I just don't remember those debates, which were very voluminous, and I have not looked at them and have not researched that point since either 1953 or 1954. I have not been called upon to do so.

Senator THURMOND. Does the case of *Prigg v. Pennsylvania*, handed down in 1842, cited by the Republicans in 1866 in support of the con-

stitutionality of the Civil Rights Act of 1866, help us in assessing the basis for the constitutionality of this bill?

Judge MARSHALL. I don't know. I do know that the constitutionality of those bills had been litigated over and over again, and they have been found to be constitutional. And if I was called on again, I would do additional research and make up my mind and vote accordingly.

Senator THURMOND. What constitutional difficulties did Representative John Bingham of Ohio see, or what difficulties do you see, in congressional enforcement of the privileges and immunities clause of article IV, section 2 through the necessary and proper clause of article I, section 8?

Judge MARSHALL. I don't understand the question.

Senator THURMOND. What constitutional difficulties did Representative John Bingham of Ohio see, or what difficulties do you see, in congressional enforcement of the privileges and immunities clause of article IV, section 2, through the necessary and proper clause of article I, section 8?

Judge MARSHALL. I don't see that any—

Senator KENNEDY. Could we just have some further clarification so all of us can benefit? I really don't understand the question myself. I was just wondering if the Senator, so we could all benefit from both the question and response, if we could have some further clarification of the question, because I really am confused as to what actually you are driving at, and I would like to hear the answer of the person that is called upon to answer.

Senator THURMOND. Well, I repeated the question twice. Would you like me to repeat it again?

Senator KENNEDY. I thought rather than repeating the question maybe there was some other way that you could arrive at it.

Senator THURMOND. I don't think I can make it any plainer, if you know the answer.

Senator KENNEDY. I see.

Senator THURMOND. It is just a question of whether you know the answer.

Senator KENNEDY. I see. Could you tell us how the Solicitor is—

Senator THURMOND. Well, I could tell you that article IV, section 2, did not set forth the powers vested in the United States. That's the answer.

Senator KENNEDY. That's the answer. I see. [Laughter.]

The CHAIRMAN. Let's have order. Proceed.

Senator THURMOND. What did the term "civil rights" mean in 1866, and what rights were included thereby?

Judge MARSHALL. The rights included in the phrase "civil rights" in 1866 meant the rights that were considered civil rights at that time. The delineation of them is not clear as of this day.

Senator THURMOND. Anything else you wish to add to that?

Judge MARSHALL. No, sir.

Senator THURMOND. What provisions of the Slave Codes in existence in the South before 1860 was Congress desirous of abolishing by the civil rights bill of 1866?

Judge MARSHALL. Well, as I remember, the so-called Black Codes ranged from a newly freed Negro not being able to own property or

vote to a statute in my home State of Maryland which prevented these Negroes from flying kites.

Senator THURMOND. Is there anything else you wish to add?

Judge MARSHALL. No, sir.

Senator THURMOND. Now, on the 14th amendment, what committee reported out the 14th amendment and who were its members?

Judge MARSHALL. I don't know, sir.

Senator THURMOND. Why do you think the framers of the original version of the first section of the 14th amendment added the necessary and proper clause from article I, section 8, to the privileges and immunities clause of article IV, section 2?

Judge MARSHALL. I don't know, sir.

Senator THURMOND. What purpose did the framers have, in your estimation, in referring to the incident involving former Representative Samuel Hoar in Charleston, S.C., in December 1844, as showing the need for the enactment of the original version of the 14th amendment's first section?

Judge MARSHALL. I don't know, sir.

Senator THURMOND. Why do you think the framer said that if the privileges and immunities clause of the 14th amendment had been in the original Constitution the war of 1860-65 could not have occurred?

Judge MARSHALL. I don't have the slightest idea.

Senator THURMOND. Why do you think the equal protection clause of the original draft of the first section of the 14th amendment required equal protection in the rights of life, liberty, and property only?

Judge MARSHALL. I don't know.

Senator THURMOND. Did you understand that question?

Judge MARSHALL. Yes, sir.

Senator THURMOND. What objections were made to the original draft of the first section of the 14th amendment in February 1866, which caused the framer to redraft it into its present form?

Judge MARSHALL. I don't know.

Senator THURMOND. In the Congressional Globe, 39th Congress, first session, at page 1065, on February 27, 1866, the following colloquy is found in reference to the original draft of the first section of the 14th amendment, and I quote:

Mr. HALE . . . this amendment is intended to apply solely to the eleven States lately in rebellion, so far as any practical benefit to be derived from it is concerned. The gentleman from Ohio can correct me if I am again in error.

Mr. BINGHAM . . . It is to apply to other States also that have in their constitutions and laws today provisions in direct violation of every principle of our Constitution.

Mr. ROGERS . . . I suppose the gentleman refers to the State of Indiana?

Mr. BINGHAM . . . I do not know, it may be so. It applies unquestionably to the State of Oregon.

Now, what were the constitutional provisions of Indiana and Oregon which it was the purpose of the framer of the first section of the 14th amendment to override; and why did the framer say the Oregon constitution violated the U.S. Constitution as it then stood; and how would proposal and ratification of the first section of the 14th amendment, either in the original draft or the final draft, have overridden the Indiana and Oregon constitutions?

Judge MARSHALL. I don't know.

Senator THURMOND. Where do you believe the privileges and immunities clause of the 14th amendment was derived from?

Judge MARSHALL. Offhand, I am not sure. There was debate on both sides, and I am not certain. But I do remember considerable debate on it, but at this moment I don't remember.

Senator THURMOND. What do you think the framer's purpose was in including the privileges and immunities clause in the 14th amendment?

Judge MARSHALL. That point has been litigated, and I am not certain yet what the answer is.

Senator THURMOND. What do you believe the privileges and immunities of citizens of the United States are, which no State shall make or enforce any law abridging?

Judge MARSHALL. That would vary as to the particular facts. I wouldn't be able or capable of making any broad general guidelines on it. I would have to apply it as a particular case came up.

Senator THURMOND. Now, as to the due process and equal protection clauses, why do you think the word "citizen" was used in the privileges and immunities clause of the 14th amendment but the word "person" was used in the due process and equal protection clauses?

Judge MARSHALL. Well, the first section said that any person born or naturalized in the United States was a citizen of the United States and the State wherein he resides, so "person" and "citizen" became pretty close. It said any person born—I mean I do not have this verbatim, but it says any person born or naturalized in the United States is a citizen of the United States and the State wherein he resides, which was the first place in the Constitution to give citizenship on a U.S. basis.

Senator THURMOND. Anything else you wish to say on that?

Judge MARSHALL. No, sir.

Senator THURMOND. Do you think that the privileges and immunities clause was meant by the framers to encompass greater rights, lesser rights, or different rights than the due process and equal protection clauses, and which rights were intended to be embodied in each of the clauses which differs from the other?

Judge MARSHALL. I am unable to give an opinion as to an abstract question of that type.

Senator THURMOND. Do you understand the question?

Judge MARSHALL. I understand it; yes, sir.

Senator THURMOND. From what provision existing before 1866 was the due process clause of the 14th amendment copied, and what was the purpose of copying it?

Judge MARSHALL. I don't know.

Senator THURMOND. In the equal protection clause, what is the reason for limiting equal protection to persons within the jurisdiction of the State?

Judge MARSHALL. I don't know any reason for that. It applies to everybody in the United States.

Senator THURMOND. What do the words "protection of the laws" mean, and how do they differ, if at all, from the words "benefit of the laws" or "rights granted by law" or "privileges granted by law"?

Judge MARSHALL. That point recurs every term of every court in the country, and I don't know the metes and bounds of that either.

Senator THURMOND. Well, would you give us the Supreme Court's interpretation of that?

Judge MARSHALL. The Supreme Court has interpreted it over and over again, and they have applied it to each individual case.

Senator THURMOND. Are you satisfied with that answer?

Judge MARSHALL. I am satisfied with my answer.

Senator THURMOND. On March 7, 1870, the framer of the equal protection clause said, as reported in the Congressional Globe, 41st Congress, second session, at page 1747, that the equal protection clause requires States to grant the equal protection of the law, not of its law, not of the law of the State, but of the law, the great law of the Republic, found in the written Constitution of the fathers.

Do you believe that this statement is reconcilable with Supreme Court cases banning discrimination in State law, and if so, how would you reconcile this statement with decisions forbidding discrimination in State laws rendered since 1954?

Judge MARSHALL. Well, Senator, I would respectfully request that I not be asked to comment on broad general principles of law apparently or allegedly decided by the Supreme Court period.

Senator THURMOND. Well, probably you would not like for me to propound any questions to you, but as an appointee by the President, I think as a Senator who has to advise and consent, I have a responsibility to do this.

Judge MARSHALL. I appreciate that, Senator, and I respectfully request that you appreciate my position of not prejudging lawsuits before I am sent them.

Senator THURMOND. During the argument in *Katzenbach v. Morgan* in the U.S. Supreme Court you stated, and I quote:

I was also most interested, since some have been delving into these debates, that the equal protection clause was for the purpose of protecting Chinese people in San Francisco—and I don't believe I remember a single one of the cases that interpreted the Fourteenth Amendment from Slaughterhouse through *Plessy v. Ferguson* that have had anything to say about the Chinese in San Francisco. To the contrary, this court says over and over again what the purpose of the equal protection clause was for—to protect the newly freed slaves.

Do you still believe your statement to be correct?

Judge MARSHALL. Yes, sir.

Senator THURMOND. In introducing the 14th amendment into the House of Representatives, Representative Thaddeus Stevens of Pennsylvania, declared, and I quote:

This proposition is not all that the committee desire. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion.

On June 13, 1866, Stevens added that the amendment contained, and I quote, "I am bound to admit, the omission of many better things." He added: "I do not pretend to be satisfied with it."

Stevens also said:

Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition? I answer, because I live among men and not among angels; among men as intelligent, as determined, and as independent as myself, who, not agreeing with me, do not choose to yield their opinion to mine. Mutual concession, therefore, is our only resort, or mutual hostilities.

Why do you think that Stevens was so dissatisfied with the 14th amendment?

Judge MARSHALL. I don't know, sir.

Senator THURMOND. Now, do you believe that the Bill of Rights has been made applicable to the States by way of the 14th amendment, and if so, through which clause of the 14th amendment?

Judge MARSHALL. Well, I think individually, not as a whole, but sections of the Bill of Rights have been taken into the 14th amendment to be applied to the States. And, of course, it would be under article—I mean section 1.

Senator THURMOND. How much of the Bill of Rights has been made applicable to the States?

Judge MARSHALL. I am not certain as of the present time just how much. But certainly, in recent years certain have been clearly applied to the States.

Senator THURMOND. On April 11, 1862, Representative John A. Bingham, of Ohio, speaking of the privileges and immunities clause of article IV, section 2, which provides the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, declared, and I quote:

The Constitution does not read, as I have heard it quoted upon this floor, that the citizens of each State should be entitled to the privileges and immunities of citizens of the several States. No, sir, the word used in the Constitution in this clause is not of, but in, the several States. "All privileges and immunities of citizens of the United States in the several States" is what is guaranteed by the Constitution. There is an ellipsis in the Constitution, as gentlemen doubtless know, which must be supplied to express clearly its meaning.

This is from the Congressional Globe of the 37th Congress, second session, page 1639.

Now, do you think that this asserted ellipsis in the privileges and immunities clause of article IV, section 2 of the Constitution has any relevance to the question of incorporation of the Bill of Rights in the 14th amendment by its framer, and if so, what relevance does it have?

Judge MARSHALL. I fail to see the relevance at all.

Senator THURMOND. Do you believe that the first section of the 14th amendment protects the right to vote, and if so, which clause of this amendment do you believe was intended to protect political rights?

Judge MARSHALL. If I may restrict my answer to the right to vote, the first section of the 14th amendment has been construed to prevent a State from setting up voting regulations which discriminate against any group of people. The broad right against discrimination is, of course, in the 15th amendment, but the equal protection clause has been recognized by Congress as protecting the individual against a State law which does not give equal protection in the State's voting qualification requirements.

Senator THURMOND. Would you care to answer now which clause of this amendment do you believe was intended to protect political rights?

Judge MARSHALL. I don't think any of them were intended to protect political rights, because I am not certain as to what are political rights. I said if you mean the right to vote, I can answer that. But I don't know what political rights are.

Senator THURMOND. On February 11, 1859, as reported in the Congressional Globe, 35th Congress, second session, page 985, Representative John A. Bingham, of Ohio, said, and I quote:

This Government rests upon the absolute equality of natural rights amongst men. There is not, and cannot be, any equality in the enjoyment of political or conventional rights, because that is impossible. . . . No sane man ever seriously proposed political equality to all, for the reason that it is impossible.

On April 11, 1862, Bingham added, and I quote:

The right to vote does not involve the right to citizenship. Neither are the rights of men or citizens to protection under the law dependent upon the right of suffrage in them. Are not children natural-born citizens of the United States? Are not they entitled to protection as citizens everywhere in all the States of the Union?

Now, do you believe that these passages are relevant to interpreting the scope of the equal protection clause as originally understood and intended by the framers in regard to the right to vote?

Judge MARSHALL. I agree that they are relevant, but not controlling.

Senator THURMOND. In 1862, the laws of Ohio barred Negroes from voting, intermarrying with white persons, or attending school with white children. On April 11, 1862, Bingham was asked what rights Negroes had under Ohio law, and in particular, whether they could vote or engage in miscegenation. Bingham replied, and I quote:

The laws of Ohio fully provide for the protection of the right of every citizen of the United States, whether black or white.

Keeping in mind that Bingham was an experienced Ohio lawyer and legislator who had been at the bar for 20 years, and was talking about the statutes of his home State, do you find this remark relevant in interpreting the equal protection clause as it applies to the right to vote, enter desegregated schools, or engage in miscegenation?

Judge MARSHALL. I certainly agree that it's relevant, but certainly not controlling. All of this was litigated in the *Brown* case. Both sides, everybody, researched it. The Supreme Court found that there was nothing clearly derived from those debates.

Senator THURMOND. On June 8, 1866, Senator William P. Fessenden, of Maine, chairman on the part of the Senate of the Joint Committee of Fifteen, in Senate Report No. 112, 39th Congress, first session, submitted for the majority of the committee a report justifying the submission of a 14th article of amendments to the U.S. Constitution, before the 11 Southern States could be admitted to representation in Congress. This report called for the constitutional amendment to secure the civil rights of all citizens of the Republic. The report further declared, and I quote:

Doubts were entertained whether Congress had power, even under the amended Constitution, to prescribe the qualifications of voters in a State, or could act directly on the subject. It was doubtful. It was doubtful, in the opinion of your committee, whether the States would consent to surrender a power they had always exercised, and to which they were attached. . . . This—

Speaking of the amendment—

it was thought would leave the whole question with the people of each State, holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise.

Now, do you find this committee report to accompany the 14th amendment relevant to the question of whether it protects the right to vote?

Judge MARSHALL. I consider it relevant but by no means controlling.

Senator THURMOND. What do you think the term "civil rights" means in the foregoing report?

Judge MARSHALL. I don't know. I cannot at this time say what the Senator meant when he said "civil rights."

Senator THURMOND. On March 1, 1866, Representative James F. Wilson, chairman of the House Judiciary Committee, defined the term "civil rights" as follows, and I quote:

It provides for the equality of citizens of the United States in the enjoyment of "civil rights and immunities." What do these terms mean? Do they mean that in all things civil, social, or political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government. Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities. Well, what is the meaning? What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. The definition given to the term "civil rights" in Bouvier's Law Dictionary is very concise, and is supported by the best authority. It is this: "Civil rights are those which have no relation to the establishment, support, or management of government."

Now, do you think that this definition is helpful in defining the term "civil rights" as understood in 1866 and as embodied in the report of the committee which reported out the 14th amendment?

Judge MARSHALL. I consider it as relevant as being the statement of a chairman of a committee in voting out a bill, but not controlling.

And if I might be specific, he says there is no right to serve on juries. It was a very few years later, when the Supreme Court said certainly that right was included, just a few years later.

Senator THURMOND. On March 8, 1850, Senator Andrew P. Butler, a South Carolina Democrat and a lawyer, who was John C. Calhoun's colleague in the Senate, stated, and I quote:

A free man of color in South Carolina is not regarded as a citizen by her laws but he has high civil rights. His person and property are protected by law, and he can acquire property, and can claim the protection of the laws for their protection . . . but they are persons recognized by law, and protected by law.

Now, do you believe that this passage shows that the State of South Carolina, while a slave State, was the national leader in giving "civil rights" and "protection of the laws" to colored people, or does it show that these terms had a different meaning a century ago that the Supreme Court has recently given them?

Judge MARSHALL. Well, I don't agree that at that time South Carolina was the leader in giving Negroes their rights.

Senator THURMOND. On January 14, 1867, Representative John A. Bingham, of Ohio, who drafted the privileges and immunities, due process, and equal protection clauses of the 14th amendment, declared, and I quote:

It is a guaranteed right of every State in this Union to regulate for itself the elective franchise within its limits.

Bingham also said that a clause of the bill admitting Nebraska to statehood, which provided, and I quote, "there shall be no denial of the elective franchise or of any other right on account of race or color," was "in utter conflict with one of the provisions of the proposed constitutional amendment," referring to the second section of the new 14th amendment.

Now, do you find this relevant in determining whether Congress has any power to determine the qualifications for voting in the States?

Judge MARSHALL. I don't consider that relevant as to the constitutional power of Congress. That is to be determined by a court.

Senator THURMOND. Anything else you want to say?

Judge MARSHALL. No, sir.

Senator THURMOND. On January 27, 1869, Representative Bingham introduced the following proposed constitutional amendment, which was never enacted, and I quote:

No State shall make or enforce any law which shall abridge or deny to any male citizen of the United States, of sound mind, and over twenty-one years of age, the equal exercise of the elective franchise in such State wherein he shall have actually resided for a period of one year next preceding such election.

Now, do you find this relevant to a determination as to whether the 14th amendment was intended by its framer to give all citizens an equal vote at all elections?

Judge MARSHALL. I consider that relevant with the restriction that it is no more relevant than other, any other, legislation where provisions are proposed but not adopted.

Senator THURMOND. In section 4 of a bill reported on May 16, 1870, by Representative Bingham, of Ohio, then chairman of the House Judiciary Committee, to enforce both the 15th amendment and so much of article I as gives Congress power over the manner of elections of U.S. Representatives, Representative Bingham provided, and I quote:

That in case the constitution or law of any State shall require the assessment or payment of a tax as a qualification of an elector, if any officer or member or any court, or other body of officers authorized or required by the laws of such State to make or correct any assessment of persons or property for the purpose of such taxation, or authorized or required by the laws of such State to assess or levy any such tax, shall refuse or willfully neglect to assess or levy any such tax upon the person or property of any colored citizen of the United States he shall for every such offense be deemed guilty of a misdemeanor.

Now, in slightly altered form, this provision became part of the Enforcement Act of 1870, of which you said in your brief in *Katzenbach v. Morgan*, at page 37, and I quote:

Contemporaries, and many of them participants in the drafting of the Amendment, their understanding of the enforcement clause is entitled to deference.

Do you believe that this bill helps to understand whether the 14th amendment was intended to abolish poll taxes as a prerequisite for voting?

Judge MARSHALL. I think it is relevant but certainly not controlling.

Senator THURMOND. On February 9, 1869, when the proposed 15th amendment was on its way toward passage in the third session of the 40th Congress, the Senate, which included many Members who had voted for the 14th amendment, altered it to forbid discrimination based

on nativity, property, education, and creed. In spite of the endorsement of Representative Bingham, of Ohio, the House of Representatives rejected this proposed Senate amendment by a vote of 37 yeas to 133 noes, and the 15th amendment took the form it now has, banning discrimination based only on race, color, and previous condition of servitude.

Now, do you think that this fact is relevant to determine whether Congress has constitutional power to invalidate State-imposed literacy tests for voting under either the 14th or 15th amendments, and why?

Judge MARSHALL. I think that whether or not Congress has constitutional power to pass legislation is vested in the Constitution, and the body of authority to determine that is the U.S. Supreme Court.

Senator THURMOND. On January 20, 1870, the following colloquy occurred between Senator William Stewart, of Nevada, and Senator Jacob Howard, of Michigan. Both of these Senators were lawyers, both were former State attorneys general, both were Republican members of the Senate Judiciary Committee, and both had voted for the 14th and 15th amendments.

Mr. STEWART. We do not want the admission of the Senator from Michigan; it may come up in debate hereafter. Does he think a State can pass any law or make any device whereby ninety-nine hundredths of the black population can be disenfranchised? Would it not be in violation of the Constitution, so as to give Congress the power to interfere?

Mr. HOWARD. I know no clause in the Constitution of which it would be a violation. The States have exercised the power of controlling, regulating, and restricting popular suffrage from the commencement of the State governments down to the present time. It is one of the rights reserved to the States and is to be exercised in its fullness and in its plenitude without any control on the part of Congress or any question being put by Congress to them; and that will be the case until the fifteenth amendment shall have been adopted, that amendment relating only to color, race, and slavery, not to property, not to educational qualifications, or anything except these three specific subjects. I insist that as to the black population this fifteenth amendment is of very little value if the State sees fit to take away the right of suffrage by affixing property qualifications, or any qualifications whatever that do not relate to race, color, or slavery.

Now, do you think that this sheds light on whether Congress can abolish State-imposed literacy tests under the 14th amendment or 15th amendment, and why?

Judge MARSHALL. I don't think it sheds any light at all, and the reason I don't think it sheds any light is because the very, not the same Congress, but Congress did do just that, and so I don't know which Congress I would rely upon.

Senator THURMOND. How does the Supreme Court's decision in *United States v. Classic* affect the right of States to set qualifications for voting?

Judge MARSHALL. *The United States v. Classic* said that you could not discriminate in the primary elections. It was strictly on the question of a primary election, as to whether that was actually an election in *Classic*.

Senator THURMOND. On February 24, 1870, Senator Stewart, of Nevada, reported from the Senate Judiciary Committee, which included several Republicans, including himself, a bill to secure to all persons equal protection of the laws. This bill provided as follows:

*Be it enacted—*

And so forth—

That all persons within the jurisdiction of the United States, Indians not taxed excepted, shall have the same right in every State and Territory in the United States and to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactations of every kind and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person emigrating thereto from a foreign country which is not equally imposed and enforced upon every person emigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void.

Now, why do you think that the members of the Judiciary Committee who had voted for the 14th amendment reported a bill to enforce the equal protection clause which was thus limited to protection of existing rights?

Judge MARSHALL. I don't have any idea why they did it. I don't know their motives or their reasons.

Senator THURMOND. Now, a few questions on constitutional interpretation.

Do you believe that the Supreme Court is bound, in construing the Constitution, to refrain from amending it in the guise of interpreting it?

Judge MARSHALL. I agree.

Senator THURMOND. Do you agree that if the Constitution was intended by the framers, those who wrote it, to mean one thing, the Supreme Court is not entitled to hold that it means something else?

Judge MARSHALL. I would say I am in general agreement with that statement.

Senator THURMOND. Would you care to specify or explain any further?

Judge MARSHALL. Well, I would just say I am in general agreement.

Senator THURMOND. Do you think that the Supreme Court must adhere to the original understanding of the Constitution as set forth by its framers, or may it ignore the intent of the framers and hold that a provision of the Constitution means whatever the Court chooses to have it mean at the moment?

Judge MARSHALL. I don't agree with that statement at all, because I know of no instance where the Supreme Court has done what you said.

Senator THURMOND. Well, which way did you answer the question?

Judge MARSHALL. I don't agree with the end of your statement that the Supreme Court has a right to interpret the Constitution any way they see fit at that moment. I don't agree with that.

Senator THURMOND. So you do agree that they are bound to adhere to the original understanding of the Constitution as set forth by its framers?

Judge MARSHALL. As set forth by its framers, and I am not trying to get around the question. My point is that I take the position, which I think is contrary to what you intend in your question, that this is a living Constitution, and its—you can't expect the Court to apply the

Constitution to facts in 1967 that weren't in existence when the Constitution was drafted. That I think is how it differs.

Senator THURMOND. If the Court is bound by the intent of the framers, in what sources would you look to ascertain that intent?

Judge MARSHALL. The whole history of the adoption of the 14th amendment—I don't mean the 14th amendment—of the Constitution and the Bill of Rights, the whole history.

Senator THURMOND. Insofar as an amendment to the Constitution is concerned, to what sources would you look to ascertain the original intent of the framers?

Judge MARSHALL. I think you originally go to Congress, and from there you go to the several States.

Senator THURMOND. In what sources would you look to ascertain the intent of Congress in proposing an amendment?

Judge MARSHALL. To the Congressional Record.

Senator THURMOND. What do you think the relative value of congressional debates and State legislative debates are, in construing an amendment?

Judge MARSHALL. I think they are very relevant, and they are due the greatest of respect, but they are not controlling.

Senator THURMOND. Do you think that the Supreme Court is entitled to amend the original understanding by Congress of the 13th, 14th, and 15th amendments, to make them mean something other than they meant in 1865, 1866, or 1869, or are they bound by the original intent?

Judge MARSHALL. They are bound by the original intent, but the original intent is not restricted to what one Senator or one Congressman or one group, or one Congressman or Senator said in debate.

Senator THURMOND. Where would you find the original intent of the 13th, 14th, and 15th amendments?

Judge MARSHALL. From the historical writings that have come about, and, of course, primarily on the Globe.

Senator THURMOND. Now, Judge Marshall, I want to advert to the theory you propounded last week that the Constitution is a living document which does not have to be interpreted historically, but may be construed in accordance with the needs of the hour. The Constitution gives Congress the power to issue letters of reprisal in article I, section 8.

If your theory is followed, if Congress is not bound by the historical meaning of the clause, may Congress give the President authority to take reprisals on rioters, for example, by shooting them on sight?

Judge MARSHALL. Certainly not.

Senator THURMOND. Supposing the Justices of the Supreme Court, knowing that the Constitution was intended by its framers to mean one thing, should declare in their opinions that it means something else, and should deliberately come to a conclusion which was contrary to the meaning its framers meant to give to the Constitution, what remedy, other than the laborious path of a constitutional amendment, would the country have for such a deliberate error?

Judge MARSHALL. Well, without agreeing with your factual basis, I repeat what I said before, that the Supreme Court of the United States makes its decisions as to the interpretation of the U.S. Consti-

tution. And under the present existing Constitution there is no appeal from their judgment. Congress is free to legislate after an opinion of the Supreme Court, but not to try to upset the constitutional determination.

Senator THURMOND. Well, the question that I propounded I think is a little different from the answer you gave. Let me ask it again.

Supposing the Justices of the Supreme Court, knowing that the Constitution was intended by its framers to mean one thing, should declare in their opinions that it means something else, and should deliberately come to a conclusion which was contrary to the meaning its framers meant to give to the Constitution, then what remedy, other than the laborious path of a constitutional amendment, would the country have for such a deliberate error?

Judge MARSHALL. I would agree with you if you would permit me to say that it is impossible for me to conceive of the Supreme Court ever doing that.

Senator THURMOND. If they did, what remedy would the country have other than the laborious path of a constitutional amendment?

Judge MARSHALL. If they by any chance did it, you are correct.

Senator THURMOND. Correct in what?

Judge MARSHALL. The only recourse would be a constitutional amendment, but I can't conceive of a Supreme Court, having taken an oath, to violate its oath and do that.

Senator THURMOND. Congress would have no power concerning the judges?

Judge MARSHALL. Not that I know of. I have difficulty with the question because I can't conceive of that possibility. The question you propose requires that Justices of the Supreme Court violate their oath, and that I can't suppose.

Senator THURMOND. No, I said, and I thought I made it clear, that if the Justices of the Supreme Court, knowing the Constitution was intended by its framers to mean one thing, should declare in their opinions that it means something else and deliberately, intentionally come to a conclusion contrary to the meaning of its framers, then what remedy does the country have other than the laborious path of a constitutional amendment?

Judge MARSHALL. I stand by my answer.

Senator THURMOND. And you do not feel the Congress has any power to exercise over the judges?

Judge MARSHALL. I think we have a separation of powers, the legislative, the executive, and the judicial. That's the framework of our Government.

Senator THURMOND. Supposing it should be material to the decision of a case who was President of the United States during the period 1861 through 1865. Further, suppose the U.S. Supreme Court Justices should be presented with evidence such as statements in the Congressional Globe like presidential messages that Abraham Lincoln was President. Moreover, supposing that, to paraphrase several recent cases, the Supreme Court Justices should declare that this evidence throws some light on who was President, but is not conclusive, and that, based on the fact that in the estimation of the Supreme Court the country was Democratic during 1861 through 1865, the Supreme

Court declares that the President during this period was Stephen A. Douglas. Should the Supreme Court make a decision based on this declaration, what remedy would there be for such a wilful error?

Judge MARSHALL. Again, I can't suppose that statement of facts.

Senator THURMOND. My question was suppose they did do it.

Judge MARSHALL. Well, I say, respectfully, Senator, I can't suppose it. I think that Government officials who take their oaths obey their oaths, and that goes for all Government officials.

Senator THURMOND. Do you know of any specific evidence relating to antimiscegenation laws which was presented to the Supreme Court in *Loving v. Virginia* which contradicted the historical evidence of the Commonwealth of Virginia that the 14th amendment was not intended to affect antimiscegenation laws, and if you do not know of such evidence, how do you justify the Court saying that the historical evidence was not conclusive?

Judge MARSHALL. I am not familiar with the case. I am only familiar with the opinion. I did not read the record in that case.

Senator THURMOND. That's a recent case—

Judge MARSHALL. Yes, sir.

Senator THURMOND (continuing). That was handed down.

Judge MARSHALL. It was one of 150 this term, 150-odd, and I can't read the records of all of them.

Senator THURMOND. It sets a new precedent, of course.

Judge MARSHALL. I don't know whether it is a new precedent.

Senator THURMOND. On January 31, 1866, in the Congressional Globe, 39th Congress, first session, page 537, Representative Thaddeus Stevens, leader of the House Radical Republicans, and chairman on the part of the House of the Joint Committee on Reconstruction, said as follows about the then proposed 14th amendment, and I quote:

I had another proposition which I hope may again be brought forward. It is this: All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race or color. There is the genuine proposition; that is the one I love; that is the one which I hope, before we separate, we shall have educated ourselves up to the idea of accepting, and that we shall have educated our people up to the point of ratifying. But it would not be wise to entangle the present proposition with that one. The one might drag down the other; and although I have not obtained what I want, I am content to take what, after comparing ideas with others, I believe we can carry through the States; and I believe we can carry this proposition.

Do you know of any case in recent years in which the Supreme Court has held that a State discriminatory law, based on race or color, does not violate the 14th amendment; have you ever urged that any such law does not violate the 14th amendment; can you give us an example of such a discriminatory law which does not violate this amendment; and if the answer to this is in the negative, why does the position that such laws violate the 14th amendment not in effect constitute an alteration of the limited scope of the 14th amendment about which Thaddeus Stevens complained a century ago?

Judge MARSHALL. As I said before, the statements made by Mr. Stevens were statements made by a Member of Congress, and they are not controlling on the Supreme Court or anybody else. They are made in debate, and I don't think they are controlling at all. I think you have to take all of the debate, all of the statements and draw from

that the intent of Congress at that particular time on that particular piece of legislation.

Senator THURMOND. Is there anything else you wish to say on that point?

Judge MARSHALL. No, sir.

Senator THURMOND. Mr. Chairman, that is all. I wish to thank the Chairman.

Thank you, Judge Marshall.

Judge MARSHALL. Thank you.

The CHAIRMAN. You were a judge of the U.S. Court of Appeals for the Second Circuit.

Judge MARSHALL. Yes, sir.

The CHAIRMAN. Did you write a dissenting opinion in the case of *People of New York v. Galamison*, 342 F. 2d—

Judge MARSHALL. Yes, sir.

The CHAIRMAN (continuing). Page 255?

Judge MARSHALL. Yes, sir.

The CHAIRMAN. In that opinion did you make the following statement found at page 279:

First, peaceful protest, speech and petition, is a form of self-help not unknown during the era of Reconstruction when Section 1443 (2) was forged?

Judge MARSHALL. I think so. I don't have the opinion before me, Mr. Chairman.

The CHAIRMAN. Did you cite a book as authority—

Judge MARSHALL. I don't remember the book.

The CHAIRMAN (continuing). By a man named Aptheker, "A Documentary History of the Negro People in the United States"?

Judge MARSHALL. I think I did.

The CHAIRMAN. Well, now, of course, I don't want to leave the impression that you have ever been a Communist or anything like that, but did you know that at the time you cited this work the author of that book, Herbert Aptheker, had been for many years an avowed Communist and was the leading Communist theoretician in the United States?

Judge MARSHALL. I positively did not know that.

The CHAIRMAN. In fact, if you had known that, would you have cited him as an authority?

Judge MARSHALL. I certainly would not—

The CHAIRMAN. Well, do you think—

Judge MARSHALL (continuing). Have done it.

The CHAIRMAN. Do you think it's proper to cite a book that's written by somebody as authority for any decision?

Judge MARSHALL. I think when you are in a decision and you are giving a historical background to it, you have a right to cite it, but should not let that book influence your judicial opinion. It's sort of factual background that you need in considering it, but certainly I didn't rely on that book.

Senator KENNEDY. Can we ask, Mr. Chairman—

Judge MARSHALL. I relied on the Supreme Court's decisions, about six of them.

Senator KENNEDY. Mr. Chairman, could we ask what references were made in the Justice's opinion? Did he quote that? Did he have some

quotation out of it? Did he cite a certain observation? And, if so, what was the observation so at least we have some idea of what the reference is being, what is being made.

The CHAIRMAN. Well, the question was, was the book the basis, citing it as authority for a court decision.

Senator KENNEDY. Is that the basis that you—

Judge MARSHALL. No, sir. Senator, the basis of that opinion was the New York law requiring the oath of college professors. And the small question before me was as to whether or not a three-judge court should have been convened, and I said it should have. And in requiring it I only had to decide the point that it was of sufficient constitutional importance to require a three-judge court. And in deciding it, I relied on about six Supreme Court cases which I thought were directly in point. And the case went back to a three-judge court, and the three-judge court denied the relief. And the Supreme Court reversed the court. So there was sufficient constitutional basis.

The CHAIRMAN. Any further questions?

Senator ERVIN. I would like ask one I omitted.

Judge MARSHALL. Yes, sir.

Senator ERVIN. I do not have access to anything in the *Gilbert* and *Wade* cases which were handed down on the 12th of June except the advance slips, I believe they call them. They do not give the names of counsel who appeared in those cases.

Judge MARSHALL. In the *Wade* case I was—I disqualified myself in the *Wade* case and had nothing to do with the case. It was handled by the first assistant, Mr. Ralph Sprintzer.

The reason I disqualified myself, because I had participated in the *Stovall* case and the same point was up, and I though it would be improper for me to handle it.

Senator ERVIN. Did you appear in the *Gilbert* case?

Judge MARSHALL. No, sir. No, sir. I think *Gilbert* was another State case. I didn't appear in any of them. That I am sure of.

Senator ERVIN. I didn't know whether you appeared in the *Gilbert* case as an amicus or not.

Judge MARSHALL. No, sir; I don't think we did.

Senator ERVIN. So far as you can tell, the Solicitor General's Office did not file a brief in this case?

Judge MARSHALL. I don't think so; no, sir.

Senator ERVIN. I am concerned about the point the chairman raised a while ago.

I read so many opinions, for example, the Chief Justice's opinion in *Miranda*, where virtually all of the opinions as far as any questions of fact are concerned consist of the reference to different books and articles and observations made by various writers who were not witnesses in the case when it was tried and who were not cross-examined at all.

I have always had the feeling as a lawyer and as a judge that all decisions made by appellate courts ought to be based on the record which was made in the trial courts and that decisions should be made on that basis rather than upon observations in books and pamphlets and magazine articles written by men who were not witnesses at the trial and who were not subject to cross-examination by anybody.

I came to the conclusion that the majority opinion in the *Miranda* case was based on observations of writers, who, so far as anybody knows, had no special competency for writing about the things they wrote about.

Judge MARSHALL. Well, to the contrary, Senator, those cases were very carefully briefed, and there was—amici were in there. There were thorough and full arguments. There were four cases, and we covered the whole spectrum, I think, of the law, so it wasn't just a side issue at all. But as of this morning, after hearing from the chairman, I think I should be very careful on that particular point.

Senator ERVIN. Yes, sir. I was just struck when I read that.

Judge MARSHALL. Sometimes you learn the hard way.

Senator ERVIN. Most of the articles referred to and quoted at length on a number of pages in the majority opinion dealt with denunciations of police in general and the methods allegedly used by police in general. It contained the writings of men who did not testify and who as the majority opinion was concerned had no personal knowledge of the things they were writing about and no special competence in the field they were writing about. It ignored virtually everything the police did who had *Miranda* in custody.

That's my reaction to the opinion. I wanted to ask you if you had any comment on it.

Judge MARSHALL. Thank you.

The CHAIRMAN. Any further questions?

Senator HART. Does this conclude the hearing, Mr. Chairman?

The CHAIRMAN. No, sir. We have got opposition.

First, I am going to place in the record a statement from Senator Long of Missouri which endorses the nominee.

(The statement of Senator Long referred to follows:)

#### STATEMENT BY SENATOR EDWARD V. LONG

Mr. Chairman, President Johnson is to be commended for his nomination of Thurgood Marshall to be an Associate Justice of the Supreme Court.

Mr. Marshall is uniquely qualified to be a member of our highest court. Not only has he had several years of experience on the federal Court of Appeals bench, he also has argued 51 cases before the Supreme Court. His won-loss record is 43-8, an enviable record indeed.

Objection has been raised to this nomination on the ground that Mr. Marshall was so closely identified with the NAACP for so many years. I totally disagree with this position. If Mr. Marshall had not possessed extraordinary legal ability he could not have retained the position of director-counsel of the NAACP Legal Defense and Educational Fund for so many years.

The proof of this ability is found not only in his 29 victories before the Supreme Court during these years, but also in his subsequent record as a federal appellate judge and as Solicitor General.

The American people are indeed fortunate that the President has sent this nomination to the Senate. Mr. Thurgood Marshall has my full support.

The CHAIRMAN. Now, I understand the Liberty Lobby—you may sit back, and then if you want to reply to anything that is said in the—

Senator KENNEDY. Mr. Chairman, while the Justice is—

The CHAIRMAN. Wait just a minute, please. He has the right, if he desires, to reply to the testimony in opposition. He has the right to reply to it.

Senator KENNEDY. Before he leaves, I would just like to make a comment.

Did you want to say something?

Senator HART. Simply this. Mr. Chairman, unless recalled, the nominee is leaving us. I think all of us were impressed by the research that Senator Thurmond has done. The questions he raised were interesting. I will have to get his answers before I know what the answers are to most of them. I did learn that there was a Michigan Senator I never heard of before who said something a hundred years ago which time has proved probably would have been wrong. But I want to say that, for one, I am satisfied with the responses that the nominee has made. Based on his record as a lawyer before the Supreme Court, with a batting average that exceeds most members of the American bar, probably most members of this committee, certainly mine—you had 29 out of 34, something like that?

Judge MARSHALL. That was before I went on the Solicitor General's staff.

Senator HART. Lawyers always feel you have a lead, about an unfair advantage on the Solicitor General.

Judge MARSHALL. I agree. I agree.

Senator HART. But as a practitioner before that Court, your record of success is magnificent. Based on that and your experience as an appellate judge in the Federal system and your experience as a Solicitor General, I am satisfied that you will be professionally skilled and decide wisely any case in which any element of any of those questions becomes relevant, has been briefed and argued. I hope that we will soon recommend favorably your nomination.

Judge MARSHALL. Thank you, Senator.

Senator KENNEDY. Mr. Chairman, Judge Marshall, I want to also state that it is at least my belief that it is our responsibility as members of the committee to which the recommendation has been made by the President, in advising and consenting, that we are challenged to ascertain the qualifications and the training and the experience and the judgment of a nominee, and that it is not our responsibility to test out the nominee's particular philosophy, whether we agree or disagree, but his own good judgment, and being assured of this good judgment, that we have the responsibility to indicate our approval or, if we are not satisfied, our disapproval.

I think at least I feel supported in that feeling by the recent hearings that this committee had with Mr. Fortas, and looking through the course of those hearings I saw at one place where a distinguished member of the minority, Senator Fong, asked now Justice Fortas about the *Reynolds v. Sims* case, and Mr. Fortas—asking whether he understood the question and understood certain words of that case, and in response now Justice Fortas said, "My profession is words." And Senator Fong said, "Yes, I understand that." And Mr. Fortas said, "And I have the greatest respect for them and the greatest fear of them, and there are very few words that are simple. And I don't want to answer your question, Senator—" And Senator Fong said, "You do not want to answer it?" Mr. Fortas says, "Because it would be idle because I have not studied it, and there is no point in my giving you" And Senator Fong said, "I appreciate your position." Mr. Fortas said, "An uninformed reaction."

And later on, just actually a few minutes later, Senator Hruska, who is a member of the committee, in referring to this set of circumstances says:

Notwithstanding that and notwithstanding my sympathy for the questions in Senator Fong's mind I want to say that I feel the nominee has given the only answer that he could give when he said he does not have an opinion on it.

We have always felt that it would be unfair to ask any nominee for any judicial office to give a legal opinion on the basis of a hypothetical question.

Obviously if a question of this kind arose it would be well briefed, it would be voluminously and extensively researched, and it would be argued at great length, so the answer that Mr. Fortes has given, in my judgment, is in compliance with the only course of action open to him.

And then our distinguished colleague, Senator Ervin, remarked, "And as a lawyer, will you not agree with me, that judges are more competent of handing down a decision after they heard the facts?"

Mr. Justice, I think that during the course of the various exchanges which have taken place in the course of the hearings, I think you certainly demonstrated, to my own satisfaction, good judgment, articulateness in your legal understanding, and it is going to be a pleasure to cast my favorable vote here in the Judiciary Committee and also on the floor of the Senate.

Judge MARSHALL. Thank you, Senator.

Senator ERVIN. Mr. Chairman, I would just like to inject myself at this point. I do not agree with Senator Kennedy's position that the philosophy of a man who is an appointee to the Supreme Court is immaterial and not to be investigated. I agree with him that it is the duty of a Senator to determine for his own satisfaction whether a nominee possesses sufficient legal learning and has sufficient legal experience. At the time the question on ratification of the Constitution was being debated, two great lawyers, Elbridge Gerry and George Mason pointed out that there were no limitations in the Constitution applying to the Supreme Court, and asserted that in the exercising of their function to interpret the Constitution, it would be possible for the judges to substitute their personal notions for the true meaning of the Constitution. Alexander Hamilton replied that this suggested danger was a phantom, that only few men would be qualified for the station of judges in the government of laws established by the Constitution and these would be men who were familiar with the precedent to and who would feel that they were bound by the precedents and would follow the precedents. I think that in passing upon the qualifications of an appointee to the Supreme Court, it is not only important for a Senator to determine whether the nominee has sufficient knowledge of the law or sufficient legal experience, but also to determine whether he is able and willing to exercise that judicial self-restraint which is implicit in the judicial process when that process is properly understood and applied by this, I mean whether or not he will base his decisions upon what the Constitution says rather than upon what he thinks the Constitution ought to have said.

And so I think that the question of the philosophy and the power of self-restraint of a nominee constitutes the most important consideration. As I said yesterday, Chief Justice Harlan F. Stone said that the Court can restrain a President and Congress, but there is no restraint whatever upon the Court except the self-restraint of its members.

Thank you.

The CHAIRMAN. Senator Tydings?

Senator TYDINGS. Mr. Chairman, I would like to associate myself with the remarks of the distinguished Senator from Michigan. I might add that we in Maryland are very proud of Judge Marshall having been nominated for the Supreme Court of the United States. He will be the first Marylander to serve on the Supreme Court.

I might comment that I agree with Senator Ervin on the importance of judicial restraint and note that Judge Marshall's performance during the last 2 days, I think, is a great testimony to his judicial restraint and hope that the committee promptly acts on his nomination.

The CHAIRMAN. Mr. Jaffe, do you have a statement?

Mr. JAFFE. Yes, sir, we do, Mr. Chairman. We do have a written statement which will be here momentarily. I apologize for the delay in getting that over here.

The CHAIRMAN. You may proceed. Identify yourself.

#### STATEMENT OF MICHAEL D. JAFFE, GENERAL COUNSEL, LIBERTY LOBBY

Mr. JAFFE. Yes. Thank you, Mr. Chairman. My name is Michael D. Jaffe, general counsel of Liberty Lobby. I am appearing here on behalf of W. B. Hicks, our executive secretary, who is unavoidably detained.

Now, we are appearing here today to present the views of our 12,000-member board of policy, on behalf of the 170,000 subscribers to our monthly legislative report—

The CHAIRMAN. You talk so fast. I can't understand you.

Mr. JAFFE. I am sorry, sir.

On behalf of the 170,000 subscribers to our monthly legislative report, Liberty Letter.

Liberty Lobby is strongly opposed to the confirmation of Mr. Marshall's nomination to the highest court in our Nation. Our opposition is based both on his lack of qualifications, and on the unfortunate attitude toward the law of the land which has marked his public career. Decisions handed down by the Supreme Court over the past 15 or so years revolutionizing virtually every area of American life have created a genuine crisis of public confidence in the impartiality and objectivity of the judicial branch of our Government. The confirmation of Thurgood Marshall can only aggravate this situation, and we feel that this committee, and the Senate, can make a vitally important contribution to the strengthening of our constitutional system of government by refusing to consent to this nomination.

Now, members of the committee, rightfully upset at Mr. Marshall's refusal to answer relevant and important questions concerning his prospective duties as a Justice of the Supreme Court, could have anticipated such conduct by examining the past record of the nominee. After hearing the facts we will present to this committee, no reasonable person could deny that his is a record of duplicity and arrogance unparalleled by that of any nominee to high judicial office in recent times.

Now, the major accomplishment of the nominee's legal career was his role in securing the 1954 Supreme Court decision outlawing school segregation. It is therefore highly important that the real nature of

his role in this matter be carefully considered. Mr. Marshall, at that time counsel for the NAACP, secured the aid of Dr. Alfred H. Kelly of Wayne State University in the preparation of a research paper on the intent of the framers of the 14th amendment concerning school segregation.

In a speech before the American Historical Association on December 28, 1961, Dr. Kelly, perhaps inadvertently, exposed the method of operation of the man now proposed as a Justice of the Supreme Court. Dr. Kelly at first proposed that the NAACP's historical argument "be cast in very generalized terms with a deliberate avoidance of the particular." However, Mr. Marshall replied, "I got to try these cases and if I try this approach, those fellows will shoot me down in flames."

Therefore, to quote Dr. Kelly:

The problem we faced was not the historian's discovery of the truth, the whole truth, and nothing but the truth. It is not that we were engaged in formulating lies; there was nothing as crude and naive as that. But we were using facts, emphasizing facts, sliding off facts, quietly ignoring facts, and, above all, interpreting facts in a way to do what Marshall said we had to do—"get by the boys down there."

Now, Mr. Marshall has not, to our knowledge, either denied or satisfactorily explained this arrogant disregard of elementary legal ethics. We can only wonder whether he will continue sliding off facts and quietly ignoring facts when sitting as a Justice of the Court. And I might add that while Liberty Lobby has frequently criticized decisions handed down by the Supreme Court, we have never been so contemptuous as to refer to the Court as "the boys down there." Any individual with this kind of an attitude is clearly unfit to serve on the Supreme Court.

Now, the nominee's cavalier attitude toward the law he is sworn to uphold, is further demonstrated by his failure to obtain a license before beginning the practice of law. The late Senator Olin Johnston of South Carolina stated—this is from the Congressional Record of September 11, 1962—

In studying the background of Thurgood Marshall we discovered that, although he had practiced law in the State of New York, he had never been licensed to conduct this practice in that State even though he had served as legal counsel for the NAACP there since 1938. In other words, for 24 years, or nearly a quarter of a century, the nominee practiced law in a State where he had never been licensed. The practice of law without a license by Thurgood Marshall certainly denotes a careless attitude toward the law of the land.

Further, a report of the Texas attorney general's office indicates that Mr. Marshall intentionally obstructed an investigation that office was conducting into the NAACP's illegal solicitation of clients to institute lawsuits. The report states:

Thurgood Marshall refused to permit the authorized representative of the Attorney General to examine certain letters and correspondence, but while sitting at his desk mutilated such documents by cutting out signatures and addresses and then delivering said mutilated copies to the representative of the Attorney General.

A further example of Mr. Marshall's antagonistic attitude toward the rule of law is seen in his behavior at a meeting of the House of Delegates of the Episcopal Church, held in St. Louis on October 20, 1964. A resolution was presented stating that some laws are "in basic

conflict with the concept of human dignity under God. This church recognizes the right of any person for reasons of conscience to disobey such laws or social customs."

Now, this resolution, which was designed to sanction illegal demonstrations, was defeated. And when it was defeated, Mr. Marshall is reported to have stormed out of the hall in protest.

Now, Mr. Marshall's associations with groups of questionable loyalty is clearly relevant to his fitness to serve as a Justice of the Supreme Court, and we believe that the committee should give these matters serious consideration. This unfortunate penchant for associations with organizations of a subversive nature runs throughout the nominee's career.

I would like to point out that we are in no way challenging Mr. Marshall's loyalty. We are merely pointing this out as far as his lack of judgment in his association with groups which would clearly disqualify him for this position.

Now, the Daily Worker of November 24, 1947, reports that Thurgood Marshall was among a group of attorneys who sent a telegram to New York Congressmen asking them to oppose the contempt citations in the case of the so-called Hollywood 10; that is, individuals who refused to answer questions as to Communist Party membership before a congressional committee.

Now, the National Lawyers Guild has been cited by the House Committee on Un-American Activities as a Communist front which, to quote, "is the foremost legal bulwark of the Communist Party, its front organizations and controlled unions," and which, "since its inception has never failed to rally to the legal defense of the Communist Party and individual members thereof, including known espionage agents."

Mr. Thurgood Marshall was shown to be an associate editor of the Lawyers Guild Review in the May-June 1948 issue. He was a member of the executive board of the National Lawyers Guild at least as recently as December 1949. Now, the Washington Star of February 8, 1949, shows that he spoke at a public forum held in Washington by the National Lawyers Guild and criticized the Federal loyalty program.

Now, Mr. Marshall was also an active member of the International Juridical Association, which has been described by the House Committee on Un-American Activities—that's Report No. 1311 of 1944—as a Communist front and an offshoot of the International Labor Defense.

Mr. Marshall's entire legal career has been spent as a pleader for the narrow special-interest group. Without at all going into the merits of Mr. Marshall's struggle for civil rights, it seems right that this narrow focus of his activities and interests should disqualify him from serving in a position where he would be required to serve all of the people. The nominee's concentration on civil rights matters may also be responsible for his failure to obtain a working knowledge of other areas of the law, essential to the performance of his duties.

Now, in an otherwise favorable article discussing Mr. Marshall's performance on the Court of Appeals, the New York Times of August 22, 1965, quotes a Government attorney as stating:

In some of the early tax cases, Thurgood's lack of knowledge was embarrassing. I recall one case where a question he asked indicated that he didn't even understand the concept of a corporation. It was not a nice moment for anyone in that courtroom.

Now, in an examination of Mr. Marshall's record, then, would indicate that his defiant attitude before this committee is no new departure, but, rather, is on a par with his conduct throughout his public career. We agree with Senator Ervin, who told the nominee:

If you don't have any opinion on what the Constitution means, you ought not to be confirmed.

The American people have a right to know the record and the legal philosophy of a man appointed to a position with the awesome powers and responsibilities of a Justice of the U.S. Supreme Court, and we commend this committee for attempting to bring these matters into the open.

Thank you.

The CHAIRMAN. We will adjourn now subject to the call of the Chair.

Senator HART. Mr. Chairman, on that—before the witness leaves, I would suggest that we incorporate, either by reference or in fact, the testimony given in connection with the hearing of this committee on the nomination of Thurgood Marshall to be judge of the second circuit court where Dr. Kelly discusses the matter raised by the witness. We reviewed this the last time the committee recommended the nominee. I hope we will this time.

The CHAIRMAN. You want it copied in the record, or as an exhibit?

Senator HART. Well, I would be satisfied, Mr. Chairman, to have only an excerpt of the testimony given by Dr. Kelly at that time, found at the top of page 182, running for about eight paragraphs.

The CHAIRMAN. Well, let's take the whole testimony as an exhibit. (The material referred to follows:)

STATEMENT OF ALFRED H. KELLY, PROFESSOR OF HISTORY, WAYNE STATE UNIVERSITY, DETROIT, MICH.

First, let me emphasize very strongly my firm belief in the integrity, honor, and decency of Judge Thurgood Marshall.

It is my opinion that he is a man of the highest professional standards and ideals, and that he is a credit to the American bar and to the Federal judiciary.

I had the privilege of working with him and observing him, at intervals, over a period of some months, while he was engaged in the preparation of the briefs in the now-celebrated case of *Brown v. Board*.

In that time I at no time heard him give expression to any unprofessional ambition, standard, ideal, or objective. If the paper I read last December to the American Historical Association conveyed to anyone the faintest implication to the contrary, I can only say that this was not my intention and it is certainly not Judge Marshall's responsibility. In fact, a good portion of that paper was devoted to expressing my open admiration for Marshall's remarkable personality and vast abilities. The paper can be construed in no other fashion, unless it is misunderstood, misread, or quoted out of context.

Let us come now to a particular point in the paper which may have been construed, quite honestly by some people, as touching unfavorably upon Judge Marshall's professional ethics. The paper speaks of the preparation of the *Brown* brief as involving, among other things, the development of a very ex parte argument.

The phrase used was "emphasizing facts, bearing down on facts, sliding off facts," and so on.

Now it must be remembered that this paper was prepared for an audience of professional historians. The analysis attempted to emphasize the profound

difference in the way a lawyer develops an argument in a brief, making the best he can of his facts by careful selection, emphasis, quiet omission, and so on, from the way a historian handles evidence.

It is a vastly different technique than that which historians use, I assure you. The argument in the brief was not history; it was advocacy. It was, in short, a lawyer's brief, and the paper attempted to make that clear to an audience of historians.

This does not mean that the brief falsified facts, that it lied, or even that it necessarily reached false conclusions. Within a large sense, most Reconstruction historians believe it did not, again as the paper of last December tried to make it clear.

Now the important point here is that within the ethics of the legal profession, Thurgood Marshall's professional obligations required him to handle his available evidence in this fashion.

Again, he was functioning as an advocate, not as a historian. As one prominent lawyer in Michigan told me:

"If I developed an argument for a client in any other fashion, I would be derelict in my duty."

I have discussed this point with a great many responsible members of the bar in the last few years and never did inquiry elicit other than emphatic agreement upon this point.

In all probability, there is no lawyer now present in this room who disagrees with this proposition. In short, to imply that because Marshall and his professional associates did not write professional history when they prepared their brief in *Brown v. Board*, that they were thereby guilty of professional malfeasance, is grossly to misconstrue the modus operandi of the legal profession.

It may be worth while to observe, by the way, that the brief prepared by the late Mr. John W. Davis for the respondents in *Brown v. Board* is, from a technical historical point of view, every bit as far from a balanced constitutional history of reconstruction as is the NAACP brief.

Again, Mr. Davis' brief was not history; it was advocacy. Yet no one has indicted him for having argued his case adequately for his clients. No doubt he would have been open to a charge of professional dereliction and malpractice had he done otherwise.

Now as to possible factual discrepancies between certain of the details presented by Judge Marshall in his recent testimony before this subcommittee and the points raised in my paper of last winter: Not a one of these so-called discrepancies, if they are that, has any significant substantive quality or reflects in any way on Judge Marshall's character. They are trifling—one is tempted to say piffing. However, let me dispose of them as best I can.

First, Judge Marshall denies that he left the now-famous September conference to raise money in Philadelphia. So be it. I used the phrase, at one point in this account, "it is my recollection that \* \* \*." I had intended to check this point specifically with NAACP officials in New York before my paper reached the public domain: unauthorized and unforewarned publication of the paper by the Washington Star made that impossible.

I am sure Judge Marshall's knowledge on this point is better than mine, and I cheerfully accept any correction he may make.

Let me touch also on his point in testimony that "we did not buy his argument \* \* \*" [meaning Kelly's argument in the original paper of September 1953].

This is perfectly correct.

In my paper of last December, I myself made this point very clearly and emphatically. In fact, the argument finally used in the brief was developed and refined after two or three tentative earlier arguments had been set up and rejected.

The basic final historical argument, which I described last December as containing a measure of actual historical truth, was the work of a great many minds. If it was even in part mine, I am very proud. But Judge Marshall is in a better position than anyone else to assess the contribution of the numerous persons who lent their efforts to the preparation of the brief last fall.

Finally, I observe with some astonishment and incredulity that some serious attention has been paid to a Marshall anecdote incorporated in the 1961 paper.

The paper, in the course of relating a series of anecdotes, tells how Marshall on one occasion assured me in a moment of humorous irritation that "when we colored folks take over, every time a white man draws a breath, he'll have to pay a fine."

Judge Marshall has said solemnly that this does not represent his philosophy, that he does not even recall making that remark. I do recall the remark. But the remark was mordant humor, given exclamation by a man possessed of a powerful sense of humor, and who expresses something of the excitement of verbal exchange in humorous hyperbole of this kind. The paper related this incident merely as one of a series of anecdotes which attempted to portray something of the nuances and coloration of a truly remarkable personality. To lift the remark out of context and treat it as a threat or even a philosophical observation is absurd, even grotesque, in its bizarre distortion of reality.

It may be worth observing here that I have also heard Marshall express personally his powerful conviction that communism and Marxism are fatal pitfalls for the American Negro which must be avoided like the plague. I have heard him speak also of the extreme care which he and other NAACP officials have used to keep their organization free of Communist and Marxist contamination. On more than one occasion Marshall in my presence bespoke his intense conviction that the destiny of the American Negro is to be fulfilled in terms of the American constitutional system.

What he wanted for the Negro, he made clear, was first class citizenship. I have heard him say, "We want no more; we will not take less."

That, gentlemen of the Senate Judiciary Committee, is Judge Marshall's philosophy as I have understood it.

Let me say in closing that I am proud to have known Judge Marshall and proud of my small contribution to the *Brown* brief. I believe this case involved one of the great steps forward in the fulfillment of the American democratic dream.

It is my conviction that Thurgood Marshall's victory in *Brown v. Board*, consistent as it was with the highest ethics of the legal profession, has already earned him a permanent position of honor in American history. And as a constitutional historian, I believe strongly that in his new capacity as a Federal judge, he will prove to be an outstanding and preeminent judicial figure.

Gentlemen of the Committee, I thank you very much for your patience.

Senator KENNEDY. Mr. Chairman, could we have some idea, if we are going to adjourn, when we could expect a continuation of the hearings?

The CHAIRMAN. Well, I have just had a request from a committee member that he desires to ask some more questions. He is not ready yet. As soon as he is ready, within a reasonable time we will call the committee.

Senator KENNEDY. Would you expect that to be any time within the rest of this week?

The CHAIRMAN. I cannot answer that question. I would expect it to be in the next day or so.

Senator TYDINGS. Mr. Chairman, could we have the witness come back then, too, because I may have some questions I will want to ask him.

The CHAIRMAN. Sure. Do you want to now?

Senator TYDINGS. No.

The CHAIRMAN. You mean—

Senator TYDINGS. That's right.

The CHAIRMAN (continuing). Mr. Jaffe?

Senator TYDINGS. That's right.

The CHAIRMAN. OK. Fine. And can we expect copies of your statement, Mr. Jaffe?

Mr. JAFFE. Yes, sir. They will be here momentarily.

Thank you very much, Mr. Chairman,

(Whereupon, at 12:30 p.m., the committee adjourned subject to the call of the Chair.)

## NOMINATION OF THURGOOD MARSHALL

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MONDAY, JULY 24, 1967

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The committee met, pursuant to call, at 10:45 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland, chairman, presiding.

Present: Senators McClellan (presiding), Ervin, Hart, Kennedy, and Thurmond.

Also present: John H. Holloman, chief clerk.

Senator McCLELLAN. The committee will come to order.

### STATEMENT OF HON. THURGOOD MARSHALL—Resumed

Senator McCLELLAN. I note the presence of the photographers. Let me ask you, Mr. Solicitor, if the snapping of these pictures in any way bothers you.

Judge MARSHALL. No, sir.

Senator McCLELLAN. I understand when Senator Eastland presides he doesn't permit it. But when I hold hearings, as long as they do not interfere or interrupt the proceedings, I have always been very generous toward the press and the photographers.

If you have no objection, as long as they do it very quietly, they may continue.

Very well. We will proceed.

Mr. Solicitor, last Wednesday, during the last day of hearings I requested of the Chair that if there was no indication of any further questioning at that time—which I anticipated there would be—that I be granted an opportunity to ask a few more questions.

I had received, during the proceedings that morning, information concerning an article in which you had discussed wiretapping; but I did not have the article, and therefore I could not question you about it at that time. Since then I have procured it. I will let you have a copy of it, if you wish to follow it, as I interrogate you about it. I had a copy made.

I am very concerned, as many other people are, about a condition that prevails in our country today, not only with respect to crime generally, but with respect to the tools that are made available to, or withheld from, law enforcement officers to use in their efforts against crime. And wiretapping or electronic surveillance has become a matter of national concern; but I think it is something that is vital. I think under proper regulations and court direction that it is absolutely indispensable to an effective war on organized crime and on some of the more heinous crimes that are committed.

And for that reason, I wanted to ascertain your views because apparently you have given a public statement which was quoted in the press. I refer particularly to an article carried in the Washington Evening Star of Thursday, December 1, 1966, headlined, "Marshall Tells Investigators Bugging Is Out," and subtitled, "Solicitor General Cites Recent Ruling by Supreme Court." The article is by Lyle Deniston. I am concerned about it and want to know, if you will tell this committee, whether in your own mind you now entertain the fixed belief or conviction that wiretapping or electronic surveillance, where authorized by a court under proper statutes and guidelines, and so forth, whether you have already concluded that the act itself would be an invasion of privacy, that it violates the constitutional rights of the individual.

Judge MARSHALL. Senator, first on the article itself: I thought in my discussion with these investigators that I made it clear that if there was a trespass on a man's property, electronic surveillance is not usable in a court. The article does not mention the trespass point at all. I don't blame the writer of the article. But my position at that time was clearly stated, that if you trespass upon a man's home or his office or any place which means going into his place without permission, and set up an electronic device, it was my interpretation of the Supreme Court decisions that that would be a violation of the man's rights under the fourth amendment.

Senator McCLELLAN. And that is irrespective of the procedures by statute, irrespective of a court order directing it under authority of a statute, you would still believe that it is unconstitutional?

Judge MARSHALL. Senator, I was speaking, as I remember, to Federal investigators.

Senator McCLELLAN. I don't care whether it is Federal or State. We can talk about Federal as far as I am concerned.

Judge MARSHALL. Under the rules the Federal investigators are not allowed to trespass except on security matters.

Senator McCLELLAN. I am talking about a statute.

Judge MARSHALL. Well, Senator, I would respectfully refer to the latest decision of the Supreme Court, which was the last decision, I think, of Mr. Justice Clark, in the New York case of *Berger*, in which the decision left open to the legislature, the Congress and the State legislature the authority to set up regulations by which eavesdropping could be done by State order, the decision.

Senator McCLELLAN. Are you saying that you do not subscribe to the doctrine or the belief that it is unconstitutional to provide by statute for such surveillance?

Judge MARSHALL. I have not made up my mind on that one way or the other. I am only guided by the Supreme Court's decision in the *Berger* case at this time. And I think the matter is open. I believe that the American Bar Association is working like mad on it, with several committees. There are other committees that are working on it. I believe the legislatures, and I am sure the Congress, will come up with legislation. And I have no fixed view one way or the other how that legislation would stand up against the Constitution. I would have to look at the act once it is passed.

Senator McCLELLAN. Well, of course, it would depend upon the act, but I am talking about in principle, could you draw an act that would

be constitutional? What I am trying to ascertain, do you think one could be drawn that is constitutional?

Judge MARSHALL. I think one can be drawn that is constitutional.

Senator McCLELLAN. That would permit surveillance under a court order?

Judge MARSHALL. Not just that. It would have to be more.

Senator McCLELLAN. How much more?

Judge MARSHALL. I don't know. That is my whole point, Senator.

Senator McCLELLAN. That is what we get to. I know we get criticized for trying to find out the philosophy of a nominee for the Supreme Court of the United States. But they are possessed of and they are exercising a power that is lethal in my judgment to the security of this Nation. And if we can't get some idea of the nominee's views with respect to the Constitution of the United States, then how am I to exercise my judgment and meet my responsibility in passing upon the suitableness of that nominee? It has gotten to this point. If we can't find out some of the philosophy with respect to the Constitution, what will be constitutional and what will not be, in a matter as grave as the crime crisis in this country, I am in a quandary. What function can I perform if all I am going to do is just confirm the nominee because he is a nice fellow, or because he has training? I perform my function—if there is a clash of philosophies, one of which is dangerous to the country in my viewpoint, and the other makes the country safe, and I have got to choose between them, and I can't find out the philosophy of the nominee, how am I going to function?

It becomes that simple, and I am trying to elicit an answer so that I can make a judgment.

Senator HART. Mr. Chairman, if I could.

I think the question, how much more than just a court order before a tapping goes on, is not a question of philosophy, it is a question that calls for an opinion, and a very tough one, on a constitutional question which the nominee may be confronted with if he is confirmed. I think there is a lot of difference between philosophy and how much more than a court order is connected with a thing like that.

Senator McCLELLAN. The Senator can have his own opinion and he can rationalize the thing as he wants to. But I know there is a crisis in this country, a crime crisis. And I know that the philosophy of the Supreme Court one way or the other on these vital issues is going to be of untold consequence, and has already been, in my judgment, of serious consequences to the crime situation. And if there is going to be no change, if there is going to be a continuation, and if you subscribe to the belief that you can't use a weapon like this, I would just simply like to know it. Of course the nominee can say that he doesn't know what he will do until the time comes, but I have got to act before that time comes. I have voted once or twice against confirmation of Supreme Court Justices, and at other times I have voted for them. I have yielded and leaned over. And I have been greatly disappointed in some instances and surprised in others. And here I am confronted again with a critical situation in this country, and a Court divided five and four, as it has been on many of these issues. And I think that division—and I have said it publicly many times in addresses, and I say it anywhere in the presence of anyone—I think that division has militated against society, and has served the welfare of the criminal.

And I regret to say it. But I feel that way, and I feel deeply about it. And if there is going to be no change except to strengthen and reinforce that philosophy, which I think is dangerous to the country, then I have no alternative—that is why I wanted to talk to you. I mean that from the very depth of my being. I am concerned. I don't think we can treat this thing indefinitely, continuously, and let the crime rate continue to pyramid and expect society to survive or our Government to survive.

You talk about democracy and liberty and all these things; I think they are in jeopardy today in this country. Look at the riots everywhere. A sentiment has been built up over the country to the point where some people feel that, if you don't like the law, violate it. And the Supreme Court takes the position that at its whim it can reverse decisions on constitutional issues, on constitutional questions, constitutional laws that have been the law of the land for a century. And they can change the law. They don't feel very strongly bound to enforce it, to observe it and to follow it. No wonder the fellow out in the street, thinks that, if the Supreme Court has no regard for precedent in law, and can change it when it wants to, why can't I do as I please?

We have an intolerable situation in this country, and I would like to find some way to check it. I would like to start at the top, for I think that is where you need to start.

You may lecture me if you want to. I have told you what I think.

Judge MARSHALL. Far be it from me to attempt to lecture you, sir.

I appreciate what you said, and appreciate your problem. And at the same time I am equally certain that you would not want me to prejudge a case that is certain to come up to the Court.

Senator McCLELLAN. I don't want you to prejudge a case, I want you to prejudge the Constitution that is here before us and tell me whether the Constitution permits it or not.

Judge MARSHALL. The question, as I understand it, what type of legislation could Congress pass.

Senator McCLELLAN. That is only one of the questions. I am trying to find out if you believe that a law can be written within the Constitution with proper safeguards that will permit court directed surveillance in criminal cases.

Judge MARSHALL. I think it is possible, but I am not certain by any means. I cannot be certain until I see the law.

Senator McCLELLAN. Well, your uncertainty is going to leave me pretty certain. I don't say any given statute, of course you can't pass a given statute until you see it.

Judge MARSHALL. I must have misunderstood your question. I thought your question was, could a statute be drawn that would be constitutional.

Senator McCLELLAN. Yes.

Judge MARSHALL. That is speaking in the future.

Senator McCLELLAN. Well, the constitutional document is not new, it's over 178 years old. It is not talking in the future to say what you think the document means or what it permits or doesn't permit.

Judge MARSHALL. I said, Senator, that I believe a bill could be drawn which would have the necessary constitutional safeguards in it.

I have not said that it could not be drawn. But in saying that, I reserve the right to look at the bill.

Senator McCLELLAN. Of course, anyone should reserve the right. No one questions that.

I would like for this article, without objection, to be printed in the record.

(The article follows:)

[From the Washington (D.C.) Evening Star, Dec. 1, 1966]

**ALL EAVESDROPPING CALLED ILLEGAL—MARSHALL TELLS INVESTIGATORS BUGGING IS OUT—SOLICITOR GENERAL CITES RECENT RULING BY SUPREME COURT**

(By Lyle Denniston)

Solicitor General Thurgood Marshall today warned U.S. prosecutors that all eavesdropping is illegal, no matter how it is done.

He told them not to become involved in any form of eavesdropping if they want to win cases. "Eavesdropping is eavesdropping in my book," the government's top legal advocate said in a speech here.

"According to the latest Supreme Court decision," Marshall said, "the evil is in the eavesdropping and not in the device being used."

He apparently was referring to the high court's decision last month in the case of Washington lobbyist Fred G. Black, Jr.

The case, and the pending criminal case against Bobby Baker, prompted the Justice Department to order an "extensive review" of old and new federal criminal cases.

**AIMED AT BUGGING**

The review is designed to eliminate the effects of electronic eavesdropping, or "bugging."

This could mean that many cases may have to be tried again or dropped.

Speaking off the cuff, Marshall told the Association of Federal Investigators: "It is unfair to U.S. prosecutors and the government for investigators to make legal moves which may crop up years later in court and prevent what otherwise would be a solid conviction."

Revelations of bugging by FBI agents already have led to Supreme Court reversal of Black's conviction on tax evasion charges; a government proposal that one other tax evasion conviction be wiped out, and a disruption of a government prosecution of a federal estate tax case.

Marshall's interpretation of the meaning of the high court ruling in the Black case suggested that the justices had adopted a new doctrine on the validity of eavesdropping.

Since 1961, the legal rule that had applied was that eavesdropping was illegal if the device used had physically penetrated private property—as, for example, the penetration of a wall by a "spike mike."

However, the solicitor general's comments indicated he now understands the law to be that all eavesdropping is unlawful.

Marshall spelled out that understanding by giving a broad definition of eavesdropping. He said it was "listening to the conversation of someone who speaks in such a manner that he is under the impression that only the person to whom he is talking hears what he is saying."

The Supreme Court's majority opinion in the Black case did not say, in so many words, that the Justices were following a new legal rule.

However, Justice John M. Harlan, in a dissent said:

"The only basis I can think of for justifying this decision (to reverse the conviction) is that any governmental activity of the kind here in question automatically vitiates—so as at least to require a new trial—any conviction occurring during the span of such activity."

Marshall, in a memorandum filed at the high court last night, disclosed that the "extensive review" is going ahead on past and pending cases that might have been based on evidence gathered by bugging.

The review could either confirm or refute the belief held widely here that bugging has been used widely by the FBI and other agencies.

Justice Department aides indicated that the review is not restricted to any time period, so the new look at old cases may be reaching well into the past.

However, these aides said "we don't think this will lead to wholesale reopenings," of settled cases. "It will affect only a relatively few cases, maybe one in thousands," one source said.

If the review shows that eavesdropping has been done in any past case, and if it reveals that the evidence obtained that way was actually used for prosecution, courts will be asked to re-examine and perhaps throw out the conviction.

In cases that have not yet been tried, the solicitor general said, the government will not prosecute until it is sure it will be making no use—direct or indirect—of evidence "obtained in violation of a defendant's protected rights."

Marshall said the review "will necessarily be a time-consuming process but will be diligently pursued to completion."

He also disclosed that acting Attorney General Ramsey Clark last month told all U.S. attorneys—the government's chief prosecutors—that they "must never proceed with any investigation or case which includes evidence illegally obtained or the fruits of that evidence."

Disclosure of this approach and the broad review of cases came as Marshall—for the second time this year—confessed to the Supreme Court that a case already disposed of there had involved bugging.

Last month, the justices refused to review the tax-evasion conviction of a Brooklyn man, Joseph F. Schipani.

The court had made up its mind on the basis of legal papers which did not mention the bugging that the solicitor general reported yesterday.

Marshall told the justices that he became aware of the bugging of Schipani "since Nov. 21"—two weeks after the court refused to hear Schipani's appeal.

The solicitor general's admissions to the court were similar to those he had made in the Black case. Then, for the first time in history, the government voluntarily reported it had used an electronic bug to spy on a suspect.

The revelation in the Schipani case was different in this respect. Marshall said: "We cannot say in the instant case that none of the evidence used by the government at his trial was obtained, either directly or indirectly, from an improper source."

Marshall urged the court to nullify the Schipani conviction and to send the case back to a lower court "for a new trial, should the government seek to prosecute petitioner (Schipani) anew." In the meantime, Schipani will not be ordered to begin a 3-year prison term to which he had been sentenced.

The bug used in the case was identified only as a microphone installed at "a place of business" visited frequently by Schipani.

It was understood that the microphone was installed Jan. 10, 1961.

Marshall's memorandum said that the FBI had approved the installation, just as he had said the FBI was responsible for the Fred Black bugging.

And, as in that case, other department aides disputed that the FBI alone was responsible.

The solicitor general said a microphone in the Schipani case was put in because the FBI believed that the business establishment "was being utilized for purposes connected with organized crime."

Marshall reported that Schipani himself was not the subject of the eavesdropping by FBI agents but that he did take part in "various conversations electronically monitored on a number of occasions in 1961."

The memorandum also revealed that agents of the Treasury's Alcohol and Tobacco Tax Division had bugged another place visited by Schipani. Investigation of that is still going on, Marshall said, but "it appears that the surveillance lasted for a brief period and that no relevant information relating to him was obtained."

**Senator McCLELLAN.** You are quoted in the first paragraph of this article as follows:

Solicitor General Thurgood Marshall warns U.S. prosecutors that all eavesdropping is illegal, no matter how it is done.

Is that a true statement?

**Judge MARSHALL.** The statement, Senator, was qualified by, if there is an unlawful trespass.

**Senator McCLELLAN.** I don't see that in here.

Judge MARSHALL. That is what I said. That is the basis of it.  
Senator McCLELLAN (reading) :

He told them not to become involved in any form of eavesdropping if they want to win cases.

"Eavesdropping is eavesdropping in my book," the Government's top level advocate said, in a speech here.

Any qualification on that?

Judge MARSHALL. On the same qualification, if it is by trespass.

Senator McCLELLAN. Well, let's see what you mean by the word "trespass." Do you regard it as a trespass to use any device to penetrate through the walls of a building, to listen in on the conversation that takes place in there?

Judge MARSHALL. If it is a man's home or his private office, or any place that is his own as of today, it is my understanding that under the decision of the Supreme Court, that is a trespass.

Senator McCLELLAN. Well, it may be, without any statute authorizing it.

Judge MARSHALL. Yes, as of today.

Senator McCLELLAN. Without any statute authorizing it. But the question is, under those circumstances where there is a law authorizing it, if it is constitutional, would you call that trespassing, and wouldn't that be there under all circumstances?

Judge MARSHALL. I can't comment on the law to be passed.

Senator McCLELLAN. The article continues:

Marshall spelled out—

That is on the second page there—

Marshall spelled out that understanding by giving a broad definition of eavesdropping. He said it was "listening to the conversation of someone who speaks in such a manner that he is under the impression that only the person to whom he is talking hears what he is saying."

Now, would that apply to all circumstances where a man might think he is talking to another in confidence and someone happened to be in a position without the knowledge of the party talking to hear what he said, would that come under the head of eavesdropping, even though he is there for the purpose of trying to hear?

Judge MARSHALL. No. As witness our brief in the *Hoffa* case.

Senator McCLELLAN. This didn't clarify that. That is why I asked.

Judge MARSHALL. No, sir, it doesn't. You asked my position, and that is my position. It was stated in the *Hoffa* case.

Senator McCLELLAN. That is why I have been trying to get your position on some of these things.

We are confronted with this device. And I have no hesitancy in saying that in my judgment, again, it is a weapon that is imperative—if we are going to be successful in the war, particularly, on organized crime, and in combatting other serious crimes in this country, I think the law enforcement officials are going to have to be equipped with it. I cannot support the nomination of anybody, I don't care who he is, from a brother up and down, who I think will not sustain the right of the sovereign to protect itself against internal danger, especially with the Constitution authorizing a reasonable search and seizure. I think this is an issue that we have got to settle. And if I can't get some satis-

faction, I cannot support the confirmation of any nominee who would not sustain properly safeguarded wiretapping or electronic surveillance as an essential weapon against crime.

Judge MARSHALL. Senator, I think it was the original statement that the unreasonableness is the point that is to be decided. Is it? I think our only difference is as to prejudging what safeguards will be put in what legislation.

Senator McCLELLAN. I haven't tried to enumerate a single one. I just used the word "adequacy."

Judge MARSHALL. I think if a bill can be drawn with adequate constitutional safeguards, of course it would be all right. I don't see any problem with it. But we get to the question—

Senator McCLELLAN. You have some doubt?

Judge MARSHALL. In approaching the future of this country I have very little doubt as to what we can do. We can meet situations as they come up and we can meet them in a constitutional fashion.

Senator McCLELLAN. We haven't been meeting the crime situation very successfully.

Judge MARSHALL. I agree.

Senator McCLELLAN. Very well.

Any questions?

Senator ERVIN. I have one or two questions.

It is always dangerous to attempt to quote a constitutional provision. But is not fair to say that the fourth amendment merely states that the right of the people to be secure in their persons and houses and papers and effects against unreasonable searches and seizures shall be inviolate, and no warrants shall be issued except upon probable cause supported by oath or affirmation particularly describing the person or thing to be seized. Isn't that substantially what the fourth amendment said?

Judge MARSHALL. Yes, sir.

Senator ERVIN. Now, if there is no trespass, the search and seizure is not unreasonable within the purview of the fourth amendment.

Judge MARSHALL. I have no quarrel with that.

Senator ERVIN. And it is well recognized by courts that officers of the law may be empowered by search warrants issued by the court upon probable cause to enter upon the premises of a person against the will of the person, and search for and seize articles which are illegal or articles which can be used for evidence found on those premises, isn't that true?

Judge MARSHALL. We have stated that in one of the latest cases in the Supreme Court. And the Solicitor General filed a brief of amicus curiae in the case involving the use of evidence seized by special warrant.

Senator ERVIN. Does not the recent decision excluding evidence obtained by an eavesdropping device hold that if the use of the eavesdropping device involves trespass upon the premises of the accused, the use of such evidence is unconstitutional; isn't that the effect of it? In other words, if officers search upon their own authority, or, rather, use an eavesdropping device upon their own authority, and their use of the eavesdropping device entails the trespass upon the property of the individual, then the search is unreasonable under the fourth amendment, isn't it?

Judge MARSHALL. Generally, that is correct.

Senator ERVIN. Now, is it not implied in the fourth amendment that a statute which authorizes the use of electronic devices to obtain evidence relevant to a crime, or relevant on the trial of an accused, which is supported by a showing of probable cause, would be permitted?

Judge MARSHALL. Senator, the *Berger* case held that the order signed by the judge was too broad. And that was the fundamental basis. That case said that the statute was too broad, but left open the opportunity of any State to pass a statute which would not have the effect of the New York statute, and an order that would not have the breadth of the New York order.

Senator ERVIN. But is there any valid distinction between a search and seizure in which officers seize papers of the owner of a property under a search warrant based upon probable cause and the use of electronic devices to seize the conversation of the inhabitant of the house, if the use of an electronic device for that purpose is based upon the warrant issued upon probable cause?

Judge MARSHALL. I think that point was left open in the *Berger* case. I think there will have to be some further litigation and clarification on it.

Senator ERVIN. Of course, in many cases the seizure of papers in one's house is for the use of those papers as evidence, is it not?

Judge MARSHALL. Yes, sir.

Senator ERVIN. And it is quite conceivable, is it not, that officers can seize the conversation of a person by an eavesdropping device for the purpose of using it as evidence, isn't it?

Judge MARSHALL. It is conceivable.

Senator ERVIN. And is there anything in the Constitution that would prevent that, provided it is done pursuant to a warrant issued upon probable cause showing the relevance of it to some cause?

Judge MARSHALL. I say at this time I don't know, because the *Berger* case left it open. And I am not too sure which way the Constitution calls on that.

Senator ERVIN. I can't see any difference in principle between seizing a tangible thing and seizing an intangible thing. Unreasonable searches and seizures of the person are forbidden, but reasonable searches and seizures of the person are allowed. And after all, a man's voice is nothing more than part of his person, like his hand.

I have undertaken to quote a statement made by Chief Justice Stone when he was Associate Justice of the Supreme Court. He was speaking of the failure of the Constitution to put any limitation upon himself and his associates on the Supreme Court. He said this:

While unconstitutional exercise of power by the Executive and the Legislative Branches of the Government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint.

I think Chief Justice Stone made a statement of absolute truth when he said that. Although the Constitution provides that Congress and the States may change a decision of the Supreme Court by a constitutional amendment, it is practically impossible to obtain a constitutional amendment because it takes two-thirds of the vote of each House of Congress, and three-fourths of the States to do so. And it is exceedingly difficult to get the necessary support to circumvent a

Supreme Court decision. For some reason too strange for me to fathom, people who are very much inclined to condemn unwarranted exercise of constitutional power by the President or by the Congress seem to regard the exercise of such power by the Supreme Court as something rather sacrosanct.

It is often said that the President of the United States is the most powerful public official in the world. I am inclined to question that statement. The President can be restrained by the Supreme Court, and he can be restrained in some ways by the Congress. But I know of no power on earth that can restrain a Supreme Court Justice in an effective manner except his own self-restraint. A Supreme Court Justice who writes or concurs in opinions which add something to the Constitution which is not there, or subtracts something from the Constitution which is there is not exercising the self-restraint which is necessary for the preservation of a constitutional government in America. That is what concerns me. What gives me concern is this: As a Member of the Senate I have a highly important responsibility. The American people have the right to be governed by the constant and certain principles of the Constitution, rather than by the inconstant and uncertain wills of Supreme Court Justices or any other public officials. And I have responsibility to do everything I can to see that the American people are not deprived of that right. And I intend to perform my duty in that regard, because I realize that Justice Sutherland stated a very tragic truth when he said, in essence, that the saddest epitaph for the loss of a right is that those who had the power failed to stretch forth a saving hand while there was yet time. I am deeply concerned about this matter. I want to be just to the nominee, and I want to be faithful to my trust to the American people as a U.S. Senator.

I love the Constitution. I am absolutely convinced that the faithful observance of the principles of the Constitution by the President, by the Congress, and by the Supreme Court is essential to the preservation of constitutional government in America. Apart from the Constitution, our country and all the human beings in it are without any security against anarchy on the one hand and tyranny on the other. And that is the reason that I have made these inquiries at length.

That is all.

Senator McCELLAN. Any other questions?

Senator Thurmond, any questions?

Senator THURMOND. Mr. Chairman, I just want to make this observation. The Congress does have some power over the Supreme Court. They can limit the appellate power of the Supreme Court. Do you agree to that?

Judge MARSHALL I didn't hear—limit?

Senator THURMOND. They can limit the appellate power of the Supreme Court; the Constitution provides that.

Judge MARSHALL. Yes, that is the way I understand it.

Senator THURMOND. You agree to that. And Congress does have power over the Supreme Court to the extent that they can impeach a member of the Supreme Court. Do you agree with that?

Judge MARSHALL. Certainly.

Senator THURMOND. I realize that the way Congress is now constituted that the latter would be practically impossible, but the time

may be coming when public opinion is going to crystallize to such an extent that Congress will have the courage to limit the appellate power of the Supreme Court, and that it will have the courage to impeach members of the Supreme Court if they flagrantly violate the Constitution. And if they flagrantly violate the Constitution, do you feel that they ought to be impeached?

Judge MARSHALL. That is up to Congress. I think that the impeachment is left—

Senator THURMOND. I understand. But I am asking you, though, that if the members of the Supreme Court do not follow the Constitution, do you feel that it is the duty of Congress to impeach them?

Judge MARSHALL. If they violate the Constitution. But I don't believe Congress has the right to impeach any Judge if in the opinion of some Congressman they wrongly interpret the Constitution.

Senator THURMOND. I am not speaking of some Congressman. You know that impeachment would have to originate with the House, they would have to bring the impeachment proceedings. The Senate would sit as a jury and act upon the proceedings. So you would have the House originating the proceedings and the Senate acting by a two-thirds majority to convict on the impeachment. But I just wondered what your thinking was, if a Supreme Court member does not follow the Constitution, if you felt he ought to be impeached.

Judge MARSHALL. I have no position on that, because I can't conceive of a situation you are talking about. If you mean that a Supreme Court Justice, or indeed the Supreme Court itself, interprets the Constitution differently from the way Congress wants it interpreted, that Congress has a right to impeach, I don't believe that.

Senator THURMOND. I was afraid you would take that position.

I have no more questions.

Senator ERVIN. I can't forbear making some observations at this point.

We had a great law teacher in North Carolina: Dean Mardeca of Trinity College, now Duke University. He said that the law makes strange requirements of different people; that it requires the layman to know every jot and tittle of the law; and that it requires the lawyer to know a reasonable amount of the law, but that it does not require the judge to know a damned thing. I have to differ with my friend from South Carolina about the power of impeachment. I don't think the House can impeach a member of the Supreme Court because of his ignorance of law or because of his lack of fidelity to the meaning of the Constitution when he undertakes its interpretation. The Constitution authorizes the House to impeach public officials for high crimes and misdemeanors. I don't believe a Supreme Court Judge's ignorance of the Constitution or his lack of ability to interpret the Constitution correctly is a high crime or a misdemeanor regardless of its serious consequence to the nature.

I am also troubled about what the Supreme Court might do in the future about the provisions of the third article of the original Constitution which apparently has given Congress the power to curtail the appellate jurisdiction of the Supreme Court. The Supreme Court might hold an act of Congress doing so unconstitutional, and I don't know what the country could do in that case. Consequently, I don't

think we have any protection outside the self-restraint of the members of the Court.

Senator THURMOND. I might make a statement on this interpretation part, Mr. Chairman.

I think when a Supreme Court Judge blatantly violates the Constitution it is in a different category than just an ordinary case of interpretation. And I want to make that distinction.

Senator McCLELLAN. Very well. If there are no other questions, the acting chairman will make this observation and announcement.

I understood this hearing was called this morning so that I might interrogate the nominee further. I did not know that I would be expected to chair the committee this morning until shortly after the committee convened. And I am making this statement as a premise to what I am now about to say. There has appeared here this morning a gentleman who wishes to testify by the name of George W. Williams, of Baltimore. I have not talked with him and I do not know what his statement will be, of course. He advises that he does not have a prepared statement. And I understand that he would prefer not to submit a statement for the record. But I don't feel at liberty to permanently deny him the right to appear. And, therefore, I am going to leave that matter to the discretion of the chairman.

I have no instructions from the chairman about closing the hearing, or adjourning it. So I am simply going to recess the hearing, subject to the call of the chairman. I would suggest to the gentleman here that he prepare a statement for the record. If he doesn't want to do that, then he should take the matter up with the chairman of the committee.

I don't know the intentions of the chairman. I haven't talked to him. I thought he would be here this morning.

Thank you very much, Mr. Nominee.

The committee will stand in recess, pending such action as the chairman may direct.

(Thereupon, at 11:25 a.m. the committee adjourned, subject to the call of the Chair.)

(Senator Dirksen requested that the following letter be made a part of the record :)

DISTRICT OF COLUMBIA REPUBLICAN COMMITTEE,  
Washington, D.C., July 14, 1967.

CHAIRMAN, SENATE JUDICIARY COMMITTEE,  
U.S. Senate, Washington, D.C.

DEAR SIR: We are hopeful your Committee will favorably report and approve the nomination of Thurgood Marshall to be Associate Justice of the Supreme Court of the United States.

Both in private practice and in public office he has demonstrated those qualities which we admire in members of our highest judicial tribunal; i.e., moderation, reasonableness, a judicial temperament, and a balanced approach to controversial and complicated national problems.

At a time when race relations in the United States seem to be regressing to a point where we may join the historical pattern of perpetual racial hostility similar to that that exists between Greeks and Turks in Cypress, or French and English in Canada, or Arabs and Jews in the Middle East, or French and Algerians in North Africa, it is important to the Nation to have a qualified member of the Negro community sitting on the Supreme Court.

Respectfully yours,

CARL L. SHIPLEY,  
*Chairman.*

