

NOMINATIONS OF WILLIAM H. REHNQUIST AND LEWIS F. POWELL, JR.

HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE NINETY-SECOND CONGRESS

FIRST SESSION

ON

NOMINATIONS OF WILLIAM H. REHNQUIST, OF ARIZONA, AND
LEWIS F. POWELL, JR., OF VIRGINIA, TO BE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

NOVEMBER 3, 4, 8, 9, AND 10, 1971

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NOMINATIONS OF WILLIAM H. REHNQUIST AND LEWIS F. POWELL, JR.

WEDNESDAY, NOVEMBER 3, 1971

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

The committee met, pursuant to call, at 10:40 a.m., in room 1202, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Hart, Kennedy, Bayh, Burdick, Byrd of West Virginia, Tunney, Hruska, Fong, Scott, Thurmond, Cook, Mathias, and Gurney.

Also present: John H. Holloman, chief counsel, Francis C. Rosenberger, Peter M. Stockett, Hite McLean, and Tom Hart.

The CHAIRMAN. Let us have order.

This hearing is on the nomination of William H. Rehnquist of Arizona to be associate Justice of the Supreme Court of the United States, vice Justice Harlan retired. Notice of the hearing appeared in the Congressional Record of October 27, 1971.

I am going to place in the record at this time the report of the American Bar Association on Mr. Rehnquist, and also the report of the American Bar Association on Lewis F. Powell. Copies will be made available to the members of the committee and to the press.

(The reports referred to follow.)

AMERICAN BAR ASSOCIATION,
STANDING COMMITTEE ON FEDERAL JUDICIARY,
November 2, 1971.

Hon. JAMES O. EASTLAND,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR: The Standing Committee on the Federal Judiciary of the American Bar Association submits herewith its report regarding William H. Rehnquist.

Our Committee, with respect to nominations for the Supreme Court, limits its conclusions to the professional competence, judicial temperament, and integrity of the nominee. The Committee believes that without these characteristics no person is qualified to become a Justice of the Supreme Court. We recognize, however, that in the selection of a person for the Supreme Court by the President, and the consideration of that selection by the Senate, there are involved other factors of a broad political and ideological nature. Because the Committee does not take these factors into account, it wishes to make clear that it expresses no opinion on them, even though as will appear from what follows, its investigation revealed opposition from several sources to this nomination on that score. The Committee respects opinions on these factors on both sides; it does not attempt to evaluate them, except to the extent, if any, that they appear to affect the element of judicial temperament.

The present conclusion of the Committee, limited to the area described above, is that Mr. Rehnquist meets high standards of professional competence, judicial temperament, and integrity. To the Committee, this means that from the viewpoint of professional qualifications, Mr. Rehnquist is one of the best persons available for appointment to the Supreme Court.

While the Committee is unanimous in the view that Mr. Rehnquist is qualified for the appointment, three members of the Committee believe that his qualifications do not establish his eligibility for the Committee's highest rating and would, therefore, express their conclusion as not opposed to his confirmation.

EDUCATION

Mr. Rehnquist received his B.A. from Stanford in 1948, his M.A. in Political Science from Stanford in 1949, his M.A. in Government from Harvard in 1950, and his LL.B. from Stanford in 1952.

He was first in his law school class, an editor of the Law Review, and he was highly respected by the faculty and fellow students as a gifted scholar. A classmate who is now a partner in a leading west coast firm, at our request, interviewed several other members of Mr. Rehnquist's class. Their evaluation, in part, is as follows:

"Mr. Rehnquist is of exceptional intellectual and legal ability. He was a law student among law students, * * *. From the standpoint of intellectual and legal ability, there cannot be question among reasonable men on his exceptional qualifications.

"His personal integrity is not subject to challenge. While various of the interviewees, including myself, by no means agree with some of the political and social views of Mr. Rehnquist, each of us is completely satisfied that he will approach his task with objectivity, that he will decide each case that comes before him on the thorough analysis of the applicable law and a careful study of the facts."

EXPERIENCE

Supreme Court Clerkship

Mr. Rehnquist served as the law clerk for Mr. Justice Robert H. Jackson during the year 1952-53. Others who were law clerks during this period respected his ability. He was subject to some criticism for an article which appeared in the December 13, 1957 issue of U.S. News and World Report entitled "Who Writes Decisions of the Supreme Court?"

Phoenix, Arizona

Mr. Rehnquist moved to Phoenix in 1953. There he was associated with the firm of Evans, Kitchel & Jenckes. He then formed the partnership of Ragan & Rehnquist. This firm merged with Cunningham, Carson & Messenger and he became a junior partner of the latter firm. In 1960, he withdrew from this firm and formed a new partnership, Powers & Rehnquist. All of these changes of professional relationship were made without hard feelings and were made solely because of Mr. Rehnquist's view that the change would offer him a richer professional experience.

Mr. Rehnquist's rating in Martindale-Hubbell at the time he left Phoenix was the highest — AV. He could not be said to be the leading lawyer of Phoenix, but he was clearly a person of recognized professional quality who, for his age, was highly regarded. He handled a fair amount of litigation, including a notable case in which he acted as Counsel for the Arizona House of Representatives and one of its Commissions in the impeachment proceedings before the Arizona State Senate concerning certain public officers.

Present Government Position

Mr. Rehnquist is presently an Assistant Attorney General of the United States and head of the Office of Legal Counsel in the Department of Justice. As such, he is responsible to the Attorney General for the resolution of most of the legal questions presented to the Department which do not relate to litigation. In this position he has become highly respected among his colleagues in the government and particularly in the Department of Justice.

REPUTATION

Ninth Circuit

Over 120 judges and lawyers in seven states were interviewed. In addition, 10 law school deans were invited to comment, if possible after consultation with their faculties.

In the state of Arizona, 16 judges and 21 lawyers and 2 law school deans were interviewed. The consensus is that Mr. Rehnquist possesses outstanding ability and that he is well qualified to be an Associate Justice of the Supreme Court. Among those who endorsed him were former political opponents as well as lawyers and judges who disagreed sharply with his political and philosophical views.

Those devoted to expanding concepts of civil rights regret his nomination, yet, a number of leading liberal and civil rights lawyers support the nomination because of his professional competence, intellectual ability, and character. As one of them summed it up, he had "total professional respect for Mr. Rehnquist." He had never known of any reproach to his character. He states he is "not a Bircher, not a racist, but a decent man and a good human being". Other leading lawyers speak of him as intellectually honest and intellectually objective.

Mr. Rehnquist also has substantial support from the Arizona law schools. Although within the faculties of the two law schools there are differences in political philosophy, neither of the deans believe that there was any degree of opposition to Mr. Rehnquist's appointment within their faculties.

In the states of Washington, Montana, Oregon, California, Nevada, and Idaho, 13 judges and 51 lawyers were interviewed and also the deans and faculty members of 28 law schools. Except for many of the Stanford alumni, Mr. Rehnquist was not known personally to most of those interviewed, but he was known by several and known by reputation to several more. With one exception, all comments regarding Mr. Rehnquist's professional qualifications were favorable.

One judge although not personally acquainted with Mr. Rehnquist, had reservations as to his judicial temperament because of his impression that Mr. Rehnquist had such deep convictions on social and economic problems that he might be unduly and injudiciously influenced by those views in deciding cases. He believed, however, that in balance he was qualified for appointment. Others had reservations as to Mr. Rehnquist's personal views, but did not feel that this should disqualify him from appointment.

All of the deans interviewed recognized the high quality of Mr. Rehnquist's scholarship. Some acknowledged his conservatism, but felt that it did not affect his ability to be fair and open-minded. Among those to whom he was known only by reputation, some expressed the opinion that he might be "so far out of the main stream" with respect to human rights, that his qualifications were questionable; others had reservations as to temperament, but did not feel they rose to the level of disqualification.

One professor active in the civil rights movement said that he felt Mr. Rehnquist lacked the temperament of a Supreme Court Justice; that he was totally ruthless and in that sense lacked integrity. He felt that Mr. Rehnquist did not provide a full and balanced view to the Senate on what it wanted to know when he told the Senate that the Army did not give information to the Department of Justice in connection with surveillances. He felt that Mr. Rehnquist was gifted in his ability to make persuasive arguments but that he was not intellectually honest in making some of them.

Other circuits

Circuit	Lawyers	Judges	Law schools	Circuit	Lawyers	Judges	Law schools
1	4	4	7	6	10	4	8
2	17	9	5	7	25	16	7
3	26	19	3	8	75	22	7
4	150	30	11	10	14	8	1
5	41	24	8	DC	13	4	4

Practicing lawyers and judges

Outside the Ninth Circuit, Mr. Rehnquist was known only to a relatively small fraction of the lawyers and judges interviewed, but he was known by persons of recognized standing in almost every circuit. Those who knew him personally uniformly believed him qualified for the Supreme Court. The adjectives "intelligent", "brilliant", "articulate", "rational", "forceful" recurred in their discussions. Those who knew him by reputation also spoke highly of his intellectual qualities, although some expressed reservations as to his political views. Two judges felt that his positions as to civil rights and civil liberties were too far out of step with the needs of the times.

Mr. Rehnquist is highly regarded by persons who observed his work in the National Conference of Commissioners on Uniform State Laws. He was diligent and hardworking. He advocated conservative viewpoints, but he nevertheless supported the Conference recommendations if he was outvoted.

Law schools

Of the 61 law schools surveyed, no dean, and as far as we know, no faculty member has cast doubt as to Mr. Rehnquist's brilliant intellectual qualifications. Our impression from our survey is that a strong preponderance of this group favors his confirmation, notwithstanding sharp opposition to many of his philosophical views. A significant minority would oppose his confirmation, not on grounds of professional qualifications, but on the broader question of the political desirability of so conservative an addition to the court.

A very small number suggests that his reiterated conservative views manifest a defect going to his professional qualifications. One of this group said he had no question about Rehnquist's intellectual capacity and personal characteristics, but that positions he had taken on the power of the executive to engage in surveillance of private activities, the publication of the Pentagon papers and the notion of preventive detention raise, in the aggregate, a question as to the soundness of his approach to the constitutional separation of powers.

CIVIL RIGHTS AND CIVIL LIBERTIES

Mr. Rehnquist has drawn criticism both for his public defense of various administration acts and recommendations which touch on the field of civil liberties and also for certain views he expressed before becoming a government officer which manifest an extremely conservative position as to appropriate governmental action in certain areas of racial and religious discrimination.

As to positions advocated by him in speeches and in committee hearings regarding such matters as preventive detention and government surveillance, the Committee reviewed a large number of his statements and concluded that regardless of the merits of the positions advocated, it did not appear that this defense of those positions was beyond proper limits of professional advocacy.

As to the positions he espoused before becoming a government officer, such as his opposition to proposed local and state legislation forbidding discrimination in places of public accommodation, his views were obviously conservative, but they were expressed on philosophical grounds and concerned only the merits of pending legislation. When the legislation was enacted, Mr. Rehnquist in no way attempted to frustrate or oppose the enforcement of the law and, indeed, he now acknowledges that its successful execution convinces him that his position was probably wrong on the merits.

Members of the Committee have also spoken with representatives of labor and civil rights groups concerning Mr. Rehnquist. This includes the AFL-CIO, the NAACP, the Americans for Democratic Action and the Leadership Conference on Civil Rights. The Committee has been informed that many, if not all, of these groups are opposed to the confirmation of Mr. Rehnquist. As with respect to other objections to the nominee already noted, the reasons advanced for the opposition of these groups so far as the Committee has been informed, lie outside the area with which the Committee is concerned and to which its opinion is confined.

CONCLUSION

The Committee's investigation of Mr. Rehnquist was commenced on Friday, October 22, 1971, and this report was prepared on November 2, 1971. If further facts are learned which are significant, our Committee would ask for the privilege of submitting a supplemental report to deal with them.

As we stated at the outset, our Committee expresses no view whatever as to Mr. Rehnquist's personal and philosophical views. We have concluded that they do not affect his professional qualifications, that is, his professional competence, judicial temperament and integrity. Accordingly, the Committee is unanimous in its view that he is qualified for appointment to the Supreme Court. A majority of nine is of the opinion that he is one of the best qualified available and thus meets high standards of professional competence, judicial temperament, and integrity. The minority would not oppose the nomination, but is not ready to express this high degree of support.

Respectfully submitted,

LAWRENCE E. WALSH, *Chairman.*

**AMERICAN BAR ASSOCIATION,
STANDING COMMITTEE ON FEDERAL JUDICIARY,
November 2, 1971.**

Hon. JAMES O. EASTLAND,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR: The Standing Committee on the Federal Judiciary of the American Bar Association submits herewith its report regarding Louis F. Powell.

Our Committee, with respect to nominations for the Supreme Court limits its conclusions to the professional competence, judicial temperament, and integrity of the nominee. The Committee believes that without these characteristics no person is qualified to become a Justice of the Supreme Court. We recognize, however, that in the selection of a person for the Supreme Court by the President, and the consideration of that selection by the Senate, there are involved other factors of a broad political and ideological nature. Because the Committee does not take these factors into account, it wishes to make clear that it expresses no opinion on them, even though as will appear from what follows, its investigation revealed opposition from several sources to this nomination on that score. The Committee respects opinions on these factors on both sides; it does not attempt to evaluate them except to the extent, if any, that they appear to affect the element of judicial temperament.

The present unanimous conclusion of the Committee, limited to the area described above, is that Mr. Powell meets high standards of professional competence, judicial temperament, and integrity. To the Committee, this means that, from the viewpoint of professional qualifications, Mr. Powell is one of the best persons available for appointment to the Supreme Court.

EDUCATION

Mr. Powell received his B.S. from Washington and Lee University in 1929 and his LL.B. in 1931. He ranked first in his law school class. He was a campus leader and has the high respect of those who knew him as a student and as an alumnus. He is presently a Trustee of Washington and Lee University.

EXPERIENCE

Since 1937 Mr. Powell has been a partner of the firm of Hunton, Williams, Gay, Powell & Gibson. This firm is one of the leading firms in the State of Virginia and Mr. Powell is regarded as one of the leading lawyers of Virginia. His practice has embraced extensive litigation experience as well as other fields of professional activity. He is a director of a dozen important corporations and also serves as a trustee, member of the Executive Committee and general counsel of Colonial Williamsburg, Inc.

PUBLIC OFFICES

From 1952 to 1961 he served as Chairman of the Richmond Public Schools Board. From 1962 to 1969 he was a member of the Virginia Board of Education. As Chairman of Richmond Public Schools Board he is credited with a substantial contribution to the peaceful desegregation of the Richmond School system.

PROFESSIONAL ACTIVITIES

Mr. Powell has been active in the American Bar Association since 1941. He served as a member of many committees and as chairman of several. After service in the House of Delegates and on the Board of Governors, he was elected president of the American Bar Association for the year 1964-65. He has served as president of the American Bar Foundation since 1969 and as president of the American College of Trial Lawyers for the year 1969-70. Mr. Powell's presidency of the American Bar is remembered as a year of significant achievement. The uniform and undeviating comment of those who worked with him and knew him in this position emphasizes his courtesy, temperance and effectiveness.

REPUTATION

Fourth Circuit

One hundred thirty-two lawyers and judges were interviewed in the seven states of the Fourth Circuit. In addition, seven law school deans were asked for their own views and to the extent possible the views of their faculties. The Comments received can only be described as unrestricted enthusiasm for Mr. Powell. He has

received in most eloquent and emphatic terms the highest possible praise of the members of the profession who have known him and worked with him.

The law school faculties to the extent that their sentiment could be quickly obtained through the seven law school deans we interviewed are delighted with the President's choice. They regard him as moderate, temperate and extremely able—a most promising appointment to the Court.

The comments run the range of conceivable compliments—"absolutely tops in integrity, forthrightness, candor and fairness," "a superb human being," "one of our most capable individual practitioners," "a sensible conservative," "one of the finest lawyers and men I have ever known," "in every respect a great lawyer," "an example of selection based upon professional excellence," "a perfect gentleman and a distinguished scholar."

The cross-section of lawyers interviewed included lawyers from all specialties including those deeply committed to the area of civil rights. Only two adverse comments were received. One lawyer criticized Mr. Powell's firm for not having employed black lawyers and for its participation in the Prince Edward County school desegregation case. Another active civil rights lawyer expressed opposition to Mr. Powell's conservatism. This lawyer's partner, who is equally active in the civil rights matters has expressed his support for Mr. Powell.

Other circuits

Circuit	Lawyers	Judges	Law schools	Circuit	Lawyers	Judges	Law schools
1.....	4	4	7	7.....	25	16	7
2.....	17	9	5	8.....	75	22	7
3.....	26	19	3	9.....	75	32	30
5.....	41	24	8	10.....	14	8	1
6.....	10	4	8	DC.....	13	4	4

In part because of his American Bar Association relationships, but to a substantial degree he has been active in practice outside his own circuit, Mr. Powell was well known throughout the country. Every one of those in a position to express an opinion expressed approval of his nomination. Many did so in terms of almost unrestrained admiration—"one of the best lawyers in the country," "always a leader, quiet and forceful," "calm and restrained," "it would be difficult to find a more qualified appointee," "extraordinarily able person and a fine lawyer with great intellectual talent and capacity," "one of the ten best qualified men in the country," "a moderate but not a reactionary," "an intellectual with judicial temperament," "an outstanding lawyer, his integrity is beyond reproach, he has perfect temperament for the position."

A significant number of lawyers and judges stated that Mr. Powell was their first choice for appointment. Others stated that although they disagree with his political philosophy, they were completely satisfied that he would have a "sound and lawyer-like approach to all questions."

Some of the law school faculties expressed regret or lack of enthusiasm because of Mr. Powell's conservatism but in most leading law schools the opinion was strongly favorable. For example, one scholar stated that there was no question as to his ability, that he was extraordinarily conscientious, that he was always prepared to reconsider his own viewpoints, that although he was traditionally conservative he was very fair and had a true breadth of outlook. Other comments from the law schools were: "A man of size who has humility, and depth and breadth of experience," "appointment is ideal," "highest calibre as a man and as a lawyer," "brilliant lawyer, level-headed, learned and a moderate."

CIVIL LIBERTIES

Members of the Committee have also spoken with representatives of labor and civil rights groups concerning Mr. Powell. This includes the AFL-CIO, the NAACP, the Americans for Democratic Action and Leadership Conference on Civil Rights. We have been informed that these groups are not opposed to Mr. Powell's confirmation.

CONCLUSION

It is the unanimous view of our Committee that Mr. Powell meets, in an exceptional degree, high standards of professional competence, judicial temperament and integrity and that he is one of the best qualified lawyers available for appointment to the Supreme Court.

Respectfully submitted,

LAWRENCE E. WALSH, *Chairman.*

The CHAIRMAN. I will also place in the record the biography of the nominee.

Mr. Rehnquist, is it correct?

Mr. REHNQUIST. It is correct, I believe, Mr. Chairman.

The CHAIRMAN. It will be placed in the record.

(The biography referred to follows.)

Name: William H. Rehnquist; Born: October 1, 1924, Milwaukee, Wisconsin.

Marital Status: Married, 3 children (Wife: Natalie Cornell).

Education: Stanford University, Stanford, California, 1948 B.A. degree, 1952 LL.B. degree. Harvard University, Cambridge, Mass., 1950 M.A. degree.

Bar: 1952, District of Columbia; 1954, State of Arizona.

Military Service: Mar. 4, 1943—Apr. 10, 1946 U.S. Army Air Force; Sergeant when discharged.

Employment: Jan. 26, 1952—July 18, 1953 Law clerk to Associate Justice Robert H. Jackson, U.S. Supreme Court. July 18, 1953—Oct. 1, 1953 Evans, Kitchel and Jenckes, Phoenix, Ariz. Oct. 1, 1955—Jan. 1, 1957 Private practice with Keith Ragan, Phoenix, Ariz. Jan. 1, 1957—Jan. 1, 1960 Cunningham, Messenger, Carson and Elliott, Phoenix, Ariz. Partner. Jan. 1, 1960—Feb. 1, 1969 Powers and Rehnquist, Phoenix, Ariz. Feb. 1, 1969—Present U.S. Department of Justice, Office of Legal Counsel, Assistant Attorney General.

Office: United States Department of Justice, Washington, D.C.

Home: 7004 Arbor Lane, McLean, Va.

To Be: Associate Justice of the Supreme Court of the United States.

The CHAIRMAN. A resolution from the State Bar of Arizona and other letters will also be placed in the record.

(The material referred to follows.)

STATE BAR OF ARIZONA,
Phoenix, Ariz., October 26, 1971.

Hon. JAMES EASTLAND,

*Chairman, Senate Judiciary Committee,
Senate Office Building, Washington, D.C.*

SIR: I have enclosed a resolution of the Board of Governors of the State Bar of Arizona strongly endorsing the nomination and appointment of William H. Rehnquist as an Associate Justice of the Supreme Court of the United States. The State Bar of Arizona is greatly honored by Mr. Rehnquist's nomination and would like to be on record as enthusiastically supporting his appointment.

Should your committee request appearances in connection with its consideration of Mr. Rehnquist's nomination, a representative of the State Bar of Arizona would be honored to appear on behalf of Mr. Rehnquist's appointment.

Sincerely,

HOWARD H. KARMAN, *President.*

RESOLUTION

Whereas, Mr. William H. Rehnquist, a member of the State Bar of Arizona, has been nominated by the President of the United States as an Associate Justice of the Supreme Court of the United States, subject to the advice and consent of the Senate; and

Whereas, Mr. Rehnquist has continually demonstrated the very highest degree of professional competence and integrity and devotion to the ends of justice both in the State of Arizona and the United States of America; therefore, it is

Resolved by the Board of Governors of the State Bar of Arizona that the said Board of Governors unanimously endorses the nomination and appointment of WILLIAM H. REHNQUIST as an Associate Justice of the Supreme Court of the United States; and be it further

Resolved, that the president of this association be, and he is hereby authorized and directed to proceed in an appropriate manner to communicate this endorsement to the Judiciary Committee of the United States Senate, including, but not limited to, an appearance by a representative of the State Bar of Arizona before such committee in support of Mr. Rehnquist's nomination and appointment.

The above resolution was unanimously adopted by the Board of Governors of the State Bar of Arizona at its meeting on October 23, 1971.

HOWARD H. KARMAN, President.

Attest:

ELDON L. HUSTED, Executive Director.

MOORE, ROMLEY, KAPLAN, ROBBINS & GREEN,
1600 ARIZONA TITLE BUILDING,
Phoenix, Ariz., October 27, 1971.

Sen. EDWARD W. BROOKE,
Old Senate Office Building,
Washington, D.C.

DEAR SENATOR BROOKE: As the Senate undertakes to deliberate upon President Nixon's recent nominations, I urge your favorable consideration of the appointment of William H. Rehnquist as Associate Justice of the United States Supreme Court.

I have known Mr. Rehnquist well as a professional colleague for many years. He is an outstanding lawyer, completely thorough, scholarly, perceptive, articulate and possessed of the utmost integrity as well as a keen wit. He enjoys the highest respect of his fellow lawyers for his legal talent. There is, in my mind, no question about Mr. Rehnquist's legal qualifications to serve upon the Supreme Court.

Parenthetically, I wish to state that I do not share much of Mr. Rehnquist's political views or philosophy. But that hardly detracts from his legal abilities or from my recognition of those abilities. Nor am I aware of any real basis for characterizing his views as extremist. Mr. Rehnquist is a consummate advocate, as any good lawyer must be. He states his views (or the views of those whom he represents) with the zeal of a skilled advocate. This is what he is trained to do, and should not be misunderstood as extremism.

For many years I have worked to build bridges of communication and understanding among our many groups of people in Phoenix. I have been, and am, most concerned with prejudice and discrimination against minority groups. In 1963, I was appointed by the Mayor to the City of Phoenix Human Relations Commission, which is dedicated to the elimination of this monstrous social disease. For several years I served as Chairman of the Commission. I have also served as President or Chairman of other organizations whose functions are to promote better human relations among all people. In all my years of intergroup relations in this community, I never once heard reference to Mr. Rehnquist as bearing hostility toward minority persons.

He did, as I recall, disagree with the content of certain proposed civil rights legislation at both the City and State levels. But unlike others, whose opposition was clearly suspect, Mr. Rehnquist's objections were based on legal grounds which he presented in a sincere fashion.

I do not profess to know everything Mr. Rehnquist has ever said or done. On the basis of what I do know, however, I believe that it is neither accurate nor fair to label him as a "racist," sophisticated or otherwise.

If desired by the Senate Judiciary Committee, I would be happy to appear and testify in greater detail in favor of the appointment of Mr. Rehnquist. By copy of this letter to Senator Eastland, I am informing him of my availability.

Yours very truly,

JAREIL F. KAPLAN.

STANFORD LAW SCHOOL,
Stanford, Calif., October 28, 1971.

Hon. JAMES O. EASTLAND,
Senate Judiciary Committee,
New Senate Office Building. Washington, D.C.

DEAR SENATOR EASTLAND: This letter expresses my unqualified and enthusiastic support of the nomination of William H. Rehnquist as Associate Justice of the U.S. Supreme Court and the hope that his nomination will be speedily approved by the Committee and confirmed by the Senate.

During his student days in the Stanford Law School I came to intimately know Bill Rehnquist in the classroom, in my office, and in my home. Since his graduation in 1952 we have kept in touch with each other and have had frequent chats about his professional activities in private practice and in public service.

As a student he was nothing short of brilliant, dogged in his determination to achieve excellence and persistent in his expectation of excellence on the other side of the podium. I vividly recall that in the give and take of the classroom he tested my stature and sharpened my thinking as an instructor many times. He was always forthright and courageous, never equivocal, never evasive, always refined and profound in his analysis of difficult problems; his thoughts were always precisely formulated and precisely expressed. In those days it was so very easy for one like myself to predict with complete confidence that he would have a distinguished professional career, that he would become, as the President has called him, a "lawyer's lawyer," and that he would fully meet his obligations to society as a lawyer citizen.

Bill Rehnquist is not only qualified, but is eminently qualified to be a Justice of the Supreme Court. He is a fine person, a lawyer of extraordinary ability and competence, extraordinarily well equipped to meet and resolve with wisdom and good judgment those delicate and complex issues which confront a Justice, and above all else he is a man of complete intellectual and personal integrity. He will have a distinguished career on the Court.

Sincerely yours,

JOHN B. HURLBUT,
Jackson Eli Reynolds,
Professor of Law Emeritus.

THE UNIVERSITY OF MICHIGAN LAW SCHOOL,
Ann Arbor, Mich., October 29, 1971.

Senator JAMES O. EASTLAND.
Chairman, Senate Judiciary Committee,
The Capitol,
Washington, D.C.

DEAR SENATOR EASTLAND: It was my privilege to serve as Deputy Assistant Attorney General for the Office of Legal Counsel, United States Department of from May, 1969 through July, 1970. In that capacity, I worked very closely with Justice, during the period from May, 1969 through July, 1970. In that capacity, I worked very closely with William H. Rehnquist, the Assistant Attorney General for the office nominated for a Supreme Court position by the President last week. I urge you to support his nomination.

William H. Rehnquist is as fine a lawyer as I have encountered. He has a scholarly, intellectual approach to legal problems which is not found in many practicing lawyers. While he and I did not always agree on the resolution of legal issues, I always received a fair hearing and found him eager to learn all that he could before making a decision. In addition to a powerful legal mind, and perhaps equally as important, Mr. Rehnquist has abiding interest in and concern for the development of the law and legal institutions. He has all the qualities to become a truly great judge, and to assume a substantial degree of intellectual leadership on the Court for a number of years to come.

Based upon my close working relationship with Mr. Rehnquist, I believe he is exceptionally well qualified for the position to which he has been nominated. I might also add that I have been somewhat dismayed by charges made during the past that he is a "racist." That is a term used rather loosely these days, but I surely hope that we have not reached the point where all political conservatives

must bear the racist label. Mr. Rehnquist is of course on the conservative side of the political spectrum. But I neither saw nor heard anything during my two years with the Department which would in any way suggest that Mr. Rehnquist had any tendency toward racism. Charges to the contrary seem wholly unwarranted.

In my judgment, William Rehnquist will contribute much to the work of the Court and to this country's legal institutions, and I therefore strongly support his nomination.

Very truly yours,

THOMAS E. KAUPER,
Professor of Law.

YALE UNIVERSITY LAW SCHOOL,
New Haven, Conn., November 1, 1971.

Hon. JAMES O. EASTLAND,
*Chairman, Committee on the Judiciary,
Senate Office Building,
Washington, D.C.*

DEAR SENATOR EASTLAND: I am writing in support of the President's nomination of Mr. William Rehnquist for Associate Justice of the Supreme Court of the United States.

My support is based not merely upon Mr. Rehnquist's professional reputation, which is extremely high, but upon my opportunities to talk with him and to observe him in debate concerning legal matters. There can be no doubt whatever concerning his intellectual qualifications. He possesses a brilliant and analytical mind. More than that, however, Mr. Rehnquist is a deeply thoughtful man with respect for the requirements of intellectual honesty. I am sure, therefore, that in the decision of constitutional cases he will be guided not by his personal philosophy but by a commitment to the commands of the Constitution, interpreted in the light of its text and its history. This does not mean that he will be a wooden literalist but rather that he will attempt to discern the meaning of the Constitution in new circumstances by the document's fundamental principles instead of in Court and to this country's legal institutions, and I therefore strongly support accordance with whatever legislative views he might entertain if he were in the Congress rather than upon the Court. This is a difficult task, requiring the utmost in self-discipline and thoughtfulness. I believe that Mr. Rehnquist has those qualities in abundance.

I have seen Mr. Rehnquist engage in debate on highly controversial subjects. Though some persons on both sides of the issue became quite heated, he did not. He remained calm but forceful in the presentation of his views, marshalling his arguments with great skill. That performance was indicative not merely of great professional qualifications, but also of a judicial temperament.

In sum, I support Mr. Rehnquist's nomination warmly and with enthusiasm.
Yours truly,

ROBERT H. BORK,
Professor of Law.

YALE LAW SCHOOL,
New Haven, Conn., November 2, 1971.

Hon. JAMES O. EASTLAND,
*Chairman, Committee on the Judiciary, U.S. Senate,
Washington, D.C.*

DEAR SENATOR EASTLAND: I am writing to support the nomination of Mr. William H. Rehnquist as an Associate Justice of the Supreme Court of the United States.

By way of reputation, I know Mr. Rehnquist to be a distinguished lawyer blessed with a brilliant mind. I have also been fortunate enough to have had personal contact with him. He is a reflective, thoughtful individual with a temperament ideally suited to a judicial position. He is intellectually honest and has a highly developed sense of legal craftsmanship.

Mr. Rehnquist is experienced in matters of constitutional law. He will bring to the Court knowledge and a sense of history as well as intellectual power. He understands, and accepts, the fundamental principles of government established

by the Constitution and appreciates the difficult role a court must play as a constitutional arbiter in a democratic society.

It is my anticipation that Mr. Rehnquist, if he is confirmed, will serve with distinction and that history will judge him to be one of our greatest Justices.

Sincerely yours,

RALPH K. WINTER, Jr.,
Professor of Law.

THE UNIVERSITY OF CHICAGO,
THE LAW SCHOOL,
Chicago, Ill., November 10, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary, U.S. Senate,
Washington, D.C.

DEAR SENATOR EASTLAND: I should like to express my warm support for the confirmation of William H. Rehnquist as Associate Justice of the Supreme Court.

Rehnquist was a student of mine at Stanford Law School. He was not only the top student in his class but one of the best students in the School over a number of years. He has remained in my mind as one of the most impressive students I have had in some twenty-two years of teaching.

I am confident that he is a fair-minded and objective man. Any suggestions of racism or prejudice are completely inconsistent with my recollections of him. Although I have had little contact with him in the intervening years, I have confirmed my impressions about both his intellectual quality and his objectivity with members of the Arizona bar whose judgment I respect.

I believe he would be an independent judge and that he would bring to the Court an unusual capacity for understanding and responding to all dimensions of the difficult problems the Supreme Court must confront. In my judgment his appointment would add great strength to the Court.

Sincerely,

PHIL C. NEAL, *Dean.*

ARIZONA STATE UNIVERSITY,
COLLEGE OF LAW,
Tempe, Ariz., November 11, 1971.

Hon. JAMES OLIVER EASTLAND,
Chairman, Committee on the Judiciary, U.S. Senate,
Washington, D.C.

DEAR SENATOR EASTLAND: I write to support the nomination of William H. Rehnquist to the Supreme Court of the United States. Neither his political party nor his political philosophy is mine. Nonetheless, he is a lawyer of such skill, intelligence and integrity that I was moved to approach him a year ago about the possibility of an academic career with the faculty of the College of Law of Arizona State University. He felt his commitment at the Department of Justice would not then permit him to consider such an appointment.

The qualities that would, in my judgment, have made him an excellent law professor should make him an excellent Justice of the United States Supreme Court. On that Court, charged with responsibility to serve the interests of all of the people in interpreting the Constitution of the United States and the laws of Congress, I am confident he will serve his country with great distinction.

Sincerely,

WILLARD H. PEDRICK, *Dean.*

The CHAIRMAN. Senator Fannin.

STATEMENT OF HON. PAUL J. FANNIN, A SENATOR FROM THE STATE OF ARIZONA

Senator FANNIN. Thank you.

Mr. Chairman and members of the committee, I am delighted to join with my colleagues, Senator Goldwater and Congressman Rhodes, in presenting to you Mr. William H. Rehnquist who has been nominated to be an Associate Justice of the Supreme Court.

Mr. Rehnquist was born in Milwaukee in 1924. He received his undergraduate degree "with great distinction" in 1948 from Stanford University where he was elected to Phi Beta Kappa. In 1950 he received a masters degree from Harvard University. In 1952 he was graduated first in his class from Stanford Law School where he was elected to the Order of the Coif and served on the board of editors of the Stanford Law Review. From law school he came to Washington where he first clerked for Supreme Court Justice Robert H. Jackson.

In 1953 Mr. Rehnquist moved to Arizona and entered private law practice in Phoenix. He has been a partner in Phoenix law firms from 1955 until 1969 when he was nominated to be the assistant attorney general for the Office of Legal Counsel. Mr. Rehnquist's nomination was favorably reported by this committee on January 30, 1969; the next day he was confirmed by the Senate.

As you know, the Office of Legal Counsel—often called the President's law firm—operates as the primary constitutional authority for the executive branch. In effect, Mr. Rehnquist is, as President Nixon described him, the President's lawyer's lawyer.

But let me not monopolize this forum with my own praise of Mr. Rehnquist's qualifications; permit me to note what Mr. Rehnquist's fellow Arizonans think about his nomination to be an associate justice of the Supreme Court.

Arizona Governor Jack Williams described Mr. Rehnquist as a "real scholar * * * an outstanding attorney." Vice Chief Justice Jack D. H. Hays of the Arizona Supreme Court noted that Mr. Rehnquist is "a very outstanding young man * * * a tremendous legal scholar." Former Arizona Supreme Court Judge Charles Bernstein stated: "I couldn't think of a better choice. * * * He has an extremely well-balanced philosophy. * * * A sense of feeling for human beings, especially for the little man."

Gary Nelson, attorney general of Arizona, noted: "I was ecstatic at the announcement of his nomination * * * I think he's outstanding." State Senator Sandra D. O'Connor, a law school classmate, stated: "When Bill has expressed concern about any law or ordinance in the area of civil rights, it has been to express a concern for the preservation of individual liberties of which he is a stanch defender in the tradition of the late Justice Black." Declaring that "he has the potential to become one of the greatest jurists of our highest court," she noted that as a law student, "he quickly rose to the top of the class and, frankly, was head and shoulders above all the rest of us in terms of sheer legal talent and ability." Arizona State Republican Chairman Harry Rosenzweig remarked: "The President * * * has made a very fine selection. He is not only a lawyer but a student of the law." Herbert L. Ely, the State democratic chairman, also supports the confirmation of William Rehnquist as do the Arizona Republic, the Phoenix Gazette, and the Tucson Daily Citizen newspapers.

During his 16 years as a practicing attorney in Phoenix, Bill Rehnquist has earned the admiration of his fellow practitioners. In a unanimous endorsement by the Board of Governors of the State Bar of Arizona, Mr. Rehnquist was praised for having "continually demonstrated the very highest degree of professional competence, integrity, and devotion to the ends of justice." C. A. Carson III, a former law partner and a member of the ABA Board of Governors and House

of Delegates, characterized the nominee as "a wonderful man, a great lawyer, and a scholar with a fine mind."

Another former law partner, James Powers, described Mr. Rehnquist as "a first rate legal scholar," adding: "He is the ultimate reasonable man. * * * I'm sure he'll make an excellent Justice." John P. Frank, a Phoenix attorney considered to be an expert on the subject of judicial nominations, noted: "He's splendid. He's going to make a good Supreme Court Justice."

The tributes to Mr. Rehnquist from his fellow Arizonans go on and on, and I am certain that you will hear many more testimonials during the course of this hearing.

Mr. Chairman, it is with great pleasure that I join in commending Mr. Rehnquist to you and recommending the approval of his nomination to be an Associate Justice of the Supreme Court.

Thank you.

The CHAIRMAN. Any questions?

Senator Goldwater.

STATEMENT OF HON. BARRY GOLDWATER, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator GOLDWATER. Thank you.

Mr. Chairman, it is an unqualified privilege for me to join with my colleagues from Arizona today in introducing William Rehnquist as a nominee for the position of Supreme Court Justice.

Let me state at the outset, Mr. Chairman, that I have personally known Mr. Rehnquist during the past 18 years, since he first arrived in Phoenix, and out of this long and close association I can tell you in complete honesty that he is fit in every sense of the word to become a great and respected member of the High Court.

Mr. Chairman, I personally know of the nominee's exceptional service to his citizen clients as a practicing attorney in Arizona and, in recent years, to the general public in his capacity as a Government official. In addition to the attitudes of diligence and dedication which Mr. Rehnquist brings to every legal task before him, he is unquestionably one of the most brilliant legal craftsmen in America. In fact, Mr. Chairman, President Nixon has credited Bill Rehnquist "as having one of the finest legal minds in this whole Nation."

Mr. Rehnquist has earned these plaudits every step of the way throughout his distinguished career in the law. In 1948, he graduated from Stanford University "with great distinction" and as a member of Phi Beta Kappa. In 1952, also at Stanford, he graduated first in his law school class, having acquired an MA from Harvard in between his Stanford courses.

Then he began his actual career first as a public servant in the spot of clerk to former Supreme Court Justice Robert Jackson. From this select position, he came to Phoenix where he embarked upon a 16-year period of private practice, thereby acquainting himself with a wide variety of legal issues.

Most recently, in 1969, the nominee became the Assistant Attorney General for the Office of Legal Counsel. This position, Mr. Chairman, is a highly important post. A 1970 report of the Attorney General describes the functions of this office as including the drafting of

formal opinions of the Attorney General himself, rendering opinions on a variety of "significant and complex constitutions, statutory, and other legal questions involving the executive branch," and considering conflicts of interest questions.

Also this officer must pass on matters relating to the Freedom of Information Act and is often called upon to testify before congressional committees as a spokesman for the position taken by the Department of Justice on legislative proposals. Thus, Mr. Chairman, Bill Rehnquist has become acquainted with the practical role and interests of the legislative branch of our Government, as well as with the executive and judicial branches.

In short, Mr. Chairman and members of the committee, the nominee is a man of varied and balanced experience. He is well versed in every aspect of the Government and he has dealt with the day-by-day concerns of average citizens as a private practitioner. He truly is a man attuned to the law, exceptionally diligent, honest to where the truth leads him, and first and foremost a scholarly interpreter of the Constitution. He is calm, competent, and has a healthy compassion for human needs. He will serve his country and its people well, and, Mr. Chairman and members of the committee, I urge his confirmation.

The CHAIRMAN. Any questions?
Congressman Rhodes.

STATEMENT OF HON. JOHN J. RHODES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. RHODES. Mr. Chairman, I deem it to be a high honor and a personal privilege to appear before you and the distinguished members of your committee for the purpose of recommending to you the confirmation of William H. Rehnquist as an Associate Justice of the Supreme Court. I make this recommendation without reservation, either as to the professional ability of Mr. Rehnquist or as to his moral, ethical, or intellectual qualifications.

Bill Rehnquist is a fine man in every sense of the word. He is a good citizen, a good man, and one of the most able lawyers I have ever known. He was graduated first in his law school class at Stanford University and served as law clerk to the late Associate Justice Robert Jackson. His career as a practicing lawyer in Phoenix, Ariz., is replete with accomplishment, and his reputation in the Arizona Bar is unsurpassed for integrity and legal skill. Mr. Rehnquist has served as president of the Maricopa County Bar Association and has been active in the work of the State Bar Association of Arizona. He has served with great distinction as Assistant U.S. Attorney General, the position he now holds.

I know that Mr. Rehnquist is a man of deep convictions. However, the points of view he expresses have been obtained by the process of reasoning, and not by way of passion or emotion. My knowledge of Mr. Rehnquist's ability to reason causes me to have every confidence that as an Associate Justice of the Supreme Court, his decisions and his opinions will be derived through the process of reasoning of a true scholar, applying legal precedents to the particular case at bar with the deft, sure strokes of a legal craftsman. He is thoroughly dedicated to the principles of the English common law. However, we can also be

sure of his great regard and reverence for the intent legislative bodies have expressed when enacting statutes, and we can expect his statutory interpretation to reflect this viewpoint.

I would predict that Mr. Rehnquist will become one of the great Justices of the Supreme Court. He is not only accomplished in the practice of the legal profession, but he is also a great human being with a fine sense of humor. He has a great feeling of respect and compassion for his fellow man and of reverence for our American institutions. It is my pleasure and honor to join my colleagues in the Arizona delegation to the Congress of the United States in recommending that this committee consider favorably the confirmation of William Rehnquist.

Mr. Chairman, I am authorized by Congressman Udall and Congressman Steiger to convey to the committee that they also recommend the confirmation.

The CHAIRMAN. Well, you are speaking for the Congressional delegation from Arizona; is that correct?

Mr. RHODES. I am about to ask the chairman for the privilege for my colleagues to file their statements for the record.

The CHAIRMAN. Yes.

Mr. RHODES. The statement you have made as to the recommendation of confirmation is correct, but I would prefer that the individuals have the privilege of filing their own statements so that they can express their ideas in their own words.

The CHAIRMAN. That will be granted.

(The statements referred to follow:)

STATEMENT OF REPRESENTATIVE MORRIS K. UDALL

Mr. Chairman, I released on October 27th in Arizona a statement with regard to the nomination of William H. Rehnquist to the Supreme Court. That statement follows:

It's natural to feel some pride when a man from one's state and from one's own professional group is nominated for a position carrying the awesome responsibility of the U.S. Supreme Court.

Thus, the President's selection of William Rehnquist stirs such pride.

At the same time, I must acknowledge that I would not have nominated Mr. Rehnquist had the choice been mine.

I say this though I can attest to his complete integrity and adherence to the highest ethical standards. In addition he has had excellent legal training and experience and possesses a clearly superior legal mind. He certainly meets the demanding professional standards for and would bring intellectual distinction to the Supreme Court.

Having said that, however, I must register my strong disagreement with Mr. Rehnquist's philosophy. I consider many of his publicly expressed views to be misguided and wrong.

Yet I believe that a President has the right to appoint judges of his own political and judicial philosophy and that his nominees should generally be confirmed when they meet ethical and professional standards, as Mr. Rehnquist obviously does.

Furthermore, we have learned that it is risky business to predict the course a lawyer will take when he leaves the political arena and begins a lifetime judicial appointment. And so I can be hopeful that as a Supreme Court justice Mr. Rehnquist will acquire different perspectives.

STATEMENT OF REPRESENTATIVE SAM STEIGER

This is more than the normal, ritual endorsement of an executive appointment by a Member of Congress who resides in the appointee's State.

Bill Rehnquist, by temperament, training and character, will be a magnificent member of the Supreme Court. His intellectual ability, his honor and integrity, and his legal achievements have been attested to by his shrillest critics.

It is incredible to me that this man, whose intellectual stature absolutely precludes bigotry, would be called racist, even by the most partisan practitioner. That Bill Rehnquist would be indifferent, or worse, to civil liberties would be laughable if these charges were not being mouthed by people who should know better. It is his total concern for the much maligned rights of the victims of organized crime that has led to his support of those carefully controlled devices necessary to the apprehension of those engaged in organized crime.

I have known Bill Rehnquist for a decade—both professionally and socially. In most of my dealings with public figures I have found my respect mitigated by tolerance after similar exposure. Not so in the case of Bill Rehnquist. I can say without hesitation that the more I know of him, the greater is my undiluted respect for him.

Mr. RHODES. Thank you.

The CHAIRMAN. Any questions?

The Chair would like to state that there has been a full field FBI investigation of the nominee, and also of Mr. Powell, the other nominee, and that the investigation showed them both clean, high-classed gentlemen. I cannot see any flaw in Mr. Rehnquist, or in Mr. Powell, as a result of the full field investigation.

TESTIMONY OF WILLIAM H. REHNQUIST, NOMINEE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

The CHAIRMAN. Mr. Rehnquist, you have an A.V. rating in Martindale's, do you not?

Mr. REHNQUIST. Yes, I did have at the time while I was practicing.

The CHAIRMAN. When did you get it?

Mr. REHNQUIST. As I recall, the minimum period in which you could get an A.V. rating at the time was a period of practice of 10 years. And it seems to me I got it in 1966, though I cannot be absolutely positive as to the date. It was very shortly after the expiration of the minimum period.

The CHAIRMAN. Of course, that is the highest rating Martindale's Legal Directory can give a person?

Mr. REHNQUIST. Yes, I believe it is.

The CHAIRMAN. And you got it in 12 years.

Mr. REHNQUIST. That certainly—it was either 11 or 12 years, Mr. Chairman. I am not positive as to the exact date.

The CHAIRMAN. No one can get it under 10 years?

Mr. REHNQUIST. That is my understanding.

The CHAIRMAN. Senator McClellan.

Senator McCLELLAN. Mr. Chairman, I have a few questions, but I should like to ask the indulgence of the Chair and my colleagues with me while I make a brief statement regarding these nominations, a statement that I want to go into the record in full. Following this statement, I will have some questions premised upon the views that I express here.

A special genius of the American people has been a commitment to the rule of law, not of men, and a special focus of that commitment has always been on the Supreme Court of the United States. This committee, and ultimately the Senate, fulfills, therefore, a sacred duty in advising and consenting to the nominations submitted by the President for the Nation's highest court.

In considering these pending nominations, three issues face this committee, and will later face the Senate:

Do these nominees have personal integrity?

Do they possess professional competency?

Do they have an abiding fidelity to the Constitution?

No Senator has a duty to vote to confirm any nomination forwarded by the President that cannot pass muster under this threefold test. In my judgment, this is what this hearing is all about—not about the so-called "Warren court," or the "Burger court" or even the "Nixon court." Those labels are the stuff of journalism, not constitutional law.

Since these nominations were announced, I have examined the public record of each of these men, and I shall undertake to listen through these hearings, without prejudgment. However, I would observe that I have found nothing in the public record of either man that raises any question whatsoever of lack of integrity or competency. I am convinced that any challenge on either of those grounds will utterly fail. Therefore, I shall be concerned about and shall direct my attention and inquiry principally to the question of their fidelity to the Constitution.

I think it can be said that there is room on the U.S. Supreme Court for liberals and conservatives, for Democrats and Republicans, for northerners and southerners, for westerners and easterners, for blacks and whites, and men and women—these and other similar factors neither qualify nor disqualify a nominee. After personal integrity and professional competency, what is most crucial, in my judgment, is the nominee's fidelity to the Constitution—its text, its intention and understanding by its framers, and its development through precedent over the history of our Nation.

There have been a few unfortunate periods in our history when Justices on the Supreme Court have taken too literally Chief Justice Hughes aphorism that the Constitution is what the judges say it is and have attempted to rewrite our Nation's basic charter according to their own personal philosophies, either conservative or liberal. In my opinion, our Nation has just passed and is still passing through such a period.

In recent years a majority of the Supreme Court—no doubt in good faith, but nonetheless in my opinion with mistaken judgment—began to impose new standards on the administration of criminal justice in the United States, on both the Federal and State levels. These decisions have not enforced, as some have suggested, the simple rule that law enforcement agents must "live up to the Constitution" in the administration of justice, a Constitution that establishes known and fundamental standards. If this was all that was involved, no one could legitimately complain. My voice, for one, would not have been raised. Instead, these cases have, to a significant degree, created and imposed on a helpless society new rights for the criminal defendant, and some of these new rights have been carved out of society's due measure of personal safety and protection from crime. Indeed, since 1960, in the criminal justice area alone, the Supreme Court has specifically overruled or explicitly rejected the reasoning of no less than 29 of its own precedents, often by the narrowest of 5-4 margins. The high water mark of this tendency to set aside precedent was in 1967, when the Court overturned no less than 11 prior decisions. Twenty-one of the 29 decisions the Court overruled involved a change in constitutional doctrine—accomplished without invoking the prescribed processes for the adoption of a constitutional amendment.

It is significant that 26 of these 29 decisions were handed down in favor of a criminal defendant, usually one conceded to be guilty on the facts. The pursuit by some jurists of abstract individual rights defined by ideology, not law, has thus threatened to alter the nature of the criminal trial from a test of the defendant's guilt or innocence into an inquiry into the propriety of the policeman's conduct.

In my judgment, these decisions, however well intentioned, have come at a most critical juncture of our Nation's history and have had an adverse impact on the administration of justice. Our system of criminal justice, State and Federal, is increasingly being rendered more impotent by such decisions in the face of an ever-rising tide of crime and disorder.

President Johnson's prestigious Crime Commission in 1967 began its monumental study of crime in the United States with these tragic words:

There is much crime in America, more than ever is reported, far more than ever is solved, far too much for the health of the Nation. Every American knows that. Every American is, in a sense, a victim of crime. Violence and theft have not only injured, often irreparably, hundreds of thousands of citizens, but have directly affected everyone. Some people have been impelled to uproot themselves and find new homes. Some have been made afraid to use public streets and parks. Some have come to doubt the worth of a society in which so many people behave so badly. Some have become distrustful of the Government's ability, or even desire, to protect them. Some have lapsed into the attitude that criminal behavior is normal human behavior and consequently have become indifferent to it, or have adopted it as a good way to get ahead in life. Some have become suspicious of those they conceive to be responsible for crime: adolescents or Negroes or drug addicts or college students or demonstrators; policemen who fail to solve crimes; judges who pass lenient sentences or write decisions restricting the activities of the police; parole boards that release prisoners who resume their criminal activities.

Mr. Chairman, I am glad to know that one of the nominees, Mr. Powell, was a member of the President's Commission that voiced these sentiments.

It is for these reasons that I, for one, welcome these two distinguished nominations. Until it has been demonstrated otherwise, I shall assume that their appointment is not an attempt to put a "liberal" or a "conservative" on the Court, but to appoint men of the highest integrity and outstanding competency—men characterized by a deeply held fidelity, not to an abstract ideology of the left or the right, but to the Constitution itself. If we can return fidelity to the Constitution, I believe our society will be both free and safe.

Mr. Chairman, with that preface, I would like to ask the nominee before us this morning some questions.

The CHAIRMAN. Proceed.

Senator McCLELLAN. Mr. Rehnquist, it is not my intention here to ask you to comment on specific litigation that might be before or might come before the Court. But, I do wish to explore for the record, your understanding, in a general way, of the role of the Court and the men who sit on it as the guardians of our Nation's basic charter.

Would you feel free, as a justice, to take the text of the Constitution particularly in its broad phrases—"due process" * * * "unreasonable search and seizure"—and to read into it your personal philosophy, be it liberal or conservative?

Mr. REHNQUIST. I would not, Senator McClellan.

Senator McCLELLAN. If you felt honestly and deeply, in light of your own personal philosophy, that the intention of the framers of

the Constitution was no longer being achieved through the specific legal devices they deliberately chose in drafting specific clauses, would you feel free, as a justice, to ignore these specific legal devices and give old clauses new readings to achieve a new, and in your judgment beneficial, result?

Mr. REHNQUIST. I do not believe I would, Senator. I think that—

Senator McCLELLAN. Well, this goes to the heart of the matter.

Would you be willing, as a judge, with the power you would have on the Court, to disregard the intent of the framers of the Constitution and change it to achieve a result that you thought might be desirable for society?

Mr. REHNQUIST. No; I would not.

Senator McCLELLAN. If you felt honestly and deeply that a settled course of constitutional doctrine developed by precedent over the years was wrongly decided in terms of your own philosophy of what is good or bad for our society, would you feel free to overrule that precedent and chart a new course of constitutional doctrine? In other words, assume that for years and years the words of the Constitution in a given clause or section had been given a certain interpretation or construction. Now, if you felt that that interpretation or construction, though in keeping with the plain intent of the framers of the Constitution, was not getting the results that you felt were necessary for a modern-day society, would you overrule that decision to bring about a change? Or instead would you feel that the Constitution should be amended by the processes prescribed by it?

Mr. REHNQUIST. I would not overrule a prior decision on the grounds that you suggest.

Senator McCLELLAN. In your judgment, what sort of respect is due precedent on constitutional questions by the Court? How much should you feel bound by the precedents the Court has established?

Mr. REHNQUIST. I feel that great weight should be given to precedent. I think the Supreme Court has said many times that it is perhaps entitled to perhaps somewhat less weight in the field of constitutional law than it is in other areas of the law. But, nonetheless, I believe great weight should be given to it. I think that the fact that the Court was unanimous in handing down a precedent makes a precedent stronger than if a court was 5 to 4 in handing down the precedent. And I think the fact that a precedent has stood for a very long time, or has been reexamined by a succeeding number of judges, gives it added weight.

Senator McCLELLAN. Should you be confirmed, to what degree would you feel free to implement on the Court your personal view of the role that the Court should play in adjusting the rights of society and the individual in the administration of justice?

Mr. REHNQUIST. None.

Senator McCLELLAN. Would you feel bound by the restraints of personal or logical consistency to follow the same legal or constitutional judgments on issues you considered either as a student, private practitioner, or in the Office of Legal Counsel?

Mr. REHNQUIST. No; I do not believe I would.

Senator McCLELLAN. Well, it occurs to me—and I have practiced a little law and observed a good many lawyers—that as a practitioner, you are an advocate for a client as well as an officer of the Court. And I can well see that the views that one might express in a given

case or on a given issue, when one becomes a judge with the power to make the determination instead of arguing the case, after weighing the other side of the argument, might not conform to one's judgment as a jurist. Could you conceive that to be true?

Mr. REHNQUIST. I not only can conceive it to be true, Senator McClellan, but I can recall at least one instance in which Justice Jackson, to whom I clerked, found as a Supreme Court Justice that he was obliged to disagree with something he had done as Attorney General. And I believe the same thing happened to Justice Clark.

Senator McCLELLAN. You mean, after they became Justices of the Court, they changed their views and decided differently on questions they had previously considered or argued as advocates of a cause?

Mr. REHNQUIST. Yes.

Senator McCLELLAN. Would you hesitate to do that if you had been wrong?

Mr. REHNQUIST. I certainly would not.

Senator McCLELLAN. You would not let your prior position become the overriding influence in your decisionmaking, would you?

Mr. REHNQUIST. No; I would not.

Senator McCLELLAN. It has been remarked, "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny." Do you share this judgment that was expressed by Mr. Justice Holmes? (*Kepner v. United States*, 195 U.S. 100, 134 (1904)).

Mr. REHNQUIST. I think I would want to know more of the factual situation, Senator, and an examination of the data that I simply have not been exposed to before. I could not categorically agree that there is more danger that criminals would be allowed to escape than that they would be subject to tyranny.

Senator McCLELLAN. Very well.

Let me read another quotation:

In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have, and which they certainly do not have in common with ordinary usage. I will not distort the words of the [Fourth] amendment in order to "keep the Constitution up to date" or to bring it into harmony with the times: it was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

That quote was from an Associate Justice of the Supreme Court. He then followed with this statement: "With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment."

This is what I am trying to ascertain from you. Do you share this philosophy? Would you be willing to give a new interpretation, never thought of or used heretofore, to change the impact of the Constitution and to decrease or to increase powers that existed or did not in the past under the Constitution, simply to try to do what they say—"to bring the Constitution up to date"?

Mr. REHNQUIST. No.

Senator McCLELLAN. All right. I assume, then, that you agree generally with that philosophy that is expressed here?

Mr. REHNQUIST. Yes, I do. I do not know what particular case that was quoted from, but I certainly—

Senator McCLELLAN. The words are those of Mr. Justice Black in *Katz v. The United States* (389 U.S. 347, 373 (1967)).

Mr. REHNQUIST. I subscribe unequivocally to the statement read.
Senator McCLELLAN. All right. The Justice further said:

I think it would be more appropriate for the Court to leave this job of rewriting (the statute) to the Congress. Waiting for Congress to rewrite its laws, however, is too slow for the Court in this day of rapid creation of new judicial rules, many of which inevitably tend to make conviction of criminals more difficult.

Would you agree with what he said here in *Lee v. Florida* (392 U.S. 378, 385 (1968))?

Mr. REHNQUIST. I certainly agree that the Court should leave to the Congress the rewriting of statutes.

Senator McCLELLAN. Well, this was the judicial philosophy of Mr. Justice Black, whom I believe Mr. Powell is to succeed.

One other now. Another Justice said, and I quote:

I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions.

I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for constitutional rights. But, in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitation which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.

This is a quote of Mr. Justice Harlan, whom you are to succeed on the Court, from *Mapp v. Ohio* (367 U.S. 643, 677, 686 (1961)).

What I am trying to ascertain, simply, is this: There is one school of thought today that believes that the Supreme Court, whenever it feels that the Constitution as written or as it has been interpreted is not adequate to deal with the conditions that prevail in society today, ought to give it a different interpretation to get, "it in to the mainstream," as some call it, of modern society. Do you believe that the Court or a Justice, under the Constitution, has the power to do that or the duty to do it, under his oath?

Mr. REHNQUIST. Under my oath I believe it would have neither the power nor the duty.

Senator McCLELLAN. Mr. Chairman, I do not want to take up all of the time this morning. I just wanted to lay this fundamental foundation. I am not one of those who believes the Court has legislative powers. I do not believe it should legislate. I do not believe that it should attempt to rewrite the Constitution. I thought Mr. Rehnquist shared those views, and I just wanted to bring that out.

I appreciate your answers, and I reserve the right to further questions.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Ervin.

Senator ERVIN. I happen to have an abiding conviction that the most precious possession of the American people is the Constitution of the United States. I agree with what Chief Justice Marshall said in *Marbury v. Madison* that the principles of the Constitution are intended to be permanent. I think the Constitution was written and ratified to place some of the fundamentals of Government, and the rights of individuals, above the reach of temporary majorities, and above the reach of impatient Presidents, and above the reach of impatient Congresses, and above the reach of impatient judges.

I think the words of the Constitution are plain and that it is the duty of the Court to hold those words to mean exactly what they say.

I also believe that when the words of the Constitution are ambiguous that it is the duty of the Supreme Court to place itself as near as possible in the position of the men who framed those words, so as to ascertain by that means what those men meant those words to provide.

I find myself entirely in agreement with what Justice Thomas M. Cooley of the Michigan Supreme Court and dean of the University of Michigan Law School said when he said that a Court which would give a construction to the Constitution not warranted by the intention of its framers is justly chargeable with disobedience of public duty and disregard of public oath.

Now, it is frequently said that there is no qualifications for Supreme Court Justices. I disagree most emphatically with that view. I think that the qualification of a Supreme Court Justice is stated in about as direct and simple a fashion as can be by Chief Justice John Marshall in the case I just alluded to, *Marbury v. Madison*, where the Court was asked to disregard its oath to support the Constitution, and not to invalidate an act of Congress which was clearly in violation of the Constitution. Chief Justice Marshall said, and I think quite rightly, that the oath of the Supreme Court Justice requires him to accept the Constitution as the rule for the Government. I think any other rule would result in the Constitution being converted into something in the nature of a quivering aspen leaf. I have opposed several nominees for the Supreme Court on the ground that their judicial actions indicated, their judicial and legal actions indicated that they thought the Constitution was something in the nature of a quivering aspen leaf, and they could switch its words to one side or the other to make it mean anything which suited their personal notion.

And I think any man who would substitute his personal notions for constitutional principles is not fit to be a member of the Supreme Court. I do not care how great he might be in his attainments in other respects.

I did not have the privilege of knowing you until you came to Washington as the Assistant Attorney General. Since you have been here in Washington as Assistant Attorney General you have accepted invitations on a number of occasions to appear before the Senate Subcommittee on Constitutional Rights and the Senate Subcommittee on the Separation of Powers, of which subcommittees I have the privilege of being chairman. On those occasions you have discussed some highly difficult and highly controversial questions arising under the Constitution.

I did not always agree with your conclusions, and you did not always agree with mine.

And I would have to add that there are some members of this Judiciary Committee that do not have the wisdom always to agree with me on such questions.

(Laughter.)

And so, I do not hold the fact that a man reaches honest conclusions different from mine against him. From my observation and experience, since you have been in Washington, on the way you have conducted yourself before these subcommittees, I have reached the conviction

that you possess what the American Bar Association calls professional competence, that you have a fine judicial temperament, and you have intellectual integrity.

In other words, I am not going to ask you any question because I do not want to be shaken in my conviction.

(Laughter.)

If you are affirmed as a member of the Supreme Court, as an Associate Justice, I think you will meet the qualifications described by John Marshall, and that you will accept the Constitution as a rule for the governing of your actions as an associate member of the Supreme Court of the United States.

For that reason, I am going to say without hesitation that it will be a pleasure to vote for your confirmation.

Mr. REHNQUIST. I will do my best not to disappoint you, Senator, should I be confirmed.

The CHAIRMAN. Senator Hart.

Senate HART. Mr. Rehnquist, may I add my congratulations to you on your nomination to what I am sure to all lawyers is the pinnacle of our profession. I, as did Senator McClellan, have an opening comment I would like to make, and then some questions.

But, before that, I would like to follow through with you on the point you were discussing—the extent to which you would, as a Justice feel free to change your position. You said, citing Mr. Justice Jackson, that there are occasions when even the best of lawyers find that they were wrong; and when they make that discovery, we agree they should change their position.

Now I am not talking about the lawyer engaged as an advocate, who argues the point of view that best serves the interest of his client. I am talking about a lawyer who is asked for his best counsel, after research, and concludes that the answer to a proposition is "yes." Later, when he is on a court or continuing in the practice, he discovers that he believes the answer is "No." Now, you say that he should not hesitate to indicate what he believes to be the correct answer when he makes the discovery; right?

Mr. REHNQUIST. Yes, Senator.

Senator HART. Can you tell me why a judge should not do the same thing, and explain why, if he does, there is any lack of fidelity to the Constitution?

Mr. REHNQUIST. You mean a judge changing his opinion as to what the Constitution or a statute means?

Senator HART. Right.

Mr. REHNQUIST. I do not think there is any lack of fidelity to the Constitution if a judge, after mature consideration, decides that an earlier expression of opinion on his part as to the meaning of a particular clause was in error.

Senator HART. Does he surrender that sense of obligation or does that obligation to make correct a position become any less when some earlier court has answered it, does he still not have the same obligation?

Mr. REHNQUIST. He certainly does have the same obligation, in my opinion, Senator. I would add only the qualification that he must take into consideration the reasoning and the strength of the earlier precedents which really is a part of the Constitution.

Senator HART. But that is also what he must do as a practicing lawyer—seek to understand the opinions on which he bases his conclusion. So the function, and the responsibility, is no different; is it?

Mr. REHNQUIST. I see no difference.

Senator HART. We get lost sometimes in the shorthand labels we give to processes of the mind.

Mr. REHNQUIST. It may be more difficult for a judge to change his mind from an earlier position taken as a judge, than it is for a judge to change his mind from an earlier position taken as an advocate, since the two roles are so clearly different. But I think the same principles would apply to both.

Senator HART. The obligation of a judge, and the functions of a court is to identify and seek to deliver justice; is that not right? Do you agree with me?

Mr. REHNQUIST. Well, I remember a statement attributed to Justice Holmes at one time who said he was always suspicious of an advocate who came before the Supreme Court saying this was a court of justice, because he felt it was a court of law. I do not see any irreconcilable conflict in those two statements. I think if we say justice under law, that that is a very happy resolution. But the suggestion that the function of the judge is to deliver justice, in the sense of meting out what he personally conceives to be justice, quite apart from the Constitution or law, I would have to reject.

Senator HART. I would agree with that, but my question relates to the theme we have heard that if a person reads the Constitution, and his judgment as to what it means reflects his personal philosophy, there is something wrong with that. I cannot buy that suggestion because, for example, what do the two words "due process" mean? They are very simple words, but how could anyone suggest that in his resolution of their meaning as applied to a set of facts he is not in part reflecting his philosophy?

Mr. REHNQUIST. Certainly my experience, in researching constitutional cases as a private lawyer, or as the Assistant Attorney General, has satisfied me that the due process clause of both the fifth and the 14th amendments is an extremely broad one and difficult to pin down, as an expression of constitutional law. And there is also no doubt in my mind that each of us, the Justices who have been confirmed in the past and I, if I were to be confirmed, would take to the Court what I am at the present time. There is no escaping it. I have lived for 47 years, and that goes with me.

But I would hope that broad as the due process clause is, or broad as any other clause of the Constitution might be, I will try to divorce my personal views as to what I thought it ought to mean from what I conceived the framers to have intended.

Senator ERVIN. If Senator Hart will pardon my interpretation, what you are saying is exactly the same thought that Tennyson has his character Ulysses express when he said "I am a part of all that I have met."

Mr. REHNQUIST. Very true.

Senator ERVIN. All of us are.

Senator HART. Which makes relevant another observation made in previous hearings: what we were is now part of what we now are, and what we are is part of what we shall be as a judge tomorrow. That makes it a little less difficult for us to explore your past views.

Now, the question of the Senate's proper role in this advice and consent procedure has been discussed rather thoroughly in the last few years, and some general ground rules are established.

I think I agree with Senator McClellan on the general definition of some of those rules. We can agree that the nominee should be a man of evident excellence, with outstanding capacity however he may have demonstrated that excellence. Moreover, those characteristics should be evident and recognized by the nominee's brethren at the bar. I hope we are never again confronted with nominees where you have to strain to find it.

You, Mr. Rehnquist, and this is also true of Mr. Powell, can have it said of you that you do clearly have such a record of ability.

Another fairly clear-cut hurdle is the possibility of disqualification because of significant conflicts or similar activities which might compel opposition because of the effect the nomination would have upon the Court and its stature in our society.

One purpose of these hearings, of course, is to explore any issues of that nature, if they arise.

Then there is a group of more difficult considerations which have been explored in past hearings. First there is a nominee's judicial philosophy. By that I mean his view of the role of the Court in our system of Government and the duty of a Justice in interpreting and safeguarding our Constitution, because let us not blink it, we do interpret the Constitution. It is not a slot machine where we put in a law and push a button to see if it is constitutional.

Second, there is a nominee's apparent willingness to enforce the great constitutional guarantees in the protections of which the Court has played a unique role throughout our history.

And third, there is a less tangible consideration of a man's breadth of vision, his compassion, his awareness, and understanding of the problem of our society to which the broad provisions of the Constitution must be applied.

In the past, as one Senator, I have acknowledged hesitancy to oppose a nominee with judicial experience merely because I might disagree with the results he had reached in specific cases.

However, I have also indicated my reservation about sending anyone to the Court whose overall record suggests a lack of sensitivity to the protection of individual rights and liberties—an insensitivity so clearly manifested that his elevation to the Court would place a cloud over the Constitution's promise of justice to the poor, the weak, and the unpopular, who must look to the Court for their protection.

As a predecessor of Senator Hruska, Senator Norris of Nebraska, put it, we ought to know how the nominee approaches these great questions of human liberty.

But it is easier to explain what we should find out than to put a handle on how you do it.

Finally, some observers have noted that when the Executive specifically chooses candidates in part because of their particular philosophy, rather than these more general credentials, the Senate, as constitutional coequal in the process of filling vacancies on the Court, must review carefully the implications of the Executive's expressly chosen criteria. I am sure that these matters, too, will be examined in these hearings. On some of these questions the nominees, themselves, will be able to offer the committee the benefit of their thoughts.

Now, Mr. Rehnquist, I would not ask you whether you agree or disagree with me that you possess both excellence and competency, but I would like to explore with you this matter of the Senate's role in regard to the nominee's philosophy and his views on the great issues of the people before the Court. I know you have written on that question. The question is a little less academic now than when you wrote. Have you given it any further thought?

Mr. REHNQUIST. I have given it some further thought, Senator, and I would say that I have no reservation at all about what I said from the point of view of the Senate.

I think I did not fully appreciate the difficulty of the position that the nominee is in.

[Laughter.]

I say that not entirely facetiously, because the nominee is in an extraordinarily difficult position. He cannot answer a question which would try to engage him in predictions as to what he would do on a specific fact situation or a particular doctrine after it reaches the Court. And yet, any member of the committee is clearly entitled to probe as to what might be called, for lack of better words, the judicial philosophy of the nominee. I think that is the right and the prerogative of any Senator who feels that is an appropriate test, and it would be presumptuous of me, perhaps, to even say that.

But, I have no disagreement at all with my earlier statement in the Harvard Law Record that it certainly is a legitimate concern of the Senate if it chooses to make it so, what the judicial philosophy of the nominee is.

Senator HART. Well, can you describe for us what your judicial philosophy is? My question just underscores the difficulty of the committee, let alone the nominee in such an inquiry.

Mr. REHNQUIST. It is so difficult to do it in meaningful terms.

Senator HART. Well, let me see, if I can push a little bit. The President has told the country that he has selected you and Mr. Powell because you were "judicial conservatives." Now, I cannot ask you to put yourself in his position, but that is what he is telling us.

He then explained that by "judicial conservative" he meant a judge who was not too much of an activist, who interpreted the Constitution strictly and did not try to include his decisions towards a particular political or social view he thought desirable.

And on the other hand, the President went on to offer another qualification to being a "judicial conservative" as he used it. He indicated that to be a true judicial conservative one must also be a judge who will swing the pendulum more to the side of the forces of Government, and away from the protection of the individual rights of the accused.

He did not put it in those exact words, but that is in essence what he said. Now, I am wondering if, in your consideration of judicial philosophy, you see any inherent inconsistency between these two definitions of judicial conservative.

In other words, how can a nominee be put on the Court for the express purpose of tipping the balance more toward the Government and still be a nominee placed on the Court to follow strictly the man-

dates of the Constitution, without regard to a personal philosophy of law and order, or desired results in a particular area of the law?

Help us on that one.

Mr. REHNQUIST. As you suggest, Senator, I cannot speak for the President on the subject. I can give you my own observations. I suppose it is conceivable that one might feel that the two were consistent if he also felt from his own study of decided cases that the pendulum had been swung too far toward the accused not by virtue of a fair reading of the Constitution but by virtue of what was conceived to be some outside influences such as the personal philosophy of one or more of the Justices.

Senator HART. You would not have a personal philosophy if you became a Justice?

Mr. REHNQUIST. I would certainly expect that I would have a personal philosophy. I mean, I have lived 47 years.

Senator HART. Then in saying the results might be different from past decisions you suggest a new Justice may find himself in disagreement with others on our Court?

Mr. REHNQUIST. Well, my personal philosophy I would hope to disassociate to the greatest possible extent from my role as a judge.

Senator HART. Well that almost gets us back to where we started. Let's take this business of balancing the competing interests of the Government and the individual defendant. It is admittedly enormously difficult, indeed one of the most difficult aspects of interpreting the Constitution and one of the toughest jobs that the Court has.

Would you agree with me that that assignment has to be approached with as strong a concern for the Bill of Rights as for either the preamble or the second article which creates the executive branch?

Mr. REHNQUIST. Unequivocally.

Senator HART. And would you, without hesitancy, protect the constitutional rights of any individual or any group as your rights best enable you to interpret those rights, without any regard to your personal feelings about the particular view or position of the individuals who were asserting rights?

Mr. REHNQUIST. Without hesitation.

Senator HART. Then I turn to an article you wrote some years ago in the American Bar Association Journal. There you were discussing two Supreme Court decisions, the names of which I do not have, but they both dealt with the denial of permission to take State bar examinations. In one case an admitted ex-Communist was denied the right to write a bar examination. And in the other an alleged Communist.

Now, your technical analysis of the decision is one thing. But there is something disturbing in the nature of your ultimate conclusion.

In reference to the defendants both being alleged Communists you wrote:

Conceding that they should be treated no worse than any other litigants, is there any reason why they should be treated better?

Nobody quarrels with that. And you conclude:

A decision in any court based on a combination of charity and ideological sympathy at the expense of generally applicable rules of law is regrettable, no matter whence it comes. But, what could be tolerated as warmhearted aberration in the local trial judge becomes nothing less than a constitutional transgression when enunciated by the Highest Court of the Land.

Now, the opinions in both of those cases were written by Mr. Justice Black, recently described by the President as a great constitutionalist, who always based his decisions on honest interpretations of the Constitution. But, to me—this is the disturbing thing I would like your reaction on—

The meaning of your conclusion, "a decision based on charity and ideological sympathy . . ." "warmhearted aberation" seemed clear. It seems to suggest that Supreme Court Justices decided those two cases as they did because of their sympathy for Communist ideology.

How, do you react?

Mr. REHNQUIST. I would react to it in this way, Senator, recalling as best I can my thoughts when I penned those words some—what was it?—13 or 14 years ago. I would say that I had no intention then, and certainly would not say now, that Justice Black, who authored the opinion, or the others who concurred with the opinion, wrote it because they were sympathetic with Communism. I think the language I used was meant to suggest that they sympathize with the plight of unpopular groups, such as Communists, and I certainly did not mean to suggest that this is an illegitimate sympathy, but I did not feel that sympathy any more than any other sympathy ought to be read into the Constitution.

Senator HART. Well, if you go on the Court, would your judgment in a particular case, assuming that you felt the Bill of Rights or the 14th amendment required you to protect an individual, would your willingness to give them that protection be in any respect modified for fear that some critic might attack your decision as being a result of ideological sympathy for that unhappy defendant?

Mr. REHNQUIST. No; I do not believe it would.

Senator HART. Now, one last question in this effort to help us. How do you get a handle on philosophy? I am sure you have been reminded often in recent days of the article you wrote when you were clerking for Mr. Justice Jackson, or shortly after you concluded that period. You wrote that when you were clerking for the Court a majority of the clerks subscribe to a liberal point of view, whose tenets include, and I quote:

Extreme solicitude for the claims of Communists and other criminal defendants, expansion of the Federal power at the expense of state power, great sympathy for any Government regulation of business, in short, the political philosophy now espoused by the Court under Chief Justice Earl Warren.

Now, when you wrote that, did you mean that you thought the Warren court was sensitive to the constitutional rights of all citizens, including the groups you named, or did you mean that the Court was more sensitive to their rights because of some ideological opinion? What do you mean by that?

Mr. REHNQUIST. I think I meant the latter.

Senator HART. And you disagree—

Mr. REHNQUIST. Yes; that was roughly the same time as the *Schware* and *Konigsberg* cases being handed down, which I did take the time to study, as a private practitioner, albeit without the benefit of briefs and arguments. And I felt that given my best lights on the subject at the time, that Justice Harlan's dissent was the better view of the Constitution.

Senator ERVIN. If I may interject, that view was adopted on the second hearing of the case; was it not?

Mr. REHNQUIST. As I recall, there was a shift on the second hearing of the case.

Senator ERVIN. The *Konigsberg* case arose in California?

Mr. REHNQUIST. Yes.

Senator ERVIN. And the California statute provided that in order to obtain a license to practice law in the courts of California a person had to have a good, moral character and in addition had to show that he did not favor overthrowing the Government of the United States by force or violence.

When Konigsberg appeared before the board of law examiners of California he stated he did not now favor overthrowing the Government by force and violence but he declined to testify as to any of his previous affiliations or actions and they denied him the right of a license.

It was appealed to the Supreme Court and Justice Black wrote the opinion in which he says the due process clause, in effect, did not preclude a board of law examiners from cross-examining Konigsberg about past affiliations or statements.

The case went back to California, and the bar association held that they did not believe what Konigsberg testified, and denied him a license on that ground, and it came back to the Supreme Court of the United States, and a majority of the Court affirmed the action of the State of California.

Now, I believe that is correct as a synopsis, paraphrasing what it meant to me as a practicing lawyer.

Mr. REHNQUIST. Your recollection is probably clearer on it than mine is, Senator.

Senator ERVIN. I thought the *Schware* decision was correct because they denied the man—and I believe it was an Arizona man incidentally—

Mr. REHNQUIST. New Mexico.

Senator ERVIN. New Mexico. They denied the license on the basis that he had, for some years, been affiliated with some Communist organization.

Senator HART. My question did not go to whether the decision was right or wrong. I was trying to find out what the nominee ascribed as a motivation for the Justices who wrote that opinion. That was what I was driving at.

Mr. REHNQUIST. Did I answer your question, Senator?

Senator HART. Yes; would you have phrased it differently if you had anticipated today?

Mr. REHNQUIST. Well, not only, had I anticipated today, but were I to rewrite it, without any prospect of a confirmation hearing, I do not think I would have used the term "political philosophy." But I think that my same observations would obtain.

Senator HART. Mr. Chairman, I have some other questions, but I know my colleagues do also. Do you want us to reserve, pass and return?

The CHAIRMAN. You can. There is a rollecall vote in the Senate at 12:30, and I thought we would run until then.

Senator HART. Well, on this business of separation of powers, with each branch serving as a check upon the other, here is where you and Senator Ervin have had earlier exchanges, I know. In some of your articles, and indeed in testifying on occasion in support of several

controversial proposals by the Nixon administration, there is a common thread that some of us see, an expansive view of inherent Executive powers.

Now, I appreciate that you have come up here and testified in support of certain measures as an advocate, and I know of no administration in history that has ever been reticent about explaining why they thought they could govern best.

But, now as a nominee, could you give us your views about the limits under our Constitution of enumerated powers on the argument of "necessity" for the exercise of supposedly inherent Executive power which reaches beyond judicial control?

Mr. REHNQUIST, I know you realize, as well as I do, Senator Hart, my obligation to keep my response on the general level rather than trying to address specific questions, or to define the professional quality of my advocacy, which I think is a perfectly legitimate question for anybody on the committee to inquire into.

I believe I am on record in one of the several hearings of Senator Ervin's—

Senator HART. Well, let me interrupt you simply to say I do agree that there is a limit beyond which you ought not to go in these discussions. But perhaps I should identify what may be the most troublesome application of this doctrine of inherent power.

It is the area of surveillance, whether it is electronic or otherwise, and here it is a little hard to say that you can put yourself into the shoes of men who in 1789, or shortly thereafter, wrote some general language, to say that we know perfectly well how they intended to handle wiretapping and bugging. One's own philosophy does get tangled up in how you handle this one.

Do you perceive any constitutional limits on the power of the President to maintain surveillance over those who oppose his policy, if he believes that their opposition may endanger the security of the country?

Mr. REHNQUIST. Well, I certainly perceive limits in the first amendment, in the fourth amendment, and without reading a catalogue, I suspect there are other limits.

Senator HART. What about an Executive that would put Senators under surveillance because he might conclude that their activities in regard to his policies may weaken our domestic security?

Mr. REHNQUIST. Well, given the latter qualification, I would think it was improper and a misuse of executive authority. I testified before Senator Ervin's subcommittee that surveillance of a Member of Congress, and we were discussing surveillance in a public area, so to speak, of public meetings, public street, that sort of thing, was not per se unconstitutional.

I also added that the only legitimate use of surveillance was either in the effort to apprehend or solve a crime, or prevent the commission of a crime, and I think I said at that time that surveillance has no proper role whatsoever in the area of where it is simply dissent rather than an effort to apprehend a criminal.

Senator HART. In those proceedings before Senator Ervin's committee, as I read it, you suggested that really surveillance did not have a chilling effect on the exercise of first amendment rights, and you cited the fact that 250,000 people turned out in this city to demonstrate against the Government policy, even though it was rather

widely known that that activity engaged in by the 250,000 would be subject to observation and surveillance. From your own personal experience, would you not agree that people differ in their willingness to risk harm to their careers, their future, in the course of protesting policies with which they disagree?

Is it not possible that more, hundreds of thousands of Americans might be deterred from exercising their first amendment rights as vigorously as they would like to because they fear the unknown impact on their families, and their careers, of a Government file, investigation reports resulting from surveillance of lawful activities? Is this not an area for judicial control of executive action?

Mr. REHNQUIST. Again, trying to keep my remarks either general or historical, certainly I do not have sufficient knowledge to say that a number of people might not have been deterred from coming to Washington in addition to the 250,000 who came, for fear that whatever surveillance was in effect at the time might somehow damage their public careers. I do recall that in an action in Chicago in connection with Army surveillance, which of course, was stopped by this administration, Judge Austin, I believe, found as a fact that it had not had a deterrent effect.

I would add one further comment, if I might, that since my testimony before Senator Ervin's committee, two people in the Justice Department have called my attention to an unreported district court case in Illinois in which a fact situation that we really did not cover, I believe, at Senator Ervin's hearings, was involved.

The case was not simply of surveillance, but of virtual harassment of a Mr. Ciancana in Chicago, where the district court did grant him a rather extraordinary form of relief. He had complained that he never played golf but what the FBI foursome was right behind him, and the district court granted equitable relief and said that there must be an intervening foursome.

(Laughter.)

The CHAIRMAN. Let us have order.

Mr. REHNQUIST. The harassment element was something I had not really considered in my testimony before Senator Ervin, and while I think it would be inappropriate for me to express a particular view of the particular facts, I would say that certainly it was not my intent to rule out careful consideration of that aspect of the thing.

Senator HART. Mr. Chairman, I suggest that if there is no objection, that others be permitted to continue questioning. I would reserve the right to return with additional questions.

The CHAIRMAN. Sure.

Senator HART. But before I do, in an effort to summarize one aspect of some exchanges we have had, let me put it this way: I agree with the critics of some of the controversial Supreme Court decisions that those decisions did handcuff the police. I agree that the decisions did do that.

But what is the purpose of the Bill of Rights? Is that not exactly what it is supposed to do?

Mr. REHNQUIST. It certainly is the purpose to put restraints on the Government.

Senator HART. Exactly. So establishing the fact that restraints resulted from the decision has nothing to do with the prudence or the wisdom or the soundness of the decision; do you agree?

Mr. REHNQUIST. Well, it might have something to do with the prudence or the wisdom of the decision, but it certainly has nothing to do with the soundness.

Senator HART. Well, is it not "prudent," if you agree that the Bill of Rights was intended to achieve an important goal; namely, to protect the individual who, even in the case of the strongest among us, is very weak in the face of Government?

Mr. REHNQUIST. All I meant to say was I do not feel prudence or wisdom are necessarily the first test of a constitutional decision. If that is what the Constitution calls for, the fact that the police are handcuffed as a result is no argument against it.

Senator HART. I reserve my time.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I want to extend a warm word of welcome to you, Mr. Rehnquist. Quite clearly you come highly recommended as a student and scholar of the law, and as a superb craftsman, and as being extremely gifted in your legal mind.

And I want to join my colleagues in extending congratulations to you for being nominated for the Supreme Court, and extend a word of welcome to you here this morning.

I think Senator Hart, in his initial comment, stated very well the criteria which many of us will consider in performing our responsibility, under the Constitution, of advising and consenting. I think one of the things which was included in the latter part of his remarks, after he talked about the significance and importance of concerning ourselves with judicial competence, fairness, and objectivity, is the question of philosophy.

You, yourself, have mentioned this as a reasonable area of inquiry for the Senate, and have actually suggested that we pursue this in trying to evaluate the qualifications of a nominee. I think in nominations we have to judge, at least speaking for myself, not only the particular qualities and qualifications of the individual, but also the selection in the context in which it has been placed by the President. We must also consider what this nomination will mean for the position of the Court in continuing to support and guarantee the various fundamental rights and liberties of the individual, in preserving the important concept of the separation of powers.

The President has indicated in his comments to the Nation that he has set out a plan for the Court, a role that the Court would play in the context of various rights and liberties of individuals. And I think we at least have to assure ourselves, if we are to meet our responsibility, that these rights and liberties are going to be protected by the Court, and that the balance will not have shifted so dramatically as to take us backward from what I think has been one of the most dramatic and significant eras in the history of the Supreme Court—since the founding of the Republic—under the leadership of Chief Justice Warren.

So, I, too, would like to explore, if I could, with you, in the time that we have before the vote, at least your views, and particularly your actions in the past.

I have noticed that you have commented on the role of the Congress in the area of the war power. You indicated in a public statement

very serious reservations about antiwar amendments and the constitutionality of antiwar amendments.

I would be interested in whether you feel that actions that were taken, for example, by the Congress in supporting a Mansfield type of amendment would fall within your criteria of being an unconstitutional act by the Congress?

Mr. REHNQUIST. Well, I certainly understand your interest, Senator. The expression of a view of a nominee on the constitutionality of a measure pending in Congress, I feel the nominee simply cannot answer. If it is a question of public statements I have made, as the rational basis for them as a lawyer, I would be happy to try to go into it.

Senator KENNEDY. Well, I am referring here to the speech you made in 1970 at the National Leadership Training School in Pennsylvania, just 5 weeks after the Cambodian invasion. You indicated that you felt some proposed end-the-war amendments were unconstitutional, were trying to interfere with the President's powers. What could you tell us about your line of thinking which brought you to that conclusion?

Mr. REHNQUIST. Well, insofar as the antiwar amendments would attempt to limit the President's authority to preserve the lives or safety of men already lawfully in the field, I had reservations about the constitutionality, which I expressed.

Senator KENNEDY. Well, did you have any amendment specifically in mind at that time, which you felt would do so?

Mr. REHNQUIST. As I recall there were a number of amendments pending in the Congress, quite varying in their approach, and my recollection is not sufficiently good to recall the text of any of them. But I am sure I felt with at least the most restrictive that there was a constitutional problem.

Senator KENNEDY. You recognize the responsibility of the Congress, certainly with the warmaking powers, and that this is a shared power?

Mr. REHNQUIST. Certainly.

Senator KENNEDY. Did you feel that any determination by the Congress that the war ought to be ended, or terminated, or the ending of financing or funding for those war activities would raise a constitutional question, in your mind? In terms of the action of the Congress?

Mr. REHNQUIST. Let me answer it this way: To me, the question of Congress' authority to cut off funds under the appropriation power of the first amendment is so clear that I have no hesitancy in saying so, because I do not regard that as a debatable constitutional question. I think if one were again to get to the more restrictive types of amendments that were pending last year, there is some area of debatability, and it would be improper for me to answer that.

Senator KENNEDY. Have you given careful thought to the various proposals which had been introduced and were then discussed on the floor? I for one did not see any proposal that was introduced which was not sensitive to the question of the lives or a threat to the lives of American soldiers in Vietnam. But your comments said the President's opponents in the Senate had offered a series of resolutions which would seriously, and you say in some cases, I believe, unconstitutionally restrict his authority as Commander in Chief.

Mr. REHNQUIST. Well, I am on record in a discussion before, again, one of the meetings of Senator Ervin's subcommittee as saying, and

I think it is in these words, that I do not believe Congress has the authority, given the situation that existed in 1970, to tell the President that he shall not try another attack on Hamburger Hill. I believe that to be a well-reasoned advocate's statement of position, and I do not recall the full—

Senator KENNEDY. Well, would you have any trouble about the power of Congress not to permit the use of American troops in Laos or Thailand? Was there any question in your mind as to the constitutionality of the action that was taken by the Senate to have American troops out of Cambodia at a time definite, or is this whole question of the warmaking power something which you are going to relinquish completely to the President?

Mr. REHNQUIST. Well, I—

Senator KENNEDY. And I thought, for one, that it was the very definite responsibility of the House and the Senate, which perhaps had too long been unexercised in terms of achieving a joint responsibility with the President.

Mr. REHNQUIST. Your question has several parts to it. So far as relinquishing completely to the President the warmaking power, that is a constitutional doctrine inconceivable to me, and I think so clearly so that I need have no hesitancy in saying so here. So far as discussing my opinion as a potential, as a nominee, of particular constitutional amendments which I did not discuss as an advocate, I think that would be improper.

Senator KENNEDY. Well, I was thinking again back to your thinking at the time you wrote the article.

Well, we can move on. I am interested in your statements and comments about the use of force in our society. You made this comment:

I do offer the suggestion in the area of public law that disobedience cannot be tolerated, whether it be violent or nonviolent disobedience. I offer the further suggestion that if force or the threat of force is required in order to enforce the law, we must not shirk from its employment.

That is a quote.

Mr. REHNQUIST. I believe, Senator—

Senator KENNEDY. Representing your views.

Mr. REHNQUIST. Yes. I think I recognize it.

Senator KENNEDY. I was wondering how you would react to the use of force in the Kent State situation by the National Guard. Could you form any opinion about the use of force in that situation?

Mr. REHNQUIST. I obviously do not have firsthand knowledge of the facts. Are you interested in my reactions and the impressions I have gotten?

Senator KENNEDY. Yes.

Mr. REHNQUIST. It was a misguided and unwarranted use of force.

Senator KENNEDY. And were you sufficiently concerned about it to make these views known to the Attorney General when the question came up about the possibility of convening a grand jury?

Mr. REHNQUIST. This again, this type of question again poses a difficult problem for me, Senator, because there is clearly a lawyer-client relationship here. And if you are inquiring about any advice I have given to a private client, it would be unthinkable for me to testify to it.

Nonetheless, my role has been one in reform of public office, and I am bound to say that I think you are entitled to get something more out of me than simply saying on every occasion that there is a lawyer-client relationship. This one is easy for me because he never asked me.

The CHAIRMAN. Let us recess until 2 o'clock.

(Thereupon, at 12:30 p.m. the hearing was recessed, to reconvene at 2 p.m. this same day.)

AFTERNOON SESSION

The CHAIRMAN. Let us have order.

Senator Kennedy.

Senator KENNEDY. Thank you very much.

Mr. Rehnquist, just as we were winding up earlier this morning, I was asking you some questions and I guess you had indicated, I believe, that there was a problem of the client-lawyer relationship in your conversations with Mr. Mitchell. Then you indicated finally that it would not have made much of a difference because you had not been asked anyway about Kent State. Is that right?

Mr. REHNQUIST. I believe that was where we left this morning, Senator.

Senator KENNEDY. Let me ask you, getting back to the question of Kent State, you responded earlier today that you felt that obviously there was an excess use of force by the National Guardsmen. As you well understand, there has been a considerable question in the minds of many people, particularly the families of those that were lost, whether there should not have been a convening of a grand jury, and a more rigorous prosecution of those who were involved in what you would say was admittedly an "excess use of force."

Others have talked about homicide. I am just wondering from your own personal view whether this struck you as an individual as sufficiently worrisome to you and whether you, on your own, initiated any kind of action and brought this to the attention of the Attorney General, or attempted to provide an initiative on this particular question of Kent State? Is there anything you can tell us about that?

Mr. REHNQUIST. You mean urging the Attorney General to call a grand jury?

Senator KENNEDY. Yes.

Mr. REHNQUIST. No; I did not.

Senator KENNEDY. Well, was there anything that distressed you, even just reading the newspapers, not having, as you mentioned this morning, particular responsibility in this area? Were you concerned about it or outraged by it or distressed by it to the point that you felt that there was any kind of moral compunction on you to try to find out what the Justice Department could do in order to do justice for those that had been lost?

Mr. REHNQUIST. Well, again, judging from the newspaper accounts I do not see how anyone could help but be distressed by what happened there. And the primary source of distress is the death of the students. I think one cannot help but be distressed over the position the National Guardsmen were put in. That does not justify what they did. But, so far as my own official responsibilities are concerned, our office is primarily a responder rather than an initiator. We are not an operating

division and the primary initiative in this area would be the Civil Rights Division.

Senator KENNEDY. Well, of course—

Mr. REHNQUIST. And I do not believe I have ever thought it proper to simply jump into somebody else's bailiwick and say: Let us do this.

Senator KENNEDY. Well, of course, the Justice Department was the initiator in the Pentagon Papers case, was it not?

Mr. REHNQUIST. Well, my impression is that this was undertaken at the behest of the Defense and the State Departments.

Senator KENNEDY. Well, is that what you would have wanted, to do something about Kent State? You had the behest of the families that were involved. Are they not given equal standing in hearings in the Justice Department with the State Department?

Mr. REHNQUIST. Well, I would not be at all surprised if they had been given hearings in the Civil Rights Division, just as the Defense and State Departments were given hearings presumably in the Internal Security Division in connection with the Pentagon papers.

Senator KENNEDY. You mean that the Kent State question was given hearings?

Mr. REHNQUIST. I say I would not be surprised.

Senator KENNEDY. But, you did not try and pursue this to find out whether they would be given any kind of a hearing?

Mr. REHNQUIST. No; I did not.

Senator KENNEDY. But, bringing in now the Pentagon papers, let us put those situations back to back. What do you think is the message to young people generally from the actions of the Justice Department when they see the fact that it took about 15 months for the Justice Department to make a final determination that it was not going to convene a grand jury in the Kent State situation—and yet, in the Pentagon Papers case, in a matter of hours they convened grand juries and granted immunity and performed all of the investigatory functions that I wish they had, quite frankly, for the Kent State people.

I am interested now more in your philosophical view, what you think the message is to young people or to others that are concerned about the state of justice in our society. Do you think there is any message that can be drawn?

Mr. REHNQUIST. So far as the criminal aspect of the Pentagon papers situation as compared to the criminal aspects of the Kent State grand jury prosecutions I am simply not familiar enough with either of those to comment personally. You are not asking me for my personal comments. I take it you are asking me what is a younger person going to think seeing it?

Senator KENNEDY. What do you think a young person—how would they look at these two different kinds of situations?

Do you think they would have any reason to be concerned generally about the role of the Justice Department as a source of justice in our society? I am more interested in your view.

Mr. REHNQUIST. Just to read newspaper accounts without any full understanding of what may have been very different differentiations between the two situations, I think very likely many young people may have felt that one is not being treated the same as the other. That would not be my own personal opinion, but you are asking me

what I think a young person might think simply on the basis of media accounts.

Senator KENNEDY. Well, now let us take your personal view. How would you have looked at it as someone who, as you have mentioned, was not intimately involved in either of the situations?

Mr. REHNQUIST. But, I am a lawyer, Senator Kennedy, and as a lawyer I feel that I would not make or jump to a conclusion that the disparity in time meant a disparity in the quality of justice administered without having a rather thorough knowledge of the factual situation, which I simply do not have.

Senator KENNEDY. Do you think Congress has a right to investigate what happened out at Kent State, and what steps were taken by the Government in investigating the Kent State incident?

Mr. REHNQUIST. I can answer generally to the effect that I think Congress has very significant oversight authority in connection with the operation of the executive branch. Whether that authority would extend to this particular situation or not I am simply not prepared to say.

Senator KENNEDY. Can you see any reason why Congress should not have, for example, the FBI investigation files?

Mr. REHNQUIST. Yes; I can see a reason.

Senator KENNEDY. What would that be?

Mr. REHNQUIST. Correspondence across my desk between you and the Attorney General, and again, I feel free here since it has gone out of the Department to comment on it to the extend of my input, and I think you are entitled to get that, that some 30 years ago when Justice Jackson was an attorney general he wrote an opinion refusing the request of Carl Vinson, who was then chairman of the Naval Affairs Committee. Chairman Vinson had requested that his committee be furnished with FBI reports, and Justice Jackson in his opinion made what I felt was an extremely sound argument for the proposition that investigative files in the executive branch ought not be furnished to the legislative branch, both because of possible unfairness to the prosecution and possible unfairness to the potential defendants.

Senator KENNEDY. As one who has looked over the correspondence, what is going to be the answer? Is it Executive privilege that is being asserted?

Mr. REHNQUIST. It is a branch of the doctrine of executive privilege.

Senator KENNEDY. Is it not possible that this material can still be made available to the Congress without being made available generally to the public?

Mr. REHNQUIST. That is a question of fact, Senator.

Senator KENNEDY. Who should decide that? Are you going to be the ones who are going to decide?

Mr. REHNQUIST. No; I am certainly not, but I am suggesting that I think the executive branch is entitled to consider, in analyzing that type of request, its past experience as to congressional committees maintaining a pledge of executive session type of confidentiality. And I certainly do not suggest that I know anything about the facts in connection with your own particular committee that would lead me to think that it would not be kept confidential.

Senator KENNEDY. Well, then, what do you think would be the reason that the material would not be made available, the investigations for executive sessions?

Mr. REHNQUIST. Well, as I understand it, and I am simply recalling the correspondence, and I do not think there was any offer of executive sessions.

Senator KENNEDY. But, if it were to be used only in executive session, from your personal point of view you would not see any reason why it should not be made available?

Mr. REHNQUIST. I think to the extent to which I can answer that question, with the sense that I am adviser to the Attorney General, I would say that that would be an added factor to be weighed in the case.

Senator KENNEDY. Did you talk about this material to the Scranton Commission?

Mr. REHNQUIST. I did not.

Senator KENNEDY. Do you know whether the Justice Department did?

Mr. REHNQUIST. My impression is that some of it was made available to the Scranton Commission.

Senator KENNEDY. Well, they made some available and held some back?

Mr. REHNQUIST. I do not know that much about it, Senator.

Senator KENNEDY. What about in the State of Ohio? Do you know whether it was talked about in Ohio?

Mr. REHNQUIST. My impression is that some of it was made available in an unknown quantity. So far as my knowledge is concerned, it was made available to the prosecuting attorneys in the State of Ohio.

Senator KENNEDY. Could we go into the area we were just talking about, the Pentagon papers. Could you tell me what role you have had in the Government's action to prevent publication of the Pentagon papers?

Mr. REHNQUIST. You realize, of course, I am sure, the difficulty that that question poses for me because of my relationship with the Attorney General. It does seem to me that because the Government ultimately took a public legal position and argued the matter in the courts, that I would not be breaching the attorney-client relationship to answer your question.

I am hesitant, but I believe that I am right in saying that I had a slipped disk operation in the latter part of May, and was either at home in bed or in the hospital until about the latter part of the second week in June. I am just trying to recall from memory. Then I started coming back into the office half days, and found that I was overdoing the first couple of days, so I stayed out again. And I think it was either on a Monday or Tuesday I was back in, perhaps for the third time, on a half-day basis, and the Attorney General advised me that the Internal Security Division was going to file papers that afternoon in New York to seek a preliminary restraining order and asked me if I saw any problem with it. And it was a short-time deadline, and I rather hurriedly called such of the members of my staff together as I was able to get.

When we reviewed it we came across *Near v. Minnesota*, and advised the Attorney General that basically it was a factual question so far as we could tell. If the type of documents that were about to be published came within the definitional language used by Chief Justice

Hughes in *Near v. Minnesota* there was a reasonable possibility that the Government would succeed in the action.

I believe I had one other conference with the Attorney General, and I think that was as to who should appear for the United States in the proceedings in New York and in the second circuit. I then went to the beach for a week during which time the arguments took place in the Courts of Appeal, and I think the Supreme Court case was argued while I was at the beach, too, and I had no further involvement in it than that.

Senator KENNEDY. Well, are there any circumstances that you see where the executive branch would be able to impose a prior restraint on these papers?

Mr. REHNQUIST. I do not think it is proper for me to answer that question, Senator. That has just been before the Supreme Court. If you want me to tell you what I understand the law to be as of now, I am not at all sure you would be interested in my account of that, and I think my own opinion is something that is simply too close to the type of question I would be asked to describe if I were confirmed, so that I ought not to answer it.

Senator KENNEDY. Well, let me ask you, if you would, rather than giving us a sort of decision, I would be interested in how you would weigh the different considerations, what value, what weight you would give to the different factors. I am interested not so much than in your telling me how you would come out as in what you think are the various balancing factors and what weight you would give to these items.

Mr. REHNQUIST. I would be reluctant to get into much detail in that for the same reason. I certainly have not quarrel with the language in the per curiam opinion that the Supreme Court handed down in connection with the *New York Times* case that prior restraint comes before this Court with a heavy burden on it. I do not think it would be appropriate for me to go further than that.

Senator KENNEDY. Well, I am trying to get at least some idea of how intensively you believe, for example, in the freedom of the press. I mean, I am once again trying to elicit, at least get some kind of idea, as you suggested in your law school newspaper article, of your own feelings and beliefs, and how important that freedom is in a free society, how essential it is to the preservation of the Government structure? How important is it in terms of the separation of powers?

Mr. REHNQUIST. I believe it is very important.

Senator KENNEDY. Well, what can you do to help me to try to evaluate the significance of your views?

Mr. REHNQUIST. Well, I think it would be inconceivable for a democracy to function effectively without a free press, because I think that the democracy depends in an extraordinarily large degree on an informed public opinion. The only chance that the "outs," or those who do not presently control the Government, have to prevail at the next election is to make their views known and the press is one of the principal, probably the principal media in the country through which that can be accomplished.

I believe it is a fundamental underpinning of a democratic society.

Senator Kennedy. What would be your view—would you permit, say, the suppression by injunction of a newspaper that advocated violence? What could you tell us?

Mr. REHNQUIST. I think that is too close, Senator. I would decline to answer that.

Senator KENNEDY. Well, you say that the importance of a newspaper is in informing the public, and that is a very general kind of answer which I think you must understand doesn't help us much in trying to gather at least some greater degree of sense of your commitment to some of these guarantees in the Constitution.

Mr. REHNQUIST. Well, I am not the first nominee that you or your fellow Senators on the Judiciary Committee have had this problem with. And I can fully sense the problem you have, and surely you can sense the problem that the nominee has, too. Past nominees have generally confined themselves to fairly general expressions, which I am sure are less than satisfying to the Senators. But, in the same token, to start discoursing on one's view, if one has a view, of what the law should be in particular cases, or what he thinks the Constitution should be in particular cases, would strike me as entirely inappropriate.

Senator KENNEDY. I was asking you about your own kind of deep-seated belief in the importance of the free press in our society.

Now, you know, it is one thing to say a free press is essential if we are going to have democracy, and leave it that way. Or you could give us, at least, I would hope, some greater kind of feeling about the importance for you of that institution and the importance of due process and the importance of equal rights and some of these others. That is what I think we are trying to get at without making direct reference to a case.

Now, I do not think that that is asking too much, and in fairness to the nominees that I have heard before the committee, they have responded to that.

Mr. REHNQUIST. I simply do not feel I can answer, properly answer the question about the constitutional principles that would be applied to a newspaper that advocates violence. I think that is too close to the kind of question that might come before or one might be called upon to answer as a Justice of the Supreme Court. I would be glad to try to respond to some other question.

Senator KENNEDY. Well, what do you think are some of the competing values in the free press issue? What would be the other kinds of makeweights that would affect the balance for you on free press questions?

Mr. REHNQUIST. I would say one would be the extraordinarily and presumably very rare situation contemplated by the language in *Near v. Minnesota* where you had the prospect of a newspaper publishing troop movements or troopship sailings with an extraordinarily high degree of danger, not to Government policy, but to the lives of the men who are engaged in the service of the Government.

Senator KENNEDY. I do not think you would find any disagreement.

Mr. REHNQUIST. That is what bothers me about it.

Senator KENNEDY. What would be some of the others?

Mr. REHNQUIST. I am trying to think of cases that have—

Senator KENNEDY. I am not—

Mr. REHNQUIST. Just to give me, you know, ideas of what arguments have been made. I think we presently have under submission somewhere in the Government a brief on behalf of the Newspaper

Publisher's Association that they should be exempt from the price freeze because of freedom of the press.

Now, I have not had an occasion to review the merits of that brief, and I doubt that I will in my official capacity, because it belongs to another department. I would think that a newspaper's claim on the grounds of freedom of the press to be exempted from very uneven-handed types or even-handed types of economic relations such as the antitrust laws, the copyright laws, and a price control law, the interest of the Government in applying economic legislation uniformly so long as it is not hostilely inclined to the press would be another interest one would have to consider against the claim of freedom of the press in a situation like that.

Senator KENNEDY. In terms of the national security you are, you know, giving a very limited prescription on that, which can certainly be accepted and I would be willing to agree with you. But as I say, I am interested in just what considerations are in your own mind.

Again I realize the limitations on being able to say how you would come out in a particular given situation or case, but I am trying to elicit from you the sensitivity of your feelings on these questions.

Mr. REHNQUIST. I have said I place an extraordinarily high value on it, and I do not blame you for feeling you want something more specific than just a rather, what you may well consider, pious declaration, and yet I find that when one tries to elaborate specifics they tend to be things no one would disagree with or else we get into an area where the matter is likely to come before the court in some form.

Senator KENNEDY. About the Government's seeking prior restraints in the Pentagon Papers case, obviously you gave that a good deal of thought before recommending that action, or at least before you would be willing to support it.

What were the kinds of things that were going on in your mind when you gave that advice?

Mr. REHNQUIST. My initial reaction was that we had very little time to come to a decision.

Senator KENNEDY. And so what does that mean? What conclusion did that lead you to?

Mr. REHNQUIST. If you let me go on, because I am going to do the best I can to answer your question.

Senator KENNEDY. Yes.

Mr. REHNQUIST. I was frankly surprised to find the language in *Near v. Minnesota*, because I would not have thought that there would have been that authority for prior restraint, because I recalled the Blackstone statement to the effect that prior restraint is absolutely forbidden.

But, nonetheless, having found it, I was fully convinced that the Government, in its obligation as the advocate, or Justice as the advocate for the executive branch, had every right to present the matter to a court and ask for a factual determination on this sort of thing. I do not want to leave in anyone's mind the idea that after I had looked at *Near v. Minnesota*, and read its language that I was in any way opposed to the Government doing what it did, presenting this issue to the court for decision.

Senator KENNEDY. Well you speak of being the advocate for the Executive. You are also an advocate for the public interest, too, are

you not, in upholding the Constitution and the public's right to know? You spoke a moment ago of the importance of the public's right to know. And these issues were actually being debated in the Senate right during this period of time. I am just trying to elicit how weighty those factors were in your final decision?

I can see why you came down the way you did, but I am interested in how you reached that.

Mr. REHNQUIST. Well, certainly in the ordinary criminal prosecution, which this was not, the idea that the Justice Department is basically an advocate for the public is one which I have found myself unable to subscribe to.

It seems to me that the obligation of the Justice Department in the ordinary criminal prosecution is to make a reasoned advocacy in behalf of the enforcement of the laws that Congress has enacted, and that those who may be brought to courts as defendants as a result of that advocacy will themselves have their own advocates. And the decision as to the propriety of the particular prosecution will be made by the courts where it was intended to be made under our system.

Now, the *New York Times* case is certainly not a precise parallel to that, and yet I think that some of the same factors apply. The question was: was the potential publication here one of sufficient immediacy and gravity so as to fall within the language of the *Near* case. If it was, there was certainly a good argument that the Government should prevail. There was no doubt in the world that the *New York Times* and *Washington Post* were going to have the most able advocates raising the other side of the case, and for the Government to have done nothing would be, in effect, to take the decision out of the hands of the courts and left it in the hands of the executive branch.

Senator KENNEDY. Do you see a responsibility of carrying the litigation as far as it could be carried to prevent publication, even though you might anticipate what the final outcome was going to be?

Mr. REHNQUIST. What do you mean by "might anticipate what the final outcome was going to be"?

Senator KENNEDY. Did you believe, as a lawyer, that the decision would come down the way it finally did?

Mr. REHNQUIST. I never felt I knew enough about the facts, which I really knew nothing about, to make an assessment. I felt it would turn on the facts, and I did not know what the facts were.

Senator KENNEDY. Could I move to another area. Mr. Rehnquist, in the May Day situation, could you tell us what your role was? Did you have a role, to start off with?

Mr. REHNQUIST. This presents me with the same sort of problem, which I must resolve for myself, realizing that if I resolve it against answering anybody on the committee, or anybody in the Senate, is entitled to hold against me my refusal to answer.

I did speak publicly on the May Day matter down in North Carolina 2 or 3 days after it and I, therefore, feel that I do owe an obligation to the committee to describe at least in a general nature my role, without necessarily, without revealing, and "revealing" probably is not the right word, describing the various internal deliberations that went on in the Department. And this is a difficult line to walk.

I will try to walk it. My role, up until the time of the events that actually took place was being consulted as to the propriety of the use

of the Federal troops in certain situations under the provisions of 10 U.S.C. 331 through 334. And I drafted an opinion which the Attorney General gave to the Secretary of Defense, saying that it was legally permissible to use Federal troops in order to preserve the operation of the Federal Government under the situation where a fairly large number of people had announced their intention to shut it down.

And that opinion was transmitted by the Attorney General to the Secretary of Defense. I participated in two or three meetings over the weekend, immediately prior to the demonstrations, at which a good number of people were present. I do not really think I had any significant input or contribution to make at those meetings.

During the time the events were actually happening, I was in and out of the Attorney General's office. I was at a large meeting in the Criminal Division at which a number of people from the Corporation Counsel's office, the U.S. Attorney's Office, our Criminal Division, our Internal Security Division, were present.

I do not believe I remained long, and since my own knowledge of the local practice of arraignment and arrest and that sort of thing is not very large, I found I had very little to contribute. There may have been more, but that is all that occurs to me now.

Senator KENNEDY. Well, at any time that how to handle the demonstrators was being discussed, did you raise any objections to the anticipated plans or programs?

Mr. REHNQUIST. One decision reached at a meeting that I was at over the weekend, was that the permit should be revoked for the camp-ground down at Hains Point, I believe it was. I made no objection to that decision.

Senator KENNEDY. Well, at some time during the weekend there was a decision made to suspend the constitutional rights of the demonstrators and impose martial law, or qualified martial law were the words I think you used. And I was wondering whether, at any time during the meetings which you attended, you expressed any reservation about such a suspension or the imposition of qualified martial law?

Mr. REHNQUIST. I believe you have misread my statement, Senator.

Senator KENNEDY. This was at Boone, N.C.?

Mr. REHNQUIST. Yes.

Senator KENNEDY. Did you make a statement there defending the law enforcement actions that were taken at the May Day demonstrations?

Mr. REHNQUIST. I made a statement saying that the abandonment of the field arrest procedures and the consequent, or perhaps not necessarily consequent, delay in bringing the defendants before an arresting magistrate, or a committing magistrate, was, I thought, defensible because the requirements that a defendant be brought before a magistrate were that he be brought before the magistrate within a reasonable time, and that in my opinion a reasonable time in this situation should take into consideration the necessity of the arresting officer, having made the arrest, continuing to be in the field to prevent the occurrence of other violence.

I went on to say in the statement in Boone that in a situation more serious than that which prevailed in Washington on May Day, the doctrine of qualified martial law had on occasion been invoked. I made, I thought, quite clear, not only that it had not been invoked in

Washington, but that it would be justified only in a more aggravated situation.

Senator KENNEDY. You are suggesting it was not imposed on May Day?

Mr. REHNQUIST. I certainly am suggesting that.

Senator KENNEDY. Well, what doctrine was imposed on May Day? It certainly was not probable cause in terms of the arrest procedures, was it?

Mr. REHNQUIST. Well, knowing the volume of arrests which were made, I simply would not be in a position to comment on whether any particular arrest was made with or without—

Senator KENNEDY. Well, do it in a general kind of way. You made a general endorsement of the procedures which were followed at May Day. You did that in North Carolina.

Mr. REHNQUIST. Well, I stand by the language I used in North Carolina, and I would call it something less than a general endorsement of everything that was done on May Day.

Senator KENNEDY. What was done on May Day that you did not think was right?

Mr. REHNQUIST. Well, I would have to know more about the facts to be satisfied that a particular thing done was not right. I did specifically say that I thought the abandonment of the field arrest forms by Chief Wilson was a legitimate and proper decision under the circumstances which he had to, I understand, confront.

Senator KENNEDY. What about the arresting without probable cause?

Mr. REHNQUIST. I do not think arresting without probable cause is ever proper, and if, in fact, it happened on May Day, I do not agree with it. I do not know enough about the facts to say that there were or were not arrests without probable cause on May Day.

Senator KENNEDY. Well, the thing I am driving at, Mr. Rehnquist, is that at some time, as you described here, you were involved in the development of the procedures which were outlined for May Day. I can understand that there may have been actions which preceded the suggested procedures which were agreed on at the meetings which you attended, and that you are not prepared to comment or describe or elaborate because you do not have those particular facts. But, nonetheless, you cannot get away from the fact that of the approximately 12,000 arrested, only really a handful ever were found guilty of any charge.

Mr. REHNQUIST. That is my understanding.

Senator KENNEDY. Which would suggest that the procedures—well, what does that suggest to you?

Mr. REHNQUIST. It suggests to me that whereas there may have been probably cause for the arrest of the great number of people, the District of Columbia police were faced with such an overwhelming situation of violation of the law that they chose to try to keep the streets free, and rather than to preserve the necessary information that would enable them to later show either that there had been probable cause for an arrest, or probable cause to bind a man over.

Senator KENNEDY. Well, if there are so many people that deserve arrests, I do not see why they followed a procedure that resulted in the arrest of a lot of people who were innocent.

Mr. REHNQUIST. I am not satisfied that they did arrest a lot of people who were innocent.

Senator KENNEDY. That were just bystanders, that were just walking to work, that were just students coming out of restaurants. The newspapers were full of these instances. I do not think there were many of us in the Congress who did not have constituents that had reports of this type of occurrence. With the cases that they had, so many that were violating the law, I find it difficult to understand why they were arresting so many others that were not.

And as well, thousands were "detained" on the basis of no evidence at all. Others were called for trial and came to trial where there was not the slightest basis for trying them. There were judicial findings for refund of bonds and recall of arrest records. You could almost say, given the results of the courts' rulings, what really went wrong with the development—

The CHAIRMAN. That is a rollcall.

Senator KENNEDY. Can he just answer this?

The CHAIRMAN. That is a rollcall vote.

Mr. REHNQUIST. Could I have the question repeated?

Could I have either the reporter read the question back or—

Senator KENNEDY. Yes. I was just saying that given the fact that there were thousands that were detained on the basis of no evidence at all, and these are court findings, others called for trial when there were no bases for trying them, and there were judicial orders for the refund of bonds and the recall of arrest records, I am just wondering what went wrong? Was it the development of the procedures to be followed on May Day or the execution of them?

Mr. REHNQUIST. I think one thing that happened was that the number of people who were to be involved in May Day was an overwhelmingly large number, larger than the Metropolitan Police contemplated. As a result, they were faced with a choice of either, when an individual policeman arrested a law violator, or someone he thought was a law violator, of himself taking that man to the stationhouse, booking him, and going through the usual procedures, or simply having the man taken in some other manner to the stationhouse.

And the policemen then would stay on the streets to try to arrest the next bunch who were coming along. And as I understand it, they were very deliberately trying to obstruct the movement of traffic, frequently by hazardous means. I think the District police opted in favor of the latter choice, and I cannot find it in myself to fault them for it.

The CHAIRMAN. The committee will stand in recess for a few minutes and will return right after a vote.

(Short recess.)

The CHAIRMAN. The committee will come to order, please.

Senator Kennedy.

Senator KENNEDY. If I got your final response to the question right, Mr. Rehnquist, you indicated that you were in general support of the law enforcement activities which were undertaken during the course of May Day. You had expressed earlier some reservations about particular actions and were unprepared to comment on some cases, but you were in general agreement.

Am I correct in that?

Mr. REHNQUIST. No; I would not interpret my final answer that way.

Senator KENNEDY. Would you restate it, then?

Mr. REHNQUIST. I think what I said was that the Chief of the Metropolitan Police made a decision to abandon field arrest forms and run some risk of being unable to follow up on the prosecution of arrestees in the interest of keeping his forces on the street in order to preserve order, and that I could not fault him for that decision.

Senator KENNEDY. Is there any procedure that was used during the course of that day, related to regulations, rules, or procedures which were established within the Justice Department, that you would have disagreed with?

Mr. REHNQUIST. Well, the abandonment of field arrest forms, as I understand it, there was no decision taken within the Department.

Senator KENNEDY. No; that was done in the field. But, in terms of the regulations and procedures to be followed on May Day, you were involved in these decisions at the Justice Department. As I understand from what you are saying here, you did not express any reservations about them during the course of their development, nor even in the wake of how they were implemented that particular day. In hindsight, would you have done anything differently?

Mr. REHNQUIST. I was involved in some of the decisions, Senator. I suspect there were a great many that I was not involved in. It is, of course, relatively easy to look back in hindsight and say that one would have done something differently.

And the one thing that occurs to me, and this is strictly a matter of hindsight, and I do not believe this was something that could have been fairly anticipated, was to supply more adequate facilities for those who were detained.

Senator KENNEDY. This is the only, the only point of departure?

Mr. REHNQUIST. Well, you have made the statement that there were arrests made without probable cause simply as bystanders and people who were walking to work. If that was the case I would certainly have done that differently.

Senator KENNEDY. Did you ever come to the belief that that was the case any time prior to the point where the court was throwing these cases out?

Mr. REHNQUIST. No; I did not.

Senator KENNEDY. Did you, in the course of those days, read the newspapers and hear about innocent people being arrested, put in the jails or the detention centers? Did you feel that there was a possibility of people being arrested without probable cause?

Mr. REHNQUIST. Well, certainly after newspaper accounts occurred one could not rule out that possibility.

Senator KENNEDY. Well, I am just trying to think back with you, Mr. Rehnquist, to that time. It appears to me that just from a general reading of the newspapers it was clear that there were hundreds of young people being detained under very trying circumstances, under very desperate conditions. I am just wondering whether you independently might have been sufficiently concerned about the possibility of false arrests or indiscriminate arrests or any of the other practices which led to the courts throwing these cases out, whether the chance

that a great deal had gone wrong struck you prior to the time that the courts made these decisions?

Mr. REHNQUIST. Well, it certainly struck me after reading the stories in the newspapers, that if those accounts were true, people have been improperly arrested.

Senator KENNEDY. Did you feel you ought to do anything about it, as somebody who is in an important and responsible position in the Justice Department, and who has responsibility for insuring the protection of the rights of individuals?

I am wondering whether this aroused you so much that you felt that maybe you would walk down the corridor, so to speak, and speak to the Attorney General, and say: "If this is what is happening, Mr. Attorney General, I think we ought to do thus and so; we should not wait for the courts?"

Mr. REHNQUIST. By the time the newspaper accounts occurred, I think whatever had happened had happened and the Corporation Counsel and United State's Attorney's Office, as I understand it, were already engaged in a screening process. I did not do anything. I did not feel there was anything that would be appropriate for me to do.

Senator KENNEDY. Well, again, it was 2 days after the demonstrations you were down in North Carolina, I think, and one would have to say from your speech you were endorsing or supporting the May Day procedures. Was that a time when the Attorney General was suggesting that these procedures ought to be duplicated in cities all over the country? And this was 2 days afterwards, and it seems to be during that period of time it became eloquently apparent to many in the House and the Senate that there were many travesties of justice. Certainly that opinion was supported almost unanimously by the various court decisions that ruled on those cases. And I am just interested whether, when it became apparent to you that there had been an entrenching on basic rights—

Mr. REHNQUIST. My statement in North Carolina, Senator, as I recall it, and as I see it, glancing through it, dealt with the abandonment of field-arrest forms, and the concept of a reasonable time in which to take a person before a committing magistrate. It did not purport to sweepingly endorse everything that had been done during the May Day demonstrations.

As to what I may have done on my own, my own initiative, after becoming aware, I have already answered that I did nothing, and I did not think it was appropriate to do anything.

Senator KENNEDY. You would not deny that your statement down in North Carolina was a general endorsement of the steps that were taken by—

Mr. REHNQUIST. I have it in front of me, if you want me to read over a few pages and answer your question, I will do it or I will give you my recollection.

Senator KENNEDY. Well, why don't you give us your recollections?

Mr. REHNQUIST. I do not concede it to be a general endorsement.

Senator KENNEDY. Well, at any time did you express any dismay, either privately or publicly, about the procedures which were followed? You had a situation where you had about 12,000 arrests, practically all but a handful thrown out for a variety of different reasons, and I am just interested in whether you—

Mr. REHNQUIST. I am sure that I made a comment, Senator, to someone at some time that if these newspaper stories were true, certainly they arrested some people they should not have.

Senator KENNEDY. But you did not—this was in a private conversation?

Mr. REHNQUIST. I can remember my own reaction to the newspaper stories, thinking that there are always two sides to a case, and I would want to hear the other side before making a decision, but at the same time, feeling if this was true it was wrong.

Senator KENNEDY. With the benefit of hindsight, would you change anything now if you were to have a massive demonstration? Would you urge different procedures to be followed in cities, or would you agree with the Attorney General that the procedures which were followed ought to be the model for other cities?

Mr. REHNQUIST. I am not sufficiently close to the actual operations in the field to have the necessary information to make a judgment as to whether particular procedures should be changed.

As to the overall impression of the thing, the fact that there was not a serious injury, no loss of life, and that the Federal Capital was kept open, I think was a rather significant accomplishment.

Now, if it could have been done without arresting anyone who should not have been arrested, if that did, indeed, happen, then it would be better to do it that way. Whether there is some system that could be devised with some several thousand individual policemen to insure that no one would ever be arrested without probable cause, I simply do not know.

Senator KENNEDY. Of course, the Constitution is rather clear on that, is it not, about arresting without probable cause, as the Supreme Court decisions have construed it?

Mr. REHNQUIST. Well, yes, that there must be probable cause to arrest.

Senator KENNEDY. Well, does it not distress you when there is an arrest without it, then?

Mr. REHNQUIST. Yes.

Senator KENNEDY. Could we move just into an area which was mentioned this morning by the Senator from Michigan, Senator Hart—wiretapping.

Would you tell me what role, if any, you had in the Justice Department in the development of wiretapping policies?

Mr. REHNQUIST. I face the same decision here.

Senator KENNEDY. Tell me, what is the decision really? Is it that you are—is it the attorney-client relationship? Are you here under executive privilege?

Mr. REHNQUIST. No; it is attorney-client relationship.

Senator KENNEDY. Does that apply within any executive agency? Maybe you could tell me a little bit about that. I thought that your client was the public as well; is it not?

Mr. REHNQUIST. My client, in my position as the Assistant Attorney General for the Office of Legal Counsel, is the Attorney General, and the President, and applying—

Senator KENNEDY. Where does that put the rest of the Constitution?

Mr. REHNQUIST. Well, that puts the rest of the Constitution in the position of having someone advising them as to what his interpre-

tation of the Constitution is. Presumably, each of them, being very busy men, they need to get that advice from somewhere, and they get it from me and they get it from other sources, also. But, the traditional role of the attorney-client privilege is that the attorney does not disclose advice given to his client and not otherwise made public.

In the wiretapping situation, the Government has filed a brief in the Supreme Court of the United States, which is a matter of public record, and I would be happy to comment on my rather limited role in the preparation of that brief.

Senator KENNEDY. Could you?

Mr. REHNQUIST. It was drafted in the Internal Security Division, and at the request of the Attorney General we were asked to work with the Internal Security Division in preparing the draft and revising it. We did that. It was then submitted to the Solicitor General in the usual course of events, and was finally filed after having been revised by him in the Supreme Court of the United States.

Senator KENNEDY. Do you think if this issue or question were to come to the Supreme Court you would feel obligated to disqualify yourself?

Mr. REHNQUIST. I think that disqualification is a judicial act, Senator, just as one's vote to affirm or reverse a particular decision would be a judicial act and, therefore, I think it would be improper for me to express any opinion as to how I would act in a particular case.

I think I mentioned to you when I was in your office the other day, and I now state publicly, that the memorandum prepared by the Office of Legal Counsel for Justice White, at the time he went to the court, strikes me as being a sound legal analysis of the basis on which one should disqualify himself. At least the thrust of that brief is personal participation in litigation—

Senator KENNEDY. What about advising? Does the brief cover the question of advising or counseling?

Mr. REHNQUIST. Well, I think advising as to particular litigation it does cover.

Senator KENNEDY. What about policy; what about advising with respect to a policy?

Mr. REHNQUIST. My recollection is that it does not.

Senator KENNEDY. Well, what rule will you use in those areas?

Mr. REHNQUIST. I think that is a good deal more difficult question, Senator, and I think that I would have to say that I would do the best with the materials and precedents available to me.

Senator KENNEDY. Could you give us any insights as to what will be the various considerations, or how you will decide that, what factors there will be?

Mr. REHNQUIST. The factors will be the applicable disqualifications statutes which I recall are 28 U.S.C. 455, the factors set forth in that statute, and to the extent that the canons of judicial ethics would not be inconsistent with statute, the canons of judicial ethics.

Senator KENNEDY. Well, in the wiretapping case, then, you could not tell us whether you would at this time?

Mr. REHNQUIST. I obviously ought not to say that I will disqualify myself in the wiretapping case. I can say that in my opinion I person-

ally participated in an advisory capacity in the preparation of that brief, and I will attempt to apply the standards, as I understand them, to that decision.

Senator KENNEDY. Would that not fall within the purview of the White memorandum?

Mr. REHNQUIST. Senator, you are asking me as to a particular decision that I will make after I get on the court. I have said enough on that, I think, and you can draw your own conclusions.

Senator KENNEDY. Could you tell me, you have made a statement about the number of wiretaps, have you not, publicly made some statements or comments?

Mr. REHNQUIST. I am sure I have.

Senator KENNEDY. You have indicated that the charges of pervasive wiretapping are exaggerated?

Mr. REHNQUIST. Yes.

Senator KENNEDY. Can you tell us the basis for this conclusion?

Mr. REHNQUIST. You mean how I got the numbers of—

Senator KENNEDY. Yes; how you came to that conclusion.

Mr. REHNQUIST. Well, given the numbers, which I do not recall, but it seems to me it was something in the neighborhood of between 100 and 200, and the fact that there are 200 million citizens in the country, and presumably millions and millions of phones, I felt justified in saying that any number between 100 and 200 could not possibly be said to be pervasive.

Senator KENNEDY. Now, as I understand, those were taps pursuant to warrants based on probable cause; is that correct?

Mr. REHNQUIST. That is my understanding under the Omnibus Crime and Safe Streets Act of 1968.

Senator KENNEDY. They are limited in time and they must be disclosed to the person snooped on; is that right? They must be reported to the Congress and can only be used in limited circumstances?

Mr. REHNQUIST. Yes; as set forth in the statute.

Senator KENNEDY. What about the taps and bugs installed on the Attorney General's own initiative without court order? What could you tell us about that?

Mr. REHNQUIST. Well, I can tell you nothing from personal knowledge.

Senator KENNEDY. Were they included in your characterization that the number of wiretappings was exaggerated? Did you include in your evaluation the taps and bugs installed without court order?

Mr. REHNQUIST. I am not sure whether I did or not. As I recall the latter number is somewhere between 30 and 40, so that whether or not I included it it would not change my conclusion as to pervasiveness.

Senator KENNEDY. What is 30 or 40; what does that number mean?

Mr. REHNQUIST. That means that at a particular time there were 30 to 40, and I simply do not recall the figure, and I am trying to get it out of my memory generally, of this type of wiretap used.

Senator KENNEDY. My understanding is that there are three times as many days of Federal tapping or bugging without court orders as there are days of tapping and bugging with court approval. That is based on communications I have had with the Attorney General. Does this sound inconsistent with your understanding of the amount of either wiretapping or bugging?

Mr. REHNQUIST. My understanding is not sufficiently great factually to be able to answer that.

Senator KENNEDY. Could you tell us a little bit about what your reaction is to taps and bugs and when they ought to be put on?

Mr. REHNQUIST. I think it would be inappropriate for me to do so, Senator. I have acted as a spokesman and advocate in preparing a brief for the Government, and I think it would be inappropriate for me to express a personal view.

Senator KENNEDY. Well, what about the official view of the Department?

Mr. REHNQUIST. As to when a wiretap ought to be used?

Senator KENNEDY. Yes; without a court order.

Mr. REHNQUIST. In cases contained in the reservation of the act of 1968, as defined in the statutory language.

Senator KENNEDY. What about internal security and domestic, not foreign, but domestic, national security cases? Would you give us any insight as to how much is foreign, how much is domestic?

Mr. REHNQUIST. I simply do not know. I do not have any part in the operational end of it.

Senator KENNEDY. And are you unwilling to give us any kind of a feeling about your own concern over the use of wiretapping or bugging or snooping?

Mr. REHNQUIST. I think, having acted as an advocate and spokesman for the Department it would be inappropriate for me to give a personal view.

Senator KENNEDY. You would not tell about just your own concern about this as an invasion of privacy, and the concern that we have to have in our society, in terms of protecting individual rights and liberties? You are not prepared even to make general comments about this?

Mr. REHNQUIST. Well, I can make a general comment.

Senator KENNEDY. Well, will you? I am looking again for the kind of concern you have for the protection of rights and liberties.

Mr. REHNQUIST. Well, I think my comment must be sufficiently general that it is not going to satisfy you. It is, having indicated in my London speech, it is not an appealing type of thing, and it is justified only by exigent circumstances.

Senator KENNEDY. Well, you have, as you say, been willing to talk about it in London, and we are interested to hear you talk about it here today.

Mr. REHNQUIST. I was acting as a spokesman for the Department in London, and I have acted as a spokesman for the Department in other instances and in the preparation of the brief, and for that reason I do not think I should give my personal views.

Senator KENNEDY. Why? Because you feel that you are—why is that?

Mr. REHNQUIST. I do not think that one who has been an advocate, in a particular matter, particularly when it is under submission to the courts, is at all entitled to express a personal view.

Senator KENNEDY. But are we supposed to assume that your comments in London were just the Department's position and they did not present your views; they were not your views?

Mr. REHNQUIST. I was asked to appear as the hard-line type because, you know, they had four people on the forum—

Senator KENNEDY. Do you often get asked to appear as a hard-line type? [Laughter.]

The Chairman. Let us have order.

Mr. REHNQUIST. Everybody from the Justice Department does, I think. And you know, they do not want some either/or type of presentation. They want a justification of the Department position. and that is what I attempted to give them.

Senator KENNEDY. Do you think if you had had concerns about wiretapping, the pervasive use of wiretapping, that they would not have sent you to London?

Mr. REHNQUIST. Well, I will say this much, Senator, that certainly if I had felt from an advocate's point of view that the Department's position was indefensible, or personally obnoxious to me, I would have resigned.

Senator KENNEDY. Let me go to a couple of final areas, Mr. Rehnquist.

In the civil rights area, as I understand, in February 1970, you wrote a letter to the Washington Post about the Carswell case?

Mr. REHNQUIST. I did.

Senator KENNEDY. In it you suggested that those who disagreed with Judge Carswell's opinions in civil rights cases, and thought them to be anti-Negro, and anticivil rights, were missing the message of those cases, and you argued that the truth was that anyone that you called a constitutional conservative, or judicial conservative, would have reached the same judgment as Judge Carswell solely on judicial philosophy without racial animus.

Mr. REHNQUIST. You are characterizing my letter, Senator.

Senator KENNEDY. Well, could you?

Mr. REHNQUIST. I do not have it in front of me. I am sure the text is available to everybody.

Senator KENNEDY. I will ask that the whole letter be put in the record, Mr. Chairman.

The CHAIRMAN. It will be admitted.

(The letter referred to follows.)

[From the Washington Post, Feb. 14, 1970]

LETTER TO THE EDITOR—A REPLY TO TWO EDITORIALS ON THE CARSWELL NOMINATION

Having read the first two of your proposed three-part editorial on Judge Carswell, and strongly doubting that the concluding part will have an O. Henry type ending, I wish to register my protest on two counts: first, that there are substantial misimpressions created by your editorial, and, second, that your fight against the confirmation of Judge Carswell is being waged under something less than your true colors.

The discussion in the editorial of Feb. 12 of the Supreme Court's decision in the Atlanta case, for example, is seriously misleading. The editorial states that "the Supreme Court heard arguments on Atlanta's plan, then in its fourth year, amid speculation that the Justices thought the plan was too slow. Indeed, in May 1964 the Justices said just that." (Emphasis added.) In fact, the Justices did not say that the Atlanta grade-a-year plan was too slow. What actually happened was that the Supreme Court remanded the case to the District Court for an evidentiary hearing on a new proposal submitted by the board which had not been passed on by the lower courts. *Calhoun v. Latimer*, 377 U.S. 263 (1964). By implication, if not by express language, the passage cited earlier says that the Supreme Court had

pronounced grade-a-year plans, such as Atlanta's, unconstitutional across the board. Examination of the court's opinion will show the error of this implication.

In the same paragraph of the editorial the following appears:

"That same month the Supreme Court upheld a Fifth Circuit order telling Jacksonville, Florida, to stop assigning teachers to schools on the basis of race."

The thrust of this statement is two-fold: (1) that the Fifth Circuit had held earlier that the assignment of teachers on the basis of race is unconstitutional and to be enjoined in all future cases arising in the circuit; and (2) that the Supreme Court had approved this ruling as a correct statement of constitutional law to be applied nationwide.

Neither of these assertions has the slightest basis in fact. In the case in question, *Board of Public Instruction of Duval County, Florida v. Braxton*, 326 F. 2d 616 (1964), a two-to-one decision, the issue was not whether school plans *must* contain a prohibition of teacher assignments on the basis of race. The issue instead was whether a District Judge exceeded his discretion in including such a prohibition. The Fifth Circuit answered this question in the negative and upheld the lower court's order. There is nothing in the appellate court's opinion suggesting that all future court orders in school cases must contain similar prohibitions.

The Supreme Court action in the case, referred to as "upholding" the Fifth Circuit, is a denial of certiorari, 377 U.S. 924. It is elementary that such an order is not an "upholding" of the lower court decision and indeed it represents a refusal by the Supreme Court to review the case on the merits. The reference to the Supreme Court's action as a "ruling" later in the editorial merely aggravates the initial misimpression created.

My criticism of your editorial, however, goes beyond these misimpressions. The Post is apparently dedicated to the notion that a Supreme Court nominee's subscription to a rather detailed catechism of civil rights decisions is the equivalent of subscription to the Nicene Creed for the early Christians—adherence to every word is a prerequisite to confirmation in the one case, just as it was to salvation in the other. Your editorial clearly implies that to the extent the judge falls short of your civil rights standards, he does so because of an anti-Negro, anti-civil rights animus, rather than because of a judicial philosophy which consistently applied would reach a conservative result both in civil rights cases and in other areas of the law. I do not believe that this implication is borne out.

Judge Carswell in his testimony before the Judiciary Committee stated that he did not believe the Supreme Court was a "continuing Constitutional Convention."

Such a philosophy necessarily affects a judge's decision in every area of constitutional adjudication. These areas include civil rights, of course. But they also include, for example, cases involving the right of society to punish criminals, the right of legislatures and local governing bodies to deal with obscenity and pornography, and the right of all levels of government to regulate protest demonstrations.

A reading of Judge Carswell's decisions in the field of criminal law—particularly the notation of his dissent from the denial of a rehearing en banc by the Fifth Circuit of the *Agius* decision (which broadened the *Miranda* rule)—indicates that in this area too, he is not as willing as some to see read into the Constitution new rights of criminal defendants which they may assert against society. Thus the extent to which his judicial decisions in civil rights cases fail to measure up to the standards of The Post are traceable to an over-all constitutional conservatism, rather than to any animus directed only at civil rights cases or civil rights litigants.

Quite obviously The Post or any other newspaper has a perfect right to urge the Senate not to confirm a judge who has decided cases in the manner in which Judge Carswell has. But in fairness to your reading public, you ought to make it clear that what you are really fighting for is something far broader than just "civil rights," it is the restoration of the Warren Court's liberal majority after the departure of the Chief Justice and Justice Fortas and the inauguration of President Nixon. In fairness you ought to state all of the consequences that your position logically brings in its train: not merely further expansion of constitutional recognition of civil rights, but further expansion of the constitutional rights of criminal defendants, of pornographers, and of demonstrators. Such a declaration would make up in candor what it lacks in marketability.

WILLIAM H. REHNQUIST,
Assistant Attorney General, Office of Legal Counsel.

Senator KENNEDY. I do not know whether you can read either parts of it, or whether you want to take a look at it?

Mr. REHNQUIST. I will try and answer any question about it. I do have some resistance about accepting a characterizing—

Senator KENNEDY. Well, I think that is fair enough. Well, how would you characterize it? Let me ask you that, then, how would you characterize your letter in reply to the editorials on the Carswell nomination?

Mr. REHNQUIST. To the extent I recall the letter—I certainly recall the substance of it—it was basically an argument that those who attacked Judge Carswell's civil rights record were at least in part in error and that in addition, although the attack on his civil rights record might demand a good deal of popular support, the idea that it was solely a question of civil rights, and not also a question of other constitutional doctrines being involved, was a matter that should be more fairly presented.

Senator KENNEDY. Well, it seems to me that it was somewhat stronger than that. Using your own words, you say—

Your editorial clearly implies that to the extent the judge falls short of your civil rights standards, he does so because of an anti-Negro, anti-civil rights animus rather than because of a judicial philosophy which consistently applied would reach a conservative result both in civil rights cases and in other areas of the law. I do not believe that this implication is borne out.

And you say the—

Extent to which his judicial decisions in civil rights cases fail to measure up to the standards of The Post are traceable to an over-all constitutional conservatism, rather than to any animus directed only at civil rights cases or civil rights litigants.

It seems to me that you are suggesting that Carswell reached those on the basis of a conservative judicial philosophy. Is that not fair enough?

Mr. REHNQUIST. I think the letter has to speak for itself, Senator. I certainly wrote it as an advocate. I think it is a very defensible piece of advocacy.

Senator KENNEDY. Well, is it not fair for us to draw the conclusion that you at least expressed the feeling in this letter that he reached those decisions based upon a conservative judicial philosophy? Can you see where we would reach that conclusion, or are we unfair in reaching it?

Mr. REHNQUIST. The letter is there; it is a matter of record. I wrote it. I think anyone is entitled to draw what fair inferences he feels can be made from it.

Senator KENNEDY. Well, I am asking whether you think that, laying this out in the open, it would be unfair to draw that conclusion?

Mr. REHNQUIST. It is a matter of reasoned individual judgment.

Senator KENNEDY. Going back to the statement that the President made about the appointment, Mr. Rehnquist, what do you think troubles the President, and why do you think that the President makes the statement about comparing the peace forces and the criminal forces and says that he believes, and I think that I am stating it reasonably accurately, that the public interests have to be better protected than they have in the past, and it is important that he nominate to the Court, as he pledged he would during the last campaign, someone whose judicial philosophy is close to his own?

Why do you think the President believes that your appointment there will move the Court closer to the peace forces and away from the accused?

Mr. REHNQUIST. I think it would be inappropriate for me to comment on what the President's thought processes were, if I knew them.

Senator KENNEDY. Well, I suppose he says he believes your judicial philosophy is that you are a judicial conservative, is what it gets down to. Do you feel so?

Mr. REHNQUIST. Well, if by judicial conservative is meant one who will attempt to—

Senator KENNEDY. What do you think he meant by that?

The CHAIRMAN. Wait a minute. Let him answer the question.

Mr. REHNQUIST. I simply cannot speak for him, Senator.

Senator KENNEDY. Well, how do you—why do you not speak for yourself then? Do you think you are a judicial conservative?

Mr. REHNQUIST. Well, let me tell what I think I am, and then you decide whether I am a judicial conservative or not.

My notion would be that one attempts to ascertain a constitutional meaning much as suggested by Senator McClellan's questions earlier, by the use of the language used by the framers, the historical materials available, and the precedents which other Justices of the Supreme Court have decided in cases involving a particular provision.

Senator KENNEDY. If you think that the Court has made, or if we were to believe that the Court in recent times made, extremely important and landmark decisions for the preservation of basic rights and liberties, and that it is the intention, for whatever reason, that the President wants to change that, what can you tell us? What assurances can you tell us that you are not going to, or can you tell us that you are not going to move back on what I would consider the march of progress during the period of the Warren Court?

Mr. REHNQUIST. Could you be any more specific?

Senator KENNEDY. Well, you have made comments, for example, about the *Miranda* case, have you not, expressing some concerns about that?

Mr. REHNQUIST. I think the comment I made, if you are referring to my University of Arizona speech, was in the Justice Department, like any other litigant, they had a perfect right to request the Court to review, and if it found it appropriate, overrule a precedent.

Senator KENNEDY. Well, could you say in a general way you have reservations about the decisions that were made by the Warren Court?

Mr. REHNQUIST. Let me try.

Senator KENNEDY. All right.

Mr. REHNQUIST. To the extent that I believe it proper, and it is a very unenviable task for a nominee, I am sure you realize, to the extent that a decision is not only unanimous at the time it is handed down, but has been repeatedly reaffirmed by a changing group of judges, such as *Brown v. Board of Education*, it seems to me there is no question but what that is the law of the land, that the one way you try to arrive at the meaning of the Constitution is to try to see what the nine other Justices who took the oath of office thought it meant at the time they were faced with the question.

On the other hand, to the extent that a precedent is not that authoritative in the sense of having stood for a shorter period of time, or having been handed down by a sharply divided court, then it is of less weight as a precedent.

That is not to say that there is not a presumption in favor of precedent in every instance.

I do not feel I can say more without commenting on matters that actually might come before the Court.

Senator KENNEDY. Well, how about the landmark types of decisions? I am thinking of the right to counsel, for example. Could you talk about that, or about the apportionment cases which held there must be one-man, one-vote?

Mr. REHNQUIST. I feel I have got to restrain myself. I have gone as far as it seems to me a nominee ought to in indicating the way I conceive precedent to be applicable. I think anything—

Senator KENNEDY. How important do you feel it is for an indigent to have an attorney?

Mr. REHNQUIST. Well, I think it is very important.

Senator KENNEDY. Do you have any reservation about people's votes being counted equally whether they live in a city or live in rural areas in terms of popular representation? Does that bother you at all?

Mr. REHNQUIST. Well, no; phrased the way you do, it certainly does not.

Senator KENNEDY. Could it be phrased otherwise so that it would?

Mr. REHNQUIST. Well, the idea that people's vote should be counted equally strikes me as something that virtually everyone in the room should agree to. But if you are putting it in a context of a particular fact question that might come before the Supreme Court—

Senator KENNEDY. No; that is all right.

The question of blacks being able to ride in public accommodations or being able to eat in public accommodations, do you have any troubles with this?

Mr. REHNQUIST. I have done my best to indicate the use of precedent, and I simply fear that if one gets into particular issues, he is taking the position that is very inappropriate for a nominee.

Senator KENNEDY. Thank you very much, Mr. Rehnquist.

The CHAIRMAN. Senator Bayh.

Senator KENNEDY. I would like to reserve some time.

Senator BAYH. Mr. Rehnquist, Senator Fannin, I must say I admire the way in which you have borne up under this questioning session, and I want to join my colleagues in congratulating you for having the confidence of the President in such a tremendous way as to be nominated to the highest court in the land, and I hope that during these hearings that those of us who have expressed a doubt or two, as I have, will have those doubts laid to rest.

I stated on the 15th of October that I thought there should be three general criteria followed. In my own personal judgment, a nominee should have distinguished legal ability, unimpeachable personal integrity, and had demonstrated commitment to fundamental human rights; and in pursuit of this criteria, I will pose a series of questions, some of which very frankly will be just for a matter of clarification.

Your colleague, Deputy Attorney General Kleindienst, submitted some biographical data as well as some financial data, and looking at some of it, it is difficult to put it in proper order. So, let me just basically run through this.

You were born in October 1924 in Milwaukee. Went to high school in Milwaukee. Is that accurate?

Mr. REHNQUIST. Yes, it is, Senator.

Senator BAYH. You then entered the Air Force directly from high school in Milwaukee?

Mr. REHNQUIST. No; I went on to Kenyon College in Gambier, Ohio, for one quarter, at which time I turned 18, and then I entered the Army Air Force.

Senator BAYH. High school in Milwaukee, Kenyon College, and then into the Air Force?

Mr. REHNQUIST. Yes.

Senator BAYH. You went to Stanford after you got out of the Air Force and graduated in 1968. You entered directly after military service. Is that accurate?

Mr. REHNQUIST. Yes; I graduate in 1948.

Senator BAYH. 1948. I am sorry.

And, then, as I put it together, you received a master's degree in 1950 from Harvard in government?

Mr. REHNQUIST. Yes.

Senator BAYH. And then got an LL.B. from Stanford and was first in your class in 1952; is that accurate?

Mr. REHNQUIST. That is correct.

Senator BAYH. I want to compliment you for that academic record and for your military service to your country.

We have had a considerable amount of discussion before this committee relative to the whole business of ethics, and I think you certainly understand, as one who has been a member of the bar for as long as you have—and, of course, there is general acceptance as to your expertise as an attorney—but one nominated to the Supreme Court not only has an important responsibility as far as his own ethical conduct is concerned but he is called upon from time to time to rule on various cases that will set the standard for the entire judiciary throughout the country.

With this in mind, let me look at some of the information in Mr. Kleindienst's letter and ask you to answer some specific questions that have been asked of a number of nominees or prospective nominees that have come before the committee.

After your Supreme Court clerkship, you practiced law in Phoenix for 16 years; is that accurate?

Mr. REHNQUIST. Yes; it is.

Senator BAYH. Now, let me ask some rather basic, perhaps mundane, questions relative to the three principal clients that Mr. Kleindienst listed that were the bulk of your law practice. Would you have any objection to submitting to the committee a full list of the clients you may have represented over the past few years, or would that be—

Mr. REHNQUIST. It might be somewhat difficult to compile. I am sure it could be done.

Senator BAYH. I notice that Mr. Powell has submitted a rather lengthy list. I do not know whether it would be possible but I would appreciate it.

In the letter, as to the three principal clients, the first listed was a company named Sherrill & Follick which Mr. Kleindienst described as a partnership engaged in farming and land development throughout the State of Arizona. Could you tell me, did you represent this corporation and when did you begin to represent this company, and do you know how long you represented them?

Mr. REHNQUIST. It was a partnership, not a corporation, and I began representing it, I believe, in about 1960 or 1961.

Senator BAYH. Could you describe very briefly the kind of activity which this client engaged in, in some sufficient detail?

Mr. REHNQUIST. They had a feed-lot operation and a cattle feeding operation. They had been growing cotton, but, as I recall, were getting out of it by the time I came to represent them, and they had purchased a fair amount of land along the Colorado River, which was my principal association with them, the litigation arising out of that purchase.

Senator BAYH. The acquisition of land and this type of activity, this was the relationship?

Mr. REHNQUIST. Lease, the acquisition of land; then, the lawsuit to determine title to the land, though I am sure I may have represented them on occasional land acquisitions.

Senator BAYH. The second principal client listed in the letter from Mr. Kleindienst was Transamerica Title Insurance Co. Is that a subsidiary of the Transamerica Corp., the larger, international one?

Mr. REHNQUIST. Yes; I believe it is, Senator. When I first began representing them it was a locally owned company but still, between that time and the time I left Phoenix, it was acquired by Transamerica.

Senator BAYH. What was the name of the locally owned company?

Mr. REHNQUIST. Phoenix Title & Trust.

Senator BAYH. Well, can you describe the nature of the business that this client was involved in?

Mr. REHNQUIST. Well, my representation of them was in litigation which they got into as the result of acting as escrow agent or trustee under a subdivision trust. Their business, as such, was to act as escrow agent and trustee in very large volume land transactions that occurred in the State of Arizona.

Senator BAYH. Did you represent them in acquiring any of this land or disposing of it?

Now are we talking about Phoenix Title, or the client that was listed here, Transamerica Title Insurance Co., or did you represent both?

Mr. REHNQUIST. I do not think there was much change in the local entity's activities as the result of its acquisition by Transamerica. It may have grown some. It could. At least, so far as I know, it was not itself engaged in the acquisition of land. It acted as escrow agent in a situation where a buyer and seller had an agreement to sell and buy land and wished to place the agreement in escrow. Phoenix Title would act as escrow agent and also acted as subdivision trustee, which is a phenomena that is not generally found in the rest of the country but which is designed to enable a neutral title holder to facilitate the subdivision of lands which are in the process of being sold by a seller to a buyer.

Senator BAYH. Well, I want to make sure that I do not misunderstand you. You did serve as attorney for Transamerica Title and Insurance Co., and prior to that time you represented Phoenix, you represented both? Can you give us a time frame on that, please, approximately?

Mr. REHNQUIST. I was a retained attorney for specific matters in litigation, first for Phoenix Title and Trust Co., which was a locally owned company, and, then, after that company was acquired by

Transamerica Title and Insurance Co., for the local entity which was then a subsidiary of Transamerica.

Senator BAYH. Could you give us a little bit more detail of the types of individual duties that you performed?

Mr. REHNQUIST. Defendant and litigation. You know, I can give you a description of perhaps the last piece of litigation I represented them on.

Senator BAYH. We are just trying to get a general idea of the type of business they did, and thus the type of business that you had.

Now, the third principal client listed is the Arizona State Highway Department, which Mr. Kleindienst's letter indicates you served as a special counsel in termination cases, in cases involving claimed liability for defective maintenance of highways.

Can you give us sort of the same capsule rundown? When did you start representing them? Generally, what kind of cases were involved?

Mr. REHNQUIST. I believe I began representing them in 1963. Perhaps, it was 1962, and my principal representation was of the highway department, as a condemner of lands necessary for the construction of highways. I was retained by them in at least one instance to defend them against the charge of improper maintenance and construction of a highway where a personal injury and death had resulted from a collision on the highway, State highway.

Senator BAYH. Thank you.

Additional data was provided in Mr. Kleindienst's letter, and let me just quickly ask, without going into detail: You are familiar with the information relative to the assets of you and your wife?

Mr. REHNQUIST. I believe I am, yes.

Senator BAYH. Does that contain an entire listing of the assets that you possess?

Mr. REHNQUIST. To the best of my knowledge, yes. It is general and it is approximate, but I think it presents an unfortunately fair position of my financial position.

Senator BAYH. Let us gather together in misery.

You hold no additional assets in any other trusts or blind trusts that would not be listed in public records because of the unique characteristics of Arizona law; is that accurate?

Mr. REHNQUIST. Yes.

Senator BAYH. Let me, if I may, pursue your general thinking in the whole area of ethical standards and disqualifications. I am not concerned just with your standards but the standards that you might feel compelled to apply in the judiciary. I know that you cannot speak about individual cases. I know of none, and I think you share my concern that we must make certain we put our best foot forward as far as those that represent the judiciary not only on the Supreme Court but all all levels. A while ago we were discussing the Haynesworth matter as far as ethics were concerned. I do not want to get into a lengthy rehashing of that affair, but I do want to try to get from that and from your participation in it, if possible, your general feeling on what you, as a Justice, would demand of the judicial system as far as ethical standards are concerned.

In the letter that you sent—and, in fact, you sent two letters, as I recall, one on September 5 to Senator Hruska and one on September 19 to the chairman—

Mr. REHNQUIST. Those are 1969 letters?

Senator BAYH. Yes. You had this to say—I have the whole letter here, but I have taken these two specific quotes:

The clearest case is one in which the judge is a party to the lawsuit. Clearly, he may not sit in such a case. Little different is the case in which the judge owns a significant amount of stock in a corporation which is a party to the lawsuit before him. He too must remove himself.

These paragraphs do not follow, but they deal with the two different kinds of questions, and, so, they are both directly quoted.

One question is presented when a judge holds stock in a corporation which is a party to a litigation before him. A quite different question is posed when the judge merely owns stock in a corporation which does business with a party to litigation before him.

Could you give us your opinion of the responsibility of the judge to remove himself from the case in which he owns stock in the corporation, in the corporate body?

Mr. REHNQUIST. Do you want my present opinion?

Senator BAYH. Yes, please, and if it differs from the assessment you made in the Haynesworth case I certainly would be glad to have that also.

I am more concerned about what you believe now than what you may have believed 2 years ago.

Mr. REHNQUIST. Well, I am inclined to agree with the comment that Judge Blackmun made during his confirmation hearings to the effect that judges generally, after the Senate's denial of confirmation to Judge Haynesworth, had become more sensitive and perhaps more astute to disqualify themselves than they had previously. So that my own inclination would be, applying the standards laid down by 28 U.S.C. 455, and to the extent there is no conflict between them and the canons of judicial ethics, to try to follow that sort of stricter standards that I think the Senate, by its vote, indicated should prevail.

Senator BAYH. You feel then that a judge who owns stock in a corporate party should disqualify himself from sitting on that case?

Mr. REHNQUIST. That is a difficult question for me, Senator, because certainly a literal reading of 28 U.S.C. 455 does not, as I recall the statute, seem to require that.

Senator BAYH. It talks about substantial interests which is subject to some interpretation.

Mr. REHNQUIST. A substantial interest in the case, not in the party. Yet there is no question that the arguments were made in the minority report of the Senate committee, and on the floor, that were persuasive to many Senators that the canons of the ABA and the strict interpretation of those canons which says that a judge disqualifies himself if he owns stock in a case should be followed. I do not think it would be appropriate for me to simply say right now that I would or would not disqualify myself if I had a share of stock, since I think that is a judicial decision. I think that I can fairly say that I am sensitive, as Judge Blackmun indicated he was, to the closer and perhaps stricter view of disqualification that has prevailed since the Haynesworth decision.

Senator BAYH. Well, I appreciate the difficulty in a specific instance, but, very frankly, I think that question can be answered either "Yes" or "No" and that you have not done either, with all respect.

Mr. REHNQUIST. You think I should answer a question as to whether I would disqualify myself, if confirmed, if I owned a share of stock in a corporation?

Senator BAYH. Well, you know, I do not—

Senator COOK. It is not within the framework.

Senator SCOTT. You are having as much difficulty as the witness is.

Senator BAYH. Well, that is accurate, because I am not, frankly, as concerned about you, yourself, as about the fact that you may be presented with a case where another judge has faced the same situation, and thus in determining that case you will determine what the entire law is.

Mr. REHNQUIST. But I think it would be singularly inappropriate, Senator, just because of that factor, for me now to try and announce to you how I will rule on that case. I have said I think there is an increased sensitivity, increased strictness, in the views of the disqualification statutes, and I think it would be inappropriate for me to say flatly what rule of law I would propose to apply if I were confirmed.

Senator BAYH. Well, I think we have some guidance as to what the law is now in addition to what Justice Blackmun said—and I salute him for what he said—but I will not push you further if you do not care to go further, because I see no need. But in your advice to us in the 12-page memorandum you are suggesting in the strongest terms, citing a number of jurisdictions to support your position, that Judge Haynsworth had not violated the generally accepted position of the ethical standards in this country. For some reason or other, in the 12 pages you omitted reference to Supreme Court law on the case, a Supreme Court case, decided a year before, on November 18, 1968, *Commonwealth Coatings Corp. v. Continental Casualty Co.*

In that case—and I think it was Justice Black who wrote that decision—he went into some detail. He set a very strict standard. This was not the first time it had been set, and the Senate looked into the question, and brought into it the *Commonwealth Coating* case and the canon of judicial ethics which talks about appearance of propriety or impropriety. Without proceeding too much further on this, would you care to suggest why you did not give us the benefit of the Supreme Court law, or if, in your consideration, you would also consider the interpretation of the case of *Commonwealth Coating* in which the appearance of impropriety is as important as impropriety?

Mr. REHNQUIST. Yes. I have no hesitancy in doing that.

Since you are basically examining my professional qualifications as an advocate, we did not give to the committee that case because we did not find it.

Senator BAYH. You did not find the Supreme Court case that had been cited the year before in the Justice Department?

Mr. REHNQUIST. No; we did not. We ran it down under the key note system, under "Disqualification," as I recall. Partly it was staff; partly, I remember going through these volumes, myself, and as I recall, the *Commonwealth Coating* simply did not show up. Now, obviously, one can be faulted for less than complete coverage in the cases on that point. I admit that, had I found the *Commonwealth Coating* at the time I wrote the letter, I certainly would have felt obligated to comment on it. I would not have felt that it changed the result which I reached in the letter.

Senator BAYH. Oh, you would not have?

Mr. REHNQUIST. No; I do not believe I would have.

Senator BAYH. Well, I am sorry that you would not have, that it would not have changed the opinion.

Everyone is entitled to his own view, but I think the case is very clear and that Justice Black, for the Court, deals rather harshly or strictly with substantial interests, and brings in the appearance of impropriety in a way that was not suggested in the memorandum.

Mr. REHNQUIST. Well, as suggested, Senator Bayh, Mr. Frank, in his testimony before the committee, I think he also was of the view that that case was not controlling. It was basically dealing with an arbitration case and a somewhat different factual situation.

Senator BAYH. But, if you will recall, what Justice Black said was—and I will read it here—

An issue in this case is the question of whether elementary requirements of impartiality taken for granted in every judicial proceeding should also be taken for granted in arbitration cases.

So, the Court here seems to give us the impression, the very strong impression, that this is taken for granted in a judicial case such as that you were addressing yourself to. But let us not proceed further on that.

You do feel very strongly that a stricter interpretation should be put on substantial interest than you might have thought?

Mr. REHNQUIST. Yes, I do.

Senator BAYH. The third point that I mentioned earlier the basic commitment to human rights, in addressing ourselves to the criteria for a Supreme Court nominee, I suggested that no person should be put on the Court whose views are inconsistent with securing equality, equal rights, an opportunity for all, regardless of race, religion, creed, national origin, or sex, and equally important are the fundamental liberties of the Bill of Rights. Thus, a nominee should have a record that would show he is committed to preserving the basic individual freedoms.

I want to address myself to some of these questions very quickly, if I may, because I think it is extremely important today when there are a number of people who suggest there is no way of working within the system, that those of us who are in this, both in the Congress and who ultimately reach the highest echelons of the judiciary, show that we have faith in the system working. What in your past background, if you could give us just a thumbnail sketch, demonstrates a commitment to equal rights for all and basic human rights?

Mr. REHNQUIST. It is difficult to answer that question, Senator. I have participated in the political process in Arizona. I have represented indigent defendants in the Federal and State courts in Arizona. I have been a member of the County Legal Aid Society Board at a time when it was very difficult to get this sort of funding that they are getting today. I have represented indigents in civil rights actions. I realize that that is not, perhaps, a very impressive list. It is all that comes to mind now.

Senator BAYH. Would you give us a similar rundown on your background that would show a commitment to the fundamental freedom of the Bill of Rights? That is a matter that has been brought

up by at least two of my colleagues and is a matter of grave concern to me as I told you the other afternoon when we met.

Mr. REHNQUIST. Well, can you give me some example of what you have in mind?

Senator BAYH. Yes. Let me, if I may, deal with some of the specific questions. The reasons I asked the broader question is that you, with all respect, when you had been asked a more specific question, have given a broader answer, and I thought I would approach it from the other way.

You see, I am deeply concerned, and I do not want to be overly dramatic about this, but I am concerned that there are a number of people today that feel that the only way we can solve national problems is by shortcircuiting individual rights or individual freedoms, individual human rights, that we have got a lot of complicated problems that can be solved by ready answers, simple solutions, and I just do not think it works that way. It just seems to me that we have to, if we are going to preserve our institutions and a free society, say that there is an alternative, another alternative, between a police state or handcuffing individuals and taking away their individual rights on the one hand and an increase in crime on the other. That is why I address myself to this.

Let me deal more in specifics. Let us look at some of the specifics of the Bill of Rights, for example, the fourth amendment and related issues of privacy. In your judgment, what do you feel is the purpose of the fourth amendment in our judicial system, in our Constitution?

Mr. REHNQUIST. To protect individuals and their homes against unreasonable searches and seizures.

Senator BAYH. The arbitrary action of governmental officials, I suppose?

Mr. REHNQUIST. That might be another way of putting it.

Senator BAYH. Now this is the protection we are talking about at the so-called top of the spectrum, where you may well be sitting on the Supreme Court and we are sitting in the U.S. Senate, and this protection is also to be provided at the lowest level, at the local level and at all levels of Government, and the fourth amendment protections are designed to apply, is that not accurate?

Mr. REHNQUIST. I think the Supreme Court has held that the fourth amendment applies to State and local governments as well as to the Federal Government.

Senator BAYH. The FBI and local police as well?

How do you envision these fourth amendment rights being protected under the Constitution?

You see, you have had some questions about wiretapping, and eavesdropping, and I suppose we create under the interpretation that that is a fourth amendment situation; is it not?

Mr. REHNQUIST. Yes; I believe it is. Do you want me to answer?

Senator BAYH. Well, if you care to. The question is: How do you reconcile—where does the fourth amendment fit where you happen to have the local police chief or the FBI or the President on one hand feel that wires should be tapped and a room should be bugged and, on the other hand, the rights of an individual citizen protected under the fourth amendment?

Mr. REHNQUIST. Well, I think a good example of a line that has been drawn by Congress is the act of 1968, which outlawed all private

wiretapping and which required, except in national security situations, prior authorization from a court before wires could be tapped.

Now, it strikes me that both of those are protection of the citizen in his home.

Senator BAYH. And you feel that the imposition of a neutral judge between these two competing rights sometimes is a good buffer, is a good way to guarantee this fourth amendment right?

Mr. REHNQUIST. Yes.

Senator BAYH. Let me ask you, if I may, to get your specific relationship into this inasmuch as you asked me to be more specific.

Senator Kennedy asked some of these questions, and Senator Hart asked at least one, and you felt, as I recall, that you were unable to answer, because of various relationships, or not being willing, not feeling that you should prejudge any case.

Let me use a little different approach, if I may, and see if we can get a specific answer.

On March 11 of this year, the Providence Journal reported that you were questioned at Brown University about the Justice Department's—and I quote:

Practice of not obtaining judicial permission before installing wiretaps in cases of national security.

The newspaper went on to say that you replied—and here, again, I quote the newspaper:

In these cases, the Department must protect against foreign intelligence or subversive domestic elements. It often does not have the evidence of imminent criminal activity necessary for wiretapping authorization.

Is that a correct quotation of your response at Brown? Is that still your opinion? Was it then?

Mr. REHNQUIST. I have no idea whether it was a correct quotation. I can certainly remember in substance defending the administration's position on national security wiretapping, which has since been embodied in a brief in the Supreme Court of the United States.

I cannot, at this time, recall the words I used.

Senator BAYH. Well, does this reflect your views?

Mr. REHNQUIST. As I said to Senator Kennedy, Senator Bayh, I think it inappropriate in a case in which I have appeared as an advocate to now give personal views.

Senator BAYH. With all due respect, do you have—is there any legal precedent for saying that you have an obligation to the Justice Department when you are queried on your opinion at Brown University?

It is hardly the client-lawyer relationship, is it, Mr. Rehnquist?

Mr. REHNQUIST. The format of the college visits which I participated in, 10 or 12 last year, was very simple:

"Come and defend the Justice Department to the college students." They certainly would regard it as a lawyer-client relationship.

Senator BAYH. I find this a rather difficult position for me to be in, and in which I frankly would like to give you the benefit of the doubt. From your mouth have come a number of statements that concern me very much, about whether the Government is going to be given carte blanche authority to bug and to wiretap, and yet there is no way I can find William Rehnquist's opinion about that.

Mr. REHNQUIST. Well, I doubt that you can find any statement, Senator, in which I have suggested that the Government should be given carte blanche authority to bug or wiretap. I recently made a statement at a forum in the New School for Social Research up in New York, attended by Mr. Mear of the Civil Liberties Union and Mr. Katzenbach, that I thought the Government had every reason to be satisfied with the limitations in the Omnibus Crime Act of 1968.

Senator BAYH. Of course there were certain areas that were not dealt with in the Omnibus Crime Act of 1968, the whole thorny thicket of national security was not dealt with?

Mr. REHNQUIST. Well, it was dealt with to the extent that Congress made it clear that the limitations being imposed by that act were not to be carried over into that type of case.

Senator BAYH. But you do feel this gave the President rights that he did not have before?

Mr. REHNQUIST. I think that is a fairly debatable legal question.

Senator BAYH. What do you feel about it?

Mr. REHNQUIST. I think, again, having participated in the preparation of the Government's brief—the Government's brief which is on file in the Supreme Court of the United States—I think it would be inappropriate for me to give a personal opinion.

Senator BAYH. Can we find something a little more basic that may not involve a specific case?

Do you feel that there is some standard that should be present before the Government gets involved in bugging activities? For example, the standard of probable cause?

Can the Government go out here on a fishing expedition and promiscuously bug telephones because the President, himself, seems to feel it meets a certain criteria; or should it meet the probable cause test that is not foreign to our system of jurisprudence?

Mr. REHNQUIST. I think the answer to the first part of your question is so clear that I should have no hesitancy in giving it, that, certainly, the Government cannot simply go out on a fishing expedition, promiscuously bugging people's phones. As to whether a standard of probable cause, in the sense of probable cause to arrest, in the sense of probable cause laid down by the Omnibus Crime Act of 1968, or probable cause to obtain a search warrant for tangible evidence, it seems to me those are the sort of questions that may well be before the Court, and I ought not to respond.

Senator BAYH. A moment or so ago, we, I think, reached some agreement that the fourth amendment rights can be protected by interposing between the Government and the individual a neutral party, a neutral magistrate. Can you tell us why this should not be the case, in your judgment, as far as the national security is concerned?

Would you care to make a distinction between the foreign intelligence insurgent? Do you make a distinction in your own mind on these two?

Mr. REHNQUIST. I can tell you the position which the Government has taken and which I believe is a reasonably well done job of advocacy. and that is that given the facts, five preceding administrations have all taken the position that national security type of surveillance is permissible, that one Justice of the Supreme Court has expressed the view that the power does exist, two have expressed

the view that it does not exist, one has expressed the view that it does not exist, one has expressed the view that it is an open question, that Government is entirely justified in presenting the matter to the Court for its determination.

Senator BAYH. Do you not care to offer a personal opinion on it, then?

Mr. REHNQUIST. I think it would be inappropriate.

Senator BAYH. All right. I do not know whether you are aware or not—I suppose you are—of the ABA standards relating to electronic surveillance, in the tentative draft of June 1968, which says that they feel a distinction should be made in the President's right to tap wires when international agents are involved on the one hand and domestic insurgents are involved on the other. Do you care to comment on that?

Mr. REHNQUIST. I think the Department has taken the position that this is a distinction that is virtually impossible to make. Their position is taken on the basis of operational divisions with the knowledge of which I am not familiar, but I do not think it would be appropriate for me to make a personal observation.

Senator BAYH. Let me broaden the question a bit to include not only bugging, which is the more traditional fourth amendment area, but also the right to privacy, which, as the *Griswold v. Connecticut* case held, is the product of several sources, the fourth, the first, the fifth, and ninth, and maybe the 14th amendments.

Let me here again go to some of your testimony before the sub-committee of this committee where you said, in response to a question by Senator Ervin at the hearing on the investigative authority of the executive, that you saw no constitutional problem in Government surveillance of persons exercising their first amendment rights to assemble peacefully to petition the Government for redress of a grievance. Is this an accurate statement of your views?

Mr. REHNQUIST. With the qualification that the surveillance ought to be in the interest of either apprehending criminals or preventing the commission of crime, and with the additional qualification that the surveillance talked about there is not wiretapping and it is not forcibly extracting information. It is simply the viewing in a public place.

Senator BAYH. Taking pictures and compiling dossiers and this type of thing, you feel is warranted?

Mr. REHNQUIST. I feel is—what?

Senator BAYH. Is warranted.

Mr. REHNQUIST. My statement was, I believe, that I did not feel it was a violation of the first amendment. The question of whether it is warranted or not is a good deal different one it seems to me.

The question of proper use of executive manpower, you know, with the idea of compiling dossiers on political figures, such as was being done by the Army at one time, strikes me as nonsense.

Senator BAYH. But you do not feel that is a violation of anybody's constitutional rights?

Mr. REHNQUIST. I expressed that view at the time of the hearing before the Ervin committee. I was speaking for the Department, and I will stand by that statement.

Senator BAYH. Can you just tell me one more time why you feel that this kind of thing which you disagree with and you feel is

improper, some of the ridiculous examples we had of a peace march in Colorado where I think there were about 119 people and about half of them were agents, and the fact that a church's young adults class had been infiltrated by Army agents in Colorado Springs, this type of thing which would seem to me to have no useful purpose, why would that not be unconstitutional? Why is that not abrogation to the right of privacy of the individuals involved?

Mr. REHNQUIST. Well, I do not disagree with you at all, but it would seem to have no meaningful purpose to me.

Even in my examination of the cases as a Justice Department lawyer, I was unwilling, and I did not feel that the precedents suggested that everything that was undesirable or meaningless was unconstitutional.

Senator BAYH. Well, how do we protect these rights if they are not unconstitutional? Let me ask you this—

Mr. REHNQUIST. Can I answer that?

I mean, Congress has it within its power any time it chooses to regulate the use of investigatory personnel on the part of the executive branch. It has the power as it did in the Omnibus Crime Act of 1968 of saying that Federal personnel shall wiretap only under certain rather strictly defined standards. That is certainly one very available way of protecting.

Senator BAYH. You are right, but when you testified before our subcommittee, again you suggested that the Justice Department, and I quote, "vigorously opposed is any legislation that would open the door to unnecessary and unmanageable judicial separation of the executive branch for information-gathering activities."

Now, I do not think we ought to impose unmanageable or unreasonable criteria. But we have got the very strong feeling that the measure that a couple of us introduced, which appeared reasonable to us, was going to be opposed by the Justice Department. What criteria would you oppose or permit to be interposed that would not be unreasonable, unnecessary, or unmanageable?

Mr. REHNQUIST. Speaking as a Justice Department advocate, as I was at the time, I think that a couple of earlier sentences immediately preceding the one you read, Senator, summarized the view that legislation tailored to meet specific evils would not receive the categorical opposition of the Department. I think, from the law enforcement point of view, we were skeptical of the notion that some sort of judicial hearing should be required before an investigation be even undertaken which, I think, would have the most deleterious effect on effective law enforcement, in effect, preventing the commencement of an investigation which might ultimately end up in a showing of probable cause before the investigation could even start.

Senator BAYH. Have you, or has the Justice Department suggested any possible alternative to the measures that have been introduced by the Members of Congress to deal with this problem?

Mr. REHNQUIST. I think the LEAA bill sent up, in response to Senator Mathias' amendment to the LEAA Act of 1970, presents what struck me at the time I had a chance to look at it as a reasonable accommodation of the interests.

Senator BAYH. In what way?

Mr. REHNQUIST. In that it prevents the wholesale dissemination of criminal history information; it prevents almost completely the

dissemination of criminal investigative information. It confers, in some cases, a right of private action for someone who is wronged by that. I do not pretend to carry in my mind even all of the significant provisions of the act, but it seems to me those were some of them.

Senator BAYH. In commenting on this before Senator Ervin's hearing, you seemed to stress, as I recall—and this is, I suppose, an even broader question—that the only real way, or the best way, to deal with this would be self-discipline, self-discipline on the part of the executive branch.

Self-discipline, on the part of the executive branch, will provide an answer to virtually all of the legitimate complaints against excess information gathering.

Do you really believe that is sufficient?

Mr. REHNQUIST. I think it can go a long way, yes.

Senator BAYH. Let me read one paragraph of a memo prepared by a very distinguished member of my staff back on March 17, right after you made that statement, and I would like to have you comment on the thoughts here which I must say are my own.

Fundamentally, and of interest both philosophically and politically, the history of civilization and freedom suggests that no society which depends simply on the self-discipline of its government can expect to withstand the pressure and temptation to weaken and destroy individual freedom. This is, of course, a tremendously conservative thesis. The need is to protect the individual from big government. If we should rely on self-discipline we would not need the Bill of Rights, the First Amendment protection, of free religion, free speech, free press; the Fourth Amendment protections of security against searches and seizures; the Second Amendment protection against the double jeopardy and violation of due process; the Sixth Amendment requirements of speedy trial, right to confrontation, and defense; the Seventh Amendment right to jury trial; the Eighth Amendment right to fair bail and restrictions against cruel and unusual punishment. All of these guarantees are express constitutional limitations on the power of government when enacted, because we were not prepared to trust our future to the self-discipline of those who happen to be in power.

Mr. REHNQUIST. I agree with that statement. My remarks before Senator Ervin's committee were in a context of the existence of the Bill of Rights, the existence of the statutory restrictions such as were contained in the 1968 act. And the question, as I understand it, was what additional statutory prescriptions should be placed on investigative processes.

Senator BAYH. You have expressed the opinion that judicial hearings would be deleterious. I can see how sensitive matters would cause this to be the case. But is there no limit beyond which this spying can go, this eavesdropping can go?

Why do we not just have a simple recognition of the fact that if we seek the advice and counsel, seek the permission of the unbiased member of the Federal judiciary, that we have provided the buffer we need between big government on one hand that might want to spy and pry and listen and the individual citizen who has the right to privacy? How would that be deleterious?

In other words, let us get a court warrant. You would not have to have a hearing. Why could that not work?

Mr. REHNQUIST. Well, you are talking about a court warrant before you commence an investigation?

Senator BAYH. Yes; before you tap a telephone.

Mr. REHNQUIST. Well, you are required to get one now.

Senator BAYH. No; not if it is in national security. At least you suggest it is arguable as to whether it is a domestic or international security problem, and there is a very nebulous area there, as I am sure you agree. But why not let a Federal judge say "Yes," that there is probable cause there and go ahead and do it?

Mr. REHNQUIST. Well, as to whether Congress ought to enact legislation like this, I would not express any opinion. Our position in the brief in the Supreme Court has been that with the existing provisions in the act of 1968, the Constitution does not require that it be done.

Senator BAYH. What would be wrong with you, as a judge requiring that it be done? Is not this something that a member of the judiciary can take into consideration, whether there has been adequate self-restraint on the part of the executive?

Mr. REHNQUIST. You mean what would be wrong with passing such a statute?

Senator BAYH. No; a judicial interpretation without a statute in the area where I say it is now nebulous, where the administration feels they have the right, and some of us in Congress feel they do not. Is this a matter that is subject to consideration by the judiciary?

Mr. REHNQUIST. I honestly do not understand your question, Senator.

Senator BAYH. Is adequate self-restraint a subject which can be considered in judicial interpretations as to whether fourth amendment rights have been violated or the right to privacy has been violated?

Mr. REHNQUIST. I still do not understand.

Senator BAYH. Well, then, we are equal. You see, what concerns me is that we have had, in the past decade, a commingling of executive authority and political activity. In the last 10 years we have had Attorneys General, charged with the dispensation of law, maintenance of order, provision of justice, who have also been the campaign managers of the President they serve. They have run the political operation, and it just seems to me that we would be in a lot better position, before we started taking pictures, before we started listening in on peaceful demonstrations, before we started tapping telephones, if we required that a court order be given.

And I will not proceed further on that.

Will you give us your thoughts in another area, the civil rights area?

Let me just ask you, if I may, to explore the text of the two letters you wrote to the Arizona Republican in the transcript of your testimony concerning the Phoenix Public Accommodations Act enacted in 1964, your statement opposing the public accommodations ordinances, which suggested that it was "impossible to justify the sacrifice of even a portion of our historic individual freedom for such an end."

There you were referring to the freedom of businessmen to select their customer for the purpose of giving to the public access to facilities that were offered for public use. That was your opinion before you served in the Justice Department. Is that still an accurate reflection of your opinion now?

Mr. REHNQUIST. I think probably not.

Senator BAYH. How would you look to that differently now? Would you care to explain a little but in more detail for us, please?

Mr. REHNQUIST. Yes.

I think the ordinance really worked very well in Phoenix. It was readily accepted, and I think I have come to realize since it, more than I did at the time, the strong concern that minorities have for the recognition of these rights. I would not feel the same way today about it as I did then.

Senator BAYH. Have you had the same change of feeling relative to the 1967 letter to the editor in which you quoted a statement of the Phoenix school superintendent relative to the integration of the school system?

Mr. REHNQUIST. I think probably not. And if I may explain: My children here go to school out in Fairfax County, in schools that are integrated and attended by a minority of blacks. My son plays on a football team, on which both blacks and whites play. He plays on a basketball team on which blacks and whites play, and I feel he is better off for that experience than if he were playing on a team entirely composed of whites. This, however, is done in the context of the neighborhood school. All of these people are in the general geographical area and attend the school because of that. I would still have the same reservations I expressed in 1967 to the accomplishment of this same result by transporting people long distances, from the places where they live, in order to achieve this sort of racial balance, and what I would regard as rather an artificial way.

Senator BAYH. What is your feeling about transporting people either long or short distances to maintain an all-white or an all-black school?

Mr. REHNQUIST. Well, I think that transporting long distances is undesirable for whatever purpose.

Senator BAYH. You do not make a distinction between the two types of transportation?

Mr. REHNQUIST. Well, in the context of the situation where there has not been de jure segregation, obviously we get into a situation where there are questions pending before the Court, and which it would be inappropriate for me to comment on. I do feel obligated to comment, because I did write the letter to the editor. I think you are entitled to inquire into my personal views on that particular point.

Senator BAYH. May I ask you just to explain in a little further detail a specific quotation from a letter that might be more pertinent to the general question?

The superintendent of schools apparently had said that we are and must be concerned with achieving an integrated society. And you responded and said:

I think many would take issue with his statement on the merits and would feel that we are no more dedicated to an integrated society than we are to a segregated society, that we are, instead, dedicated to a free society in which each man is equal before the law, but that each man is accorded a maximum amount of freedom of choice in his individual activities.

Is that still your view now?

Mr. REHNQUIST. In the context of busing to achieve integration in a situation where it is not a dual school system; I think it is.

Senator BAYH. All right, now, we are not talking about an isolated situation where this is taking place. In fact, I think this is extremely

important, because I think generally one would adopt that hypothesis if it were not for history, and I want to ask you: Do you believe that we can achieve the free society in which each man is equal before the law, as you suggested in your letter, if we ignore the social and economic and sociological consequences of 300 years of segregation? How can we look at this in a vacuum?

Mr. REHNQUIST. Well—

Senator BAYH. We usually have gone through calculated efforts on the part of Government to segregate. Now, you suggest that we do not have to do something to redress the balance here?

It seems to me it is rather—

Mr. REHNQUIST. The courts have held where a situation has pertained in segregation we are required and obligated to redress that balance. That was not the situation to which I was addressing myself in that letter.

Senator BAYH. Let me ask you one other question about the civil rights area. As you know, there has been some opposition from the NAACP in your part of the country to you because of one quotation that I have here from a resolution which, if you are not familiar with it, I would be glad to show you.

The southwest area conference of the NAACP says:

Mr. Rehnquist does not fully accept the right of all citizens to exercise the franchise of voters' rights, and our fears are based upon his harassment and intimidation of voters in 1968 during the Presidential election in precincts heavily populated by the poor.

I have here a number of newspaper clippings citing certain types of election-day activities, and apparently you had some position of responsibility within the party to challenge in this type of thing. Would you care to explain how the NAACP would be so concerned about the voter activities?

I think Senator Hayden, on one occasion, asked the FBI to investigate.

Mr. REHNQUIST. I would not undertake to explain the grounds of the NAACP opposition. I will try to give a fair answer to the specific charges so far as 1968 is concerned. My recollection is I had absolutely nothing to do with any sort of poll watching. That is not a completely fair answer or a completely responsive answer, because in earlier years I did, and they may well have confused 1968 with earlier years.

My responsibilities, as I recall them, were never those of a challenger, but as one of a group of lawyers working for the Republican Party in Marion County who attempted to supply legal advice to persons who were challengers, and I was chairman of what was called the Lawyers Committee in a couple of elections, biennial elections, which I believe were in the early 1960's. And we had situations where our challengers were excluded from precincts where we felt, by law, they were entitled to get into, and I might say that our challenging efforts were directed not to black precincts as such but to any precinct where there was a heavy preponderance of Democratic voting, just as our counterparts in the Democratic Party devoted their efforts to precincts in which there was a heavy preponderance of Republican voting.

And, as matters worked out, what we finally developed was kind of a system of arbitration whereby my counterpart, who was for a couple

of elections chairman of the Democratic lawyers, and I, the chairman of the Republican lawyers, tried to arbitrate disputes that arose, and frequently the both of us would go together to a polling place and try to decide on the basis of a very hurried view of the facts who was in the right and who was in the wrong. And I can remember an occasion in which I felt that a couple of our challengers were being vehement and overbearing in a manner that was neither proper nor permitted by law and of telling them so. I can also remember situations in which the Democratic poll judges were refusing to allow our challengers to enter the polling place, and I can remember my counterpart insisting that they let them in.

So, I do not feel I can fairly be accused in the manner that the NAACP has accused me on the basis of what those activities were.

Senator BAYH. Of course, a part of this activity was the sending out of letters to those who lived in the minority group areas and then challenging those who had letters returned to you?

Mr. REHNQUIST. It was not devoted to minority group areas as such; it was devoted again to areas in which heavy Democratic pluralities were voting together, with some reason to believe that tombstones were being voted at the same time. And this was one of the principal means used to try to find letters returned with the addressee unknown and then to challenge the person on the basis of residence if he appeared to vote.

I might say that the Democrats made equal use of the same device.

Senator BAYH. As I read these newspaper clippings, it does not mention anything about the Democrats doing that. I suppose that does not mean they did it or did not do it, but at least the newspaper reporters did not catch it. If I were a Republican, I would want to keep as many Democrats from voting as I could, I suppose, and vice versa. But this is done in some areas, and I am familiar with this, in those areas that are not just Democratic, but minority groups primarily, whether it is chicano or black or whatever it might be, where there is more movement back and forth across the street and from one part of the community to another. Can you give me any reason why the NAACP would make this assessment, or did they just have something in for you?

Mr. REHNQUIST. I simply cannot speak for them. I know of my own conduct in these matters, and that the letters were mailed out on the basis of mathematical calculations of Democratic votes in precincts together with areas in which there was some reason to believe that there actually were tombstone or absentee voting, and I know from my trips to polling places, as a member of the Lawyers Committee, that some of the precincts certainly had a number of blacks, a number of chicanos, and many of them were totally white.

Senator BAYH. Let me ask two other specific questions, Mr. Chairman, and then I feel I would like to move on and reserve whatever time I might need for further questioning and let Senator Tunney have a chance.

There was a question asked by Senator Hart, in which he quoted a U.S. News & World Report article relative to your observations about the liberals on the Court. Are you familiar with the question he asked? I did not get the answer. What he said was: "Is your opinion the former or the latter?" And you said, "The latter," which really did not have meaning.

Mr. REHNQUIST. I do not remember the question, Senator.

Senator BAYH. When you wrote that article—

Mr. REHNQUIST. Oh, I do, too; I remember the question.

Senator BAYH. When you refer to the extreme solicitude for claims of a Communist or other criminal defendant, does that mean you thought the Warren court was very sensitive to the constitutional rights of all citizens, including these groups, or do you mean that the Court was more sensitive to their rights because of some ideological opinion?

Now, I think you answered the latter, but then we moved on to something else, and I just wanted to redefine very quickly what you meant when you said that.

Mr. REHNQUIST. Well, I certainly did not mean to suggest then or now that the Court at that time was sympathetic to the claims of Communists, because they, themselves, sympathized with communism. I think what I meant to suggest was that was an ideological sympathy with unpopular groups which was not developed from the Constitution itself which may have partaken of the decision.

Senator BAYH. One last question, and that deals with disqualification.

I understand the problem you have in not wanting to prejudge a case which you might have to decide, or even to determine whether you are going to remove yourself, but we have a problem, too, Mr. Rehnquist. We have a problem deciding whether your judgment is going to keep you from getting involved in a conflict of interest where you have, indeed, provided significant legal counsel to the Attorney General, and you have, on a number of instances, refused to say to what degree you have been involved in a number of cases. On one case, you suggested that you had helped to prepare a brief. Now, just let me ask you again, and I will not repeat all of the assessment here, what Mr. Kleindienst said your job description was, and what you, yourself, said, how you described it before Senator Ervin's subcommittee, but do you not feel that if you had helped the Justice Department prepare a brief, that this ought to disqualify you from sitting on a case? Is that not a direct conflict there?

Mr. REHNQUIST. Well, I think my answer to that would be "Yes."

Senator BAYH. Well, I may be wrong, but I thought that in the answer to the wiretap question that was raised, you came very close to saying that; but you said, well, you did not want to make a final judgment on that.

Mr. REHNQUIST. And in a sense I probably should not have answered the last question "Yes," because I think one has got to reserve his complete independence of decision if he is confirmed. I think you are entitled to know my present impressions, and my present impressions are that the memo submitted to Byron White is a good summary of disqualification law, and that it requires disqualification where there has been personal participation, even in an advisory capacity on the preparation of a brief, and that I have participated in the wiretapping brief in an advisory capacity.

Senator BAYH. I might suggest that we have a precedent that is even a bit stronger than the distinguished Justice that you referred to. Now, 28 U.S.C. 455 says that if you have previously been a counsel, that you should disqualify yourself, and it seems to me if

you have helped prepare a brief, you have been as close as you can be, in Government service, of counsel.

Mr. REHNQUIST. I would not want to venture an interpretation of the term of counsel, except to suggest I think it could fairly be said to mean "of counsel," as the term is traditionally used in the legal profession, representing a part in court.

Senator BAYH. It is not possible to be of counsel and represent one part of the question and participate in one part of a case, if you happen to be in the Government's employ?

Mr. REHNQUIST. Well, I would want to examine——

Senator BAYH. Who do you have representing the Government on a case?

The CHAIRMAN. Let him answer.

Mr. REHNQUIST. Would you repeat the question?

Senator BAYH. I did not mean to interrupt. I just wanted to rephrase the question.

Who represents the Government in a court case, who prepares the case, if it was not someone of counsel?

Mr. REHNQUIST. Well, I think the legal definition of someone of counsel is someone whose name is signed to the brief or whose name appears with a specific designation of counsel on the brief. Now, whether that provision should be construed that narrowly or not is something I would not want to prejudge.

Senator BAYH. May I quote from the White memorandum?

From the foregoing, it seems clear that a Government attorney is of counsel within the meaning of 28 U.S.C. 455 with respect to any case in which he signed a pleading or a brief, even if it is merely a formal act, and probably should be regarded as of counsel if he actively participated in any case, even though he did not sign any pleading or brief.

Do you concur in that general assessment?

Mr. REHNQUIST. Well, I concur in that general evaluation.

Senator BAYH. Are you familiar with the new canons of judicial ethics of the American Bar Association, the ones in the process of being prepared now?

Mr. REHNQUIST. No.

Senator BAYH. I might point out that in canon 2, under "Disqualification," the following is cited—and then I will ask your opinion—a judge has to disqualify himself "in any proceeding in which his partiality might reasonably be questioned, including, but not limited to instances where (1) he has a fixed belief concerning the merits of the matter before him or personal knowledge of evidentiary facts concerning it; (2) he has previously served as a lawyer in the matter in controversy or has been a material witness concerning it."

May I ask you whether you think generally those views are consistent with your view of disqualification?

Mr. REHNQUIST. I have never had an opportunity to review those canons alongside of 28 U.S.C. 455. I would presume that in any decision I made on disqualification, should I be confirmed, I would then have an opportunity to do that and would do it.

Senator BAYH. Mr. Chairman, I yield and would like to reserve the opportunity to ask further questions if it seems important afterwards.

You have been very patient, Mr. Rehnquist, and I appreciate it.

The CHAIRMAN. Mr. Tunney.

Senator TUNNEY. Thank you, Mr. Chairman.

Mr. Rehnquist, you and I are relatively young men, and, as such, I feel a very important responsibility in passing judgment on your qualifications, because it is entirely possible that in the year 2000 you will still be sitting on the Supreme Court if you are confirmed. Between now and then there is going to be a profound political, social, and economic change taking place in this country. You are going to be required to pass judgment on the constitutionality of many of these changes as they relate to maintaining an equilibrium between freedom and order, equality and efficiency, justice and security.

I look at your professional qualifications, and I have studied them, your competence, your judicial temperament, your integrity, and I see a highly qualified man for the Supreme Court. I believe, however, as I read your writings, that you share my viewpoint that a nominee's philosophy is a legitimate area for senatorial confirmation inquiry.

In other words, it is my view that where the President deems it appropriate to change entirely the character of the Supreme Court, changing it to his own image, the Senate has the right to reject the nominee on the grounds that his views on the large issues of the day will make it harmful to the country were he to sit and vote on the Court.

Now, I want to be frank with you and state that in reading what you have written and reports of what you have said in speeches, there are aspects of your philosophy of government and the right of the individual which I consider to be very disturbing, just as I am sure you would consider my views to be very disturbing if our positions were reversed.

I would like to quote from a few of your letters, articles, and speeches, and ask you to say precisely what you meant in those statements, and the context in which the statements were made.

I note that in an article that you wrote for the Harvard Law Record, you express very clearly the fact that you feel that philosophy is a legitimate area for senatorial inquiry and you state:

Specifically, until the Senate restores the practice of thoroughly examining inside of the judicial philosophy of the Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process. As of this writing, the most recent Supreme Court Justice to be confirmed was Senator Charles Evans Whittaker. Examination of the Congressional Record for debate relating to his confirmation would reveal a startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation.

Now, one of the things that I would like to say prefatory to my specific questions is that the only way that we can get an idea of your philosophy is if you answer questions. If it is impossible to probe your thinking because you feel that somehow the issue might come before the Supreme Court at some time, there is no way that we can go after the process of thinking that you engage in and which you, in this early article, felt was very important as a part of the senatorial inquiry.

Therefore, I am going to try to avoid asking you specific fact situations which will come before the Supreme Court, but it would certainly help me if you could in general explore your thinking, both at time you made the statement and your thinking on the statement now. I will try to make this inquiry brief, because I recognize that there are

Republican members of this committee who have a very keen desire to be heard before the day is over.

Last year, you wrote a letter to the editor of the Washington Post in which you defended the civil rights record of Judge Harrold Carswell. In that letter you made the assertion that any seeming anti-civil-rights bias on his part was, in fact, not that at all but rather simply a reflection of constitutional conservatism—using your words. The letter stated specifically, and I quote:

Thus, the extent to which his judicial decisions in the civil rights cases fails to measure up to the standards of the Post is traceable to an overall constitutional conservatism rather than to any animus directed at civil rights cases or civil rights litigants.

If that is true and if we are to believe that you are a constitutional conservative, and, using the President's term, a strict constructionist, what can we expect from you in the area of civil rights in the future?

Mr. REHNQUIST. Well, just as I understand your problem, you understand mine, Senator. I believe I have tried to give to Senator Kennedy some basic outlines, and however much it may displease you I do not feel I can do more.

As I said, a decision that was handed down unanimously and has been unanimously reconsidered by a succeeding group of judges, of which *Brown v. Board of Education* would be an example, is to my mind the established constitutional law of the land.

To the extent that one takes other decisions which were by a closely divided Court more recently, I would regard these precedents as not being as strong, though nonetheless entitled to weight.

So far as the power of the Congress to enact civil rights legislation, such as the Public Accommodations Act of 1964, under the commerce clause, on matters like that, I think they have been sufficiently set at rest by a constitutional decision that one need not hesitate to say that that is so.

Senator TUNNEY. And so what I take from your remarks when you testified in 1964 before the Arizona State Legislature against the civil rights bill that was pending before that legislature, you were expressing your viewpoint as a private citizen and that you may or may not hold the same views today?

Mr. REHNQUIST. That is correct, Senator.

If you were present when I answered Senator Bayh, I would answer you much the same way, and I—

Senator TUNNEY. On a different question, I believe he asked you about the ordinance, the Phoenix City Council ordinance.

Mr. REHNQUIST. Well, that was the only one. I never testified against any State legislation.

Senator TUNNEY. That was the only one?

Mr. REHNQUIST. Right.

Senator TUNNEY. There was no State legislation?

Mr. REHNQUIST. Right.

Senator TUNNEY. I am sorry. I was misinformed about that.

When the ordinance passed by unanimous vote in Arizona, you wrote a letter to the editor of the Arizona Republican in which you stated, and I quote:

Unable to correct the source of the indignity to the Negro, it redresses the situation and places a separate indignity on the proprietor. It is as barren of

accomplishment in what it gives to the Negro as from what it takes from the proprietor, the unwanted customer and the disliked proprietor are left glaring at one another across the lunch counter.

Now, I understand your testimony to say that you have a different view of that today, but I am more concerned now about another issue, and that is the relative rank that you give to individual freedoms as opposed to personal property rights.

I would assume from reading and interpreting fairly that quotation that at that point you felt that personal property rights were more important than individual freedoms, the individual freedom of the black to go up to a lunch counter?

Mr. REHNQUIST. In that context, I think that is a fair interpretation.

Senator TUNNEY. Do you still ascribe a greater degree of value to individual property rights in a civil rights area than to freedoms of individuals, individual freedoms?

Mr. REHNQUIST. I have indicated that I am no longer of the same opinion on the public accommodations point.

Senator TUNNEY. Yes; but I am trying to get at philosophy now.

Mr. REHNQUIST. OK. If we broaden it out, I certainly am not prepared to say, as a matter of personal philosophy, that property rights are necessarily at the bottom of the scale. Justice Jackson, for whom I worked, commented shortly before his death that the framers had chosen to join together life, liberty, and property, and he did not feel they should be separated. I think property rights are actually a very important form of individual rights. On the other hand, I am by no means prepared to say that a property right must not on some occasion—and I am again speaking personally and not in any sense of the Constitution or statutory construction—but certainly when a legislative decision is made that a property right must give way to what may be called a human right or an individual right, that may frequently be the correct choice.

Senator TUNNEY. How about if it is not a question of the interpretation of a statute? What happens if the case comes to you on a constitutional question and there is no precedent?

Mr. REHNQUIST. I feel that it is improper for me to answer in that context, Senator.

Senator TUNNEY. Was Justice Jackson on the Supreme Court when he made his evaluation of the relative values of life, liberty, and property?

Mr. REHNQUIST. Yes. I am not.

Senator TUNNEY. That is what I was trying to find out about. I mean, I do not think that there is anyone on this committee that would not want to support your candidacy based on your professional qualifications. You are an outstanding candidate as far as your competence. We have seen an indication of your judicial temperament and I think it is excellent. But I, like you back in 1958, when you were writing about the subject, am worried about the philosophy, the personal philosophy, of the candidate for the Supreme Court, and I would like to think that individual freedom is more important to you than personal property rights when you have a direct conflict between the two.

Mr. REHNQUIST. Senator, my fundamental commitment, if I am confirmed, will be to the greatest extent possible to totally disregard my own personal belief as to whether property is invariably sub-

ordinate to individual freedom or whether they must be balanced in some way. I realize that you certainly are not required to take at face value my statement to this effect and that anyone is perfectly free to attach such significance as they will to Senator Ervin's very perceptive comments that what I am today is part of what I was yesterday, and yet, framed in the constitutional context in which you frame it, I think it is improper for me to answer it.

Senator TUNNEY. In a speech to the Arizona Judicial Conference, you were reported as saying:

First, however, I should point out that the principle of a person is not an absolutely unchanging right. Constitutional language is sufficiently broad to permit a latitude of judicial interpretations to meet the circumstances of needs of our society at any given time.

Were you speaking there as an attorney for the Justice Department or were you speaking there from your personal philosophy?

Mr. REHNQUIST. I was speaking, I think, as a spokesman for the Department in the area of the pretrial detention bill. And I think that the context of my remarks was that based on a historical analysis of the cases that personal freedom can be limited by arrest, by detention of a subject, following a trial, or even to a momentary search under the doctrine of *Terry v. Ohio*, that these are decisions that have been made by the Supreme Court, and are parameters under which the Justice Department and the Government now operate.

Senator TUNNEY. You were not expressing a personal viewpoint on the constitutionality of preventive detention?

Mr. REHNQUIST. I was giving my best lawyer's view, I would say, as the Assistant Attorney General, of the constitutionality.

Senator TUNNEY. Would you feel, if you were on the Court that you would have to necessarily apply the same standards—

Mr. REHNQUIST. No.

Senator TUNNEY. As a justice which you applied as a member of the Department of Justice?

Mr. REHNQUIST. No; I would not.

Senator TUNNEY. In a speech to the Newark Kiwanis Club in 1969, your prepared statement says this, and I quote:

We are thus brought to the question of what obligation is owed to the minority to obey a duly-enacted law which it has opposed. From the point of view of the majority, if it functions as a whole, the answer is a simple one. The minority, no matter how disaffected, or disenchanted owes an unqualified obligation to obey a duly-enacted law.

How do those principles apply to a black person in the South who was at a segregated lunch counter?

Mr. REHNQUIST. Well, I think it is clear from my speech up there that I would not apply that principle to the situation where a person seeks to test the constitutionality of the law. He runs the risk of it being held constitutional, and then he must pay the price exacted by the law. But if the law is held unconstitutional, obviously he is vindicated.

Senator TUNNEY. Mr. Chairman, I would like to reserve the rest of my questions.

Senator BAYH (presiding). The Senator from Nebraska.

Senator HRUSKA. Thank you, Mr. Chairman.

Mr. Rehnquist, I want to congratulate you on the events which, happily, have made it possible to have your presence here in the

committee room today under these circumstances. The confidence and the judgment of the President when he transmitted to the Senate your nomination for the position of Associate Justice of the Supreme Court confirms my own favorable estimate which has been built up over the course of the last two and a half years.

During that time it has been my privilege to have worked with you quite closely on a number of matters of mutual concern, and to have observed you in your role as an advocate for the administration before various committees of the Congress. I have observed you also as a counselor, as a consultant with reference to matters of policy, and as an adviser on legal problems in the field of jurisprudence.

My conviction and my estimates have been reinforced since your nomination by a reading of some of the material that you have written and some of your public statements, which had not come to my attention sooner. I was most favorably impressed with these documents.

So, I say again, I congratulate you for the preferment that has come your way.

Mr. Chairman, I should like to defer now to my colleague, the Senator from South Carolina, who states that he has a few brief questions to pose, and then I should like to resume my statement and ask a few questions.

Senator THURMOND. Mr. Chairman, I wish to thank the distinguished, able Senator from Nebraska for his courtesy.

Mr. Rehnquist, I wish to take this opportunity to congratulate you and the President upon your appointment. In looking over the record of the Standing Committee on the Federal Judiciary of the American Bar Association, I was interested in reading its content and was impressed with the findings of this committee.

The last page of the report reads as follows: "The committee is unanimous in its view that he is qualified for appointment to the Supreme Court. A majority of nine is of the opinion that he is one of the best qualified available, and thus meets high standards of professional competence, judicial temperament, and integrity. The minority," which would be three, there are 12 on the committee, "would not oppose the nomination."

I feel that with your impeccable character, Mr. Rehnquist, your superior legal mind, and your quick intellect, that you are uniquely qualified for the Supreme Court, which Mr. Nixon has termed the fastest track in the Nation. Your experience as a law clerk to Justice Jackson, your experience in the Justice Department, and your experience as a practicing attorney are very valuable to you in this work.

I am very much interested in seeing lawyers appointed to the Court who believe in the Constitution of the United States, and who will uphold that document and will not attempt to rewrite it.

Senator Ervin and Senator McClellan have already brought out some points I intended to bring out, so I shall not duplicate. I think if I were commissioning a lawyer to go to the Supreme Court today, I would give him two books, and tell him to put one in each hand, the Bible in one hand, and the Constitution in the other, and I think he would have good guidance.

And, therefore, because of your unquestioned integrity, your very excellent ability, your successful experience in the practice of law, your service to our country, and by that elusive quality known as

judicial temperament, which few of us can define but which all of us can recognize when we see it it will be a pleasure for me to support your nomination.

Thank you, Mr. Chairman. That is all.

Senator HRUSKA. Mr. Rehnquist, your nomination by the President renews a problem that always comes to people who move from one capacity to another, whether it is in public life or in private life. You have led a varied life with many facets, first of all as a clerk to one of the Justices of the Supreme Court. Then as an advocate for your clients, when you were in private practice, and now you are occupying an office in the Department of Justice where you have served as advisor, advocate, and spokesman for the Attorney General. You are about to change your advocacy now. In fact, it will be a termination of advocacy.

But, it will be necessary for you to transfer your loyalties, and the application of your resources, and your talents to another role, that of a judge. You will no longer be an advocate; you will be looking at two or more advocates before you in the presentation of one cause or another before the Supreme Court and making a determination between them.

My question is this: Do you know of any reason why you could not be successful in shedding and thrusting to one side any loyalties that you may have had in the past, in the interest of extending to the advocates before you, as a member of the Supreme Court, that fairness of decision, and that consideration of the facts and the law which will enable you to make a fair decision, regardless of the color of the skin, regardless of the economic position, regardless of any other attribute which may be involved?

Will you be able to make a fair decision, based upon the facts and law, and the Constitution, regardless of any official position or personal feeling that you have taken in the past?

Mr. REHNQUIST. I will bend every effort to do so, Senator, and I would regard myself as a failure as a Justice if I were unable to do so.

The CHAIRMAN. To my leftwing friends, when they conclude, we will go over to 10:30 in the morning with Mr. Rehnquist. [Laughter.]

(The Republican members of the committee were seated to the chairman's left.)

Senator SCOTT. The chairman will allow the leftwing friends to continue tonight?

The CHAIRMAN. Yes, sir.

Senator SCOTT. Thank you, sir.

Senator HRUSKA. Some interrogation today has been directed toward you, which has canvassed some of the past statements you have made, some of the positions that you have taken, and some of the briefs that you have filed, and speeches made. I ask these questions for the purpose of ascertaining in my mind that you are willing to undertake the very difficult task of discontinuing your interest in past actions and positions when you assume your new position. Your responses have indicated the answer to be affirmative.

Now, with reference to positions on various current national issues held by persons in public life, whether they are officials or not, they are sometimes said to be in step with the needs of the time or "out of step with the needs of the time."

Now, with regard to the interpretation of principles of the Constitution, what are your ideas as to the part to be played by the desire or the necessity to be "in step with the needs of the times"?

Mr. REHNQUIST. Well, I think the framers drafted a document, Senator Hruska, which was capable of forming a framework of government, not just in 1789, but in our own day. And there is no question in my mind that the principles they laid down then, as subsequently interpreted, must be applied to very changed conditions which occur now rather than then.

But, I think even now it is to the Constitution and to its authentic interpretation that we must turn in solving constitutional problems, rather than to simply an outside desire to be "in step with the times."

Senator HRUSKA. Well, there is a philosophy held by many people that when one seeks to be in step with the times it is necessary to determine what is the public wave of approval or disapproval of something, at a given time, and then there should follow the interpretation of the Constitution or an application of its principles which will conform to the popular whim or fancy of the day. Do you subscribe to that sort of interpretation?

Mr. REHNQUIST. No, I do not; and I think specifically the Bill of Rights was designed to prevent exactly that sort of thing, to prevent a majority, perhaps an ephemeral majority, from restricting or unduly impinging on the rights of unpopular minorities.

Senator HRUSKA. One of the enduring values of the Constitution is its protection of the rights of minorities, is it not?

Mr. REHNQUIST. Certainly.

Senator HRUSKA. Earlier there was discussion during this hearing about some recent Supreme Court decisions that may have handcuffed the police, and I believe you answered in that connection that the Bill of Rights protects the rights of individuals against oppression by government. As a matter of fact, that is the reason for the existence of the Bill of Rights?

Mr. REHNQUIST. Yes; it is.

Senator HRUSKA. But, in addition to persons accused of crime who need certain protections, there are others who possess rights granted by the Constitution. These persons also deserve certain protections. I am speaking of many people who are not accused of crime, who are law-abiding citizens, the great bulk of society, whose rights are encroached upon when protections given individuals go beyond reasonable bounds.

In other words, all people are protected by the Constitution. We have on one side the protection of individuals by the Bill of Rights and we have safeguards and goals for the vast proportion of the population which are set forth in among other places the Preamble of the Constitution:

We, the people of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Now, then, if in the process of trying to afford individuals the rights granted by the Bill of Rights there comes about a situation where there is an impairment of the rights of the general public, then there arises a situation which the Supreme Court finds difficult to resolve.

Judge Lumbard in 1963 put it this way:

In the past forty years there have been two distinct trends in the administration of criminal justice. The first has been to strengthen the rights of the individual; and the second, which is perhaps a corollary of the first; is to limit the powers of law enforcement agencies. Most of us would agree that the development of individual rights were long overdue; most of us would agree that there should be further clarification of individual rights, particularly to indigent defendants. At the same time we must face the facts about indifferent and faltering law enforcement in this country. We must adopt measures which will give enforcement agencies proper means of doing their jobs. In my opinion, these two efforts must go forward simultaneously.

Now, there are many of us who feel that for a long time there has been an undue emphasis, and to some extent almost exclusive emphasis, upon individuals rights to the detriment of the rights of society as a whole. We believe with Judge Lumbard that this imbalance should be replaced with simultaneous attention to both aspects.

Do you agree?

Mr. REHNQUIST. Well, I would certainly not want to comment on any particular matter that would come before the Supreme Court were I confirmed in that context. Taking Judge Lumbard's statement as a desirable philosophical approach to the problem of law enforcement, the concomitant development of the rights of individuals, and the efficacy of law enforcement, I certainly have no quarrel with it at all. Ultimately, of course, any such philosophical judgment or legislative judgment is subject to the requirements of the Constitution, and were I confirmed as a Justice of the Supreme Court, it would be the commands of the Constitution, as I understand them, that I would employ in passing judgment on any such measures.

Senator HRUSKA. If in the process of implementing the Bill of Rights there is an impairment, or an erosion, or a potential destruction of the rights of society, then we have a real problem, do we not?

Mr. REHNQUIST. Well, if in fact the Bill of Rights does produce such an imbalance, we have a problem. But, it is obviously not one that the Justices of the Supreme Court should solve by rewriting the Bill of Rights so that it permits more balance on the side of law enforcement. It seems to me that the type of situation which you are referring to, and perhaps I am poorly paraphrasing your language, is that the preamble and other sections of the Constitution contemplate that the legislative process, shall ultimately govern, subject to the provisions of the Constitution. And that where the Constitution itself, were it to be distorted in meaning, so as to unreasonably restrict what was the intent of the Framers as to the extent of the legislative power, then it would be something that ought to be corrected.

Senator HRUSKA. It was not my thought that to reconcile these two positions, that the Supreme Court should step in and legislate.

Mr. REHNQUIST. No, I was sure it was not.

Senator HRUSKA. Or to construe the Constitution differently from the intent of the framers.

Now, honestly, and with due regard for precedent, and due regard for the principles that are supposed to be more or less stationary and stable, my thought was, however, that exclusive attention should not be paid to one part of the Constitution at the expense of another.

Mr. REHNQUIST. Certainly all sections of the Constitution that have any applicability to a case should be considered.

Senator HRUSKA. It seems to me that Senator McClellan spoke wisely and truly when he referred to the three tests that we should apply to any nominee for the Supreme Court which we have come before us. The idea of personal integrity, professional competency, and, or course, finally, fidelity to the Constitution, because it is those nine men on that court to whom we must look for that latter quality. I believe you meet these three tests to a high degree.

I thank you for your answers and for your appearance, and I defer now to my colleague, the Senator from Pennsylvania.

Senator SCOTT. Thank you.

Senator HRUSKA. Reserving additional time at a later time if an occasion should arise.

Senator SCOTT. Thank you, Senator Hruska.

Mr. Rehnquist, I have the greatest sympathy for the fact that you have been here a long time, and I will be very, very brief.

Initiation into the Supreme Court is one of the roughest of American tribal rites, and you have my sympathy for it.

You will hear a lot from the Members, and a considerable amount that might otherwise be designated as opinions from some of us, but we are all engaged in the search for the same thing, the qualifications of the candidate.

A major breakthrough in the fight for equality in employment opportunity occurred on the 27th of June 1969, when the Department of Labor announced the Philadelphia plan. You played a part in that. What is the plan, and what was your part leading to its enactment?

Mr. REHNQUIST. The Philadelphia plan, Senator, was a proposal implemented under the leadership of the Department of Labor to require in the construction trades in Philadelphia, and in other localities where the situation was similar to that which had prevailed in Philadelphia, where in effect statistics and history indicated that minority members were simply not getting into unions, and the construction contractors were depending on union hiring halls to furnish their employees, to require, as a condition of receiving a Government contract, a commitment to achieve, if possible, certain goals of minority hiring.

My role was that almost immediately after the plan was announced by the then Labor Secretary Shultz, the Comptroller General of the United States rendered an opinion that in his view the plan was unconstitutional and unauthorized by law.

This obviously put the Secretary of Labor in a serious bind and he consulted the Attorney General and requested an Attorney General's opinion on the legality of the plan. With the help of the Solicitor's Office in the Labor Department, and our own Civil Rights Division in the Justice Department, we prepared a draft opinion, which was ultimately signed by the Attorney General, upholding the legality and constitutionality of that plan.

Senator SCOTT. And you played a considerable part in that, in that you prepared the memorandum for the Attorney General?

Mr. REHNQUIST. Yes; I would say it was carried out under my supervision, and I personally, as I do on all draft Attorney General's opinions that have been prepared since I have been there, devoted a substantial amount of effort to it.

Senator SCOTT. Where did the opposition to the plan come from?

Mr. REHNQUIST. I do not know that I know that much about it.

Senator SCOTT. I do not mean by name, but generally who was opposing the plan and criticizing it?

Mr. REHNQUIST. My recollection is that it was the construction trade unions and some of the contractors.

Senator SCOTT. I will not go into further detail on that since the plan, itself, is pretty well known.

Mr. REHNQUIST, on the 22d of May 1962, during the administration of the late President Kennedy, the distinguished Attorney General, Robert F. Kennedy, appeared before this committee in open hearings, and I was in attendance at the time, and he made a statement which was followed by a considerable amount of questioning, and other witnesses later appeared, all of which is available if anyone wishes to note the extent of the Attorney General's opinion and the reactions of the committee, but I think it is interesting to read and ask you if you will find any reason to differ from a part of this statement. I would like, Mr. Chairman, to reserve the right to put the statement in the record tomorrow after I have made some further study of it.

The Attorney General made the point that it is necessary, and he offered H.R. 10185, in such a bill to provide adequate authority of law enforcement officers to enable them effectively to detect and prosecute certain major crimes; prohibit all wiretapping by private persons and all unauthorized wiretapping by law enforcement officers; provide procedural safeguards against abuse of the limited wiretapping which it would authorize; establish uniform standards for the Federal Government and the States.

He makes the point that:

Wiretapping is an important tool in protecting the national security. In 1940 President Roosevelt authorized Attorney General Jackson to approve wiretapping in national security cases.

Attorney General Clark, with President Truman's concurrence, extended this authorization to kidnapping cases.

Now, the questioning of you today, some of it has turned on the issue of whether or not in matters involving national security the President, or the Attorney General acting for him, has under the Constitution certain powers in addition to the powers subsequently granted to him under the Omnibus Crime Act.

Here is a part of Attorney General Kennedy's statement, on page 7, in which he seeks the alternative methods contemplated in addition to the bill:

In cases involving national security, we have provided alternative procedures. Application may be made to a court under the procedures outlined above, but in addition the bill provides that the Attorney General, in person, may authorize interception of wire communications if he finds that the commission of the offense is a serious threat to the security of the United States and that the use of the court order procedure would be prejudicial to the national interest.

In a narrowly limited class of cases, both because of the sensitivity of the information involved and in the interest of speed, the Attorney General needs this executive authority to permit wiretapping.

National security requires that certain investigations be conducted under the strictest security safeguards. All Attorney Generals since 1940 have been authorized by the President to approve wiretapping in national security cases. Attorney General Clark, with President Truman's concurrence, extended this operation to kidnapping cases.

He goes on to say:

This legislation would authorize the Attorney General to order wiretapping after the determination that there was a reasonable ground for belief that the national security was being threatened. In order to proceed, the Attorney General would have to find and certify that the offense under investigation presented a serious threat to the security of the United States; that facts concerning that offense may be obtained through wiretapping; that obtaining a court order would be prejudicial to the national interest and that no other means are readily available for obtaining such information.

And the concluding part of this section of his statement reads:

Thus, the bill would limit the authority now held by the Attorney General to authorize wiretapping but it would permit evidence obtained thereby to be presented in court. I believe these are most important points.

Would you be in a position to comment on that, outside of the same work of your own brief to the Court, Supreme Court?

Mr. REHNQUIST. Well, naturally it would be improper for me to comment in any sense in a situation like that that might come before the Court for review, whether or not I might feel bound to disqualify myself. But certainly it sounds as if Attorney General Kennedy's testimony was very similar to the practice presently followed by the Department of Justice in which it is substantially defended in the brief just filed by the Government in the Supreme Court of the United States, the limitation to national security cases, and the importance of the same to the protection of the Government, itself, that is.

Senator SCOTT. And you noted in the quotation that the Attorney General makes the point that this power has existed in the President, acting through their Attorneys General, since 1940, which is now 31 years?

Mr. REHNQUIST. Yes, and we now have 9 additional years of precedent which we have cited in the Department's brief, since Attorney General Kennedy spoke in 1962.

Senator SCOTT. Well, I thank you very much, Mr. Rehnquist, I reserve the right to continue in case there is a second round of questioning.

I would also like, Mr. Chairman, to reserve the right, as I noted, to offer this brief with some additional documentation in the hearing tomorrow. Thank you, sir.

Senator BAYH (presiding). The chairman will welcome all material the gentleman from Pennsylvania wants to put in the record.

Senator COOK.

Senator COOK. Mr. Chairman, I would like to reserve the right until tomorrow.

I think Senator Mathias and I have agreed.

There is, however, one thing that I want to say for the benefit of the few press that are left. In the letter from the American Bar Association that was distributed this morning, I would like to read the second to the last paragraph on page 2 which says:

While the committee is unanimous in the view that Mr. Rehnquist is qualified for the appointment, three members of the committee believe that his qualifications do not establish his eligibility for the committee's highest rating and would, therefore, express their conclusion as not opposed to his confirmation.

I wish to say to the few spectators that are left that this may be why people can no longer believe what they read in the newspaper, because the night final of the Evening Star says:

Court Choices Given ABA Okay. Panel Supports Rehnquist 9-3, Powell Fully.

Now, that is completely inaccurate and everybody can see it in print.

Senator MATHIAS. Mr. Chairman—

Senatory BAYH. May I just ask the Senator from Kentucky if he believes anyone who disagrees with him on an issue is on the wrong side?

Senator COOK. No, sir; I do not, and I think the acting chairman knows different than that, and the acting chairman and I have been at this for quite some time.

But, one of these days I may be fortunate enough to get enough seniority on here that I will be able to ask some of those question before they all get asked.

Senator MATHIAS. Mr. Chairman?

Senator BAYH. I would suggest that you will have to have a little patience, and we have all had a little today.

Senator SCOTT. If you would yield, I would like to comment that if this committee would some day revise its procedures in line with those of most other committees, and alternate right to left, maybe some of us would get an opportunity to be heard before the noon and the evening deadlines have passed, and all of those who have made the deadlines have happily gone hence.

Senator MATHIAS. Mr. Chairman, following up—

Senator COOK. I apologize that the able acting chairman is the one that got caught in that.

Senator MATHIAS. Mr. Chairman, the Senator from Kentucky and I made sort of a nonjudicial interpretation that this is getting close to the eighth amendment prohibition against cruel and unusual punishment to prolong this very much longer.

Mr. Chairman, can we have an understanding that we begin tomorrow with the Senator from Kentucky, and proceed with the normal rotation of questions?

Senator BAYH. With the understanding from the Senator from Indiana that our chairman decides for us and we come in at 10:30 tomorrow morning. I certainly feel we should resume—

Senator MATHIAS. With the Senator from Kentucky.

Senator BAYH (continuing). Where we had terminated.

Senator MATHIAS. Right. Thank you, Mr. Chairman.

Senator BAYH. Could I address one last question which I thought had been laid to rest, and I feel somewhat with deference to the witness and nominee, I just wondered, you have just been given a copy of the transcript that I thought answered the question obviously, but let me have just one more question:

When we were talking about various clients and I asked questions relative to Transamerica Title Insurance Corp., or Phoenix Title & Trust Co., now, did you negotiate—you talk about escrow and this type of thing, and I think you laid this to rest, but I want to ask one specific question, and I think it is important to you that it be in—did you negotiate or carry out a very large transfer of land in 1964, involving land in Arizona exchanged for land in Point Reyes National Park, Calif.?

Mr. REHNQUIST. Point Reyes Park in California? No.

Senator BAYH. Thank you.

(Thereupon, at 6:20 p.m. the hearing was recessed to reconvene tomorrow, Thursday, November 4, 1971, at 10:30 a.m.)

NOMINATIONS OF WILLIAM H. REHNQUIST AND LEWIS F. POWELL, JR.

THURSDAY, NOVEMBER 4, 1971

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

The committee met, pursuant to recess, at 10 a.m., in room 1202, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Hart, Kennedy, Bayh, Burdick, Tunney, Hruska, Fong, Scott, Thurmond, Cook, Mathias, and Gurney.

Also present: John H. Holloman, chief counsel, Francis C. Rosenberger, Peter M. Stockett, Hite McLean, and Tom Hart.

The CHAIRMAN. Let us have order.

I will state to the committee that Senator Byrd and Senator Spong desire to go to Senator Willis Robertson's funeral. Therefore, they are going to present the nominee, Mr. Powell, and then we will go back to Mr. Rehnquist.

Senator BYRD.

Senator BYRD. Thank you, Mr. Chairman.

Gentlemen of the committee, I shall be very brief. I know that the committee wants to proceed expeditiously on these two nominations since the Court is short handed.

Now, Mr. Chairman, first I would like to invite to the attention of the committee—

The CHAIRMAN. Wait just a minute.

Is Congressman Satterfield present?

Mr. SATTERFIELD. Yes, sir.

The CHAIRMAN. Would you come up, sir?

STATEMENT OF HON. HARRY F. BYRD, JR., A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator BYRD. Mr. Chairman, I want to invite to the attention of the committee that the entire Virginia congressional delegation is present this morning, four Democrats and six Republicans, in support of the nomination of Lewis F. Powell to the Supreme Court of the United States.

Also present is the attorney general of Virginia, Mr. Andrew Miller, who strongly supports the nomination of Mr. Powell, and the committee has, in its hands, a letter from Governor Holton who likewise strongly supports the nomination of Mr. Powell.

Mr. Chairman, gentlemen of the committee, I have known Lewis Powell for 25 years. He is an outstanding lawyer. He is recognized not only in Virginia but throughout the Nation as one of those who stand at the very top of the legal profession.

He has in my judgment a fine judicial temperament. He is a man of great ability and of the highest integrity. I feel confident that he will add luster to the highest court of our land.

The people of Virginia are strongly behind Lewis Powell. Although he has dedicated his life to the law, he has served his community, the city of Richmond, and his State, the State of Virginia, in many positions of responsibility of an appointive nature.

Through the years he has taken a keen interest in education, having served on the school board of his native city and subsequently on the State Board of Education for the Commonwealth of Virginia.

Mr. Chairman, and gentlemen of the committee, I strongly endorse President Nixon's nomination of Lewis F. Powell to the Supreme Court of the United States, and I am convinced that if he is approved by this committee, and confirmed by the Senate, that he will make an outstanding jurist and he will add distinction to the most distinguished court in our land.

I thank the chairman and the members of the committee for this opportunity.

The CHAIRMAN. Any questions?

Senator Spong.

STATEMENT OF HON. WILLIAM B. SPONG, JR., A SENATOR FROM THE STATE OF VIRGINIA

Senator Spong. Mr. Chairman, I am pleased to be here with Senator Byrd this morning and with Congressman Satterfield and all the other members of the Virginia congressional delegation and the attorney general of Virginia to present to the Judiciary Committee Lewis F. Powell, Jr., who has been nominated for the Supreme Court.

Mr. Powell has engaged in the private practice of law since 1932 in Richmond. His career has included positions of highest honor and greatest responsibility in the legal profession.

He was president of the American Bar Association in 1964-65, president of the American College of Trial Lawyers in 1969-70, and president of the American Bar Foundation in 1969-71. In 1970 he was elected an Honorary Venturer of Lincoln's Inn—one of only three Americans, the others being the late Dean Acheson and Whitney North Seymour, to have been so honored.

Lewis Powell has served with distinction as a citizen of his Nation, of his State, and of his community.

At the national level, Mr. Powell was a member of the National Commission on Law Enforcement and Administration of Justice, appointed by President Johnson in 1965.

He was a member of the Blue Ribbon Defense Panel, appointed by President Nixon in 1969 to study the Department of Defense.

Of special interest to the members of this committee, he was a member of the National Advisory Committee on Legal Services to the Poor, established pursuant to the Economic Opportunity Act of

1964. For his work in helping to develop the concept of legal aid within the professional legal system Mr. Powell received the first annual Office of Economic Opportunity Award in 1968.

Not least of all, his service for his country has included 33 months in the European and North African Theaters during World War II as a combat and staff intelligence officer with the U.S. Army Air Corps. He served in the ranks of first lieutenant through colonel, and was awarded the Legion of Merit, the Bronze Star, and the French Croix de Guerre with Palm.

These are impressive credential which would commend this man to you for confirmation. As a fellow lawyer, and one who has worked with Lewis Powell in Bar Association matters, I could dwell at length on his accomplishments in his chosen profession. But I want briefly to talk with you this morning about his record as a citizen of Virginia and its capital city of Richmond during the difficult times following the Supreme Court decision in *Brown v. Board of Education*.

During these years I was chairman of a commission to study and make recommendations to improve public education in Virginia. I had an opportunity to observe Mr. Powell in action and to understand the full scope of his influence and sense of fair play. Mr. Powell conferred with me with respect to the commission's work, testified before the commission and strongly supported the recommendations this commission made to improve public education throughout Virginia.

In his position as chairman of the Richmond Public School Board from 1952 to 1961 and then subsequently as a member of the State Board of Education, Mr. Powell was in a position of complex responsibility during some very turbulent and confused times.

His primary concern was to keep the schools of Virginia open and to preserve the public education system for all pupils.

You can recall with me, I am sure, some of the problems that followed the integration orders in other States of the South. That a similar fate did not befall Richmond was in large measure due to the calm leadership, the perceptive judgment and the open minded and fair attitude which exemplified Mr. Powell's schools board incumbency.

His forceful and moderating voice stood out to many Richmonders as the best hope to avoid serious disruption of their city's public school education system.

In the perspective of history, men of reason and good will can suggest actions which Mr. Powell might have taken to speed up or slow down the process of desegregation. But the point of my telling you all this, Senator Eastland and members of this committee, is to demonstrate as forcefully as I can that you have before you today a man of courage, independent judgment and intellectual honesty. These are the qualities I would hope to find in any nominee to fill a vacancy on the Supreme Court. I believe you will find them, as I have, in Lewis Powell.

Mr. Chairman, I have here the resolutions of the Virginia Bar Association, the Virginia State Bar, the Virginia Trial Lawyers Association, and of the Bar Association of the City of Richmond and I would ask that they be received in the record.

The CHAIRMAN. They will be admitted.

(The resolutions referred to follow.)

THE VIRGINIA BAR ASSOCIATION,
Richmond, Va., October 27, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: The Executive Committee of the Virginia Bar Association has noted with gratitude the nomination by the President, subject to confirmation by the Senate, of Lewis F. Powell, Jr., Esquire of Virginia to the Supreme Court of the United States. It has directed me to transmit to you a copy of a resolution adopted unanimously at the meeting of the Association held on January 18, 1969 setting forth the views of the membership as to Mr. Powell's qualifications for this office and you will find the same enclosed with this letter.

In addition, the Executive Committee at its quarterly meeting held on October 23, 1971 unanimously and enthusiastically endorsed Mr. Powell for this appointment. The members of the Committee are personally acquainted with Mr. Powell and familiar with his outstanding record as a practicing lawyer. We feel that in all respects he is thoroughly qualified for the position for which he has been nominated and endorse as of this date all that was said about him in the resolution adopted by the Association nearly three years ago. We therefore urge favorable consideration by your committee of the President's nomination of Mr. Powell and of his confirmation by the Senate.

If it is appropriate to do so and if desired by your committee, I would be happy to appear and personally convey to the committee the views expressed herein.

Respectfully submitted.

JOHN S. DAVENPORT, III, *President.*

THE VIRGINIA BAR ASSOCIATION

RESOLUTION ADOPTED AT THE MEETING OF THE MEMBERSHIP OF THE VIRGINIA BAR ASSOCIATION, JANUARY 18, 1969

Whereas Lewis F. Powell, Jr., Esquire, of Richmond, Virginia is superbly qualified by every standard of character, personality, legal ability, and experience for appointment to the Supreme Court of the United States, and

Whereas Mr. Powell's record of leadership at the Bar and in the legal profession exemplified by his distinguished service as President of the American Bar Association in 1964-65 and his outstanding contributions to the welfare of his city, state, and nation in many and varied fields, illustrated by his membership on the National Commission on Law Enforcement and The Administration of Justice appointed by President Johnson in 1965, and the Virginia Constitutional Revision Committee appointed by Governor Godwin in 1968, as well as his service as President of the Virginia State Board of Education, demonstrate the maturity of his judgment, the breadth of his experience and his capacity for sustained endeavor: Now, therefore, be it

Resolved, That the Virginia State Bar Association warmly endorses and respectfully recommends the appointment of Lewis F. Powell, Jr. to the Supreme Court of the United States when a vacancy occurs, and directs that copies of this resolution, appropriately attested, be forwarded to the President of the United States and to the members of the Virginia delegation in the Congress of the United States.

COMMONWEALTH OF VIRGINIA,
VIRGINIA STATE BAR,
Richmond, Va., November 1, 1971.

Hon. WM. B. SPONG, JR.,
Senate Office Building,
Washington, D.C.

DEAR SENATOR SPONG: Enclosed is a copy of a resolution approved by the Virginia State Bar Council urging the approval of the nomination of Lewis F. Powell, Jr., to the United States Supreme Court. I have been directed to forward this resolution to the Senators from Virginia to indicate the unanimous approval of the Council of Mr. Powell's nomination.

At the Annual Meeting in May, 1969, the members of the Virginia State Bar attending the Annual Meeting held that year in Staunton approved a resolution

urging the appointment of Lewis F. Powell, Jr., to fill a vacancy then existing on the United States Supreme Court. A copy of that resolution was sent to President Nixon and Attorney General Mitchell.

Sincerely,

N. SAMUEL CLIFTON,
Executive Director.

RESOLUTION RE NOMINATION OF LEWIS F. POWELL, JR., TO SUPREME COURT

Whereas, it is deemed obligatory that recognized segments of our society invite the attention of the Senate of the United States to any informed opinion held as to the qualifications of a nominee to the Supreme Court of the United States; and

Whereas, the true stature of a man being best understood by those privy to his conduct under many and varied circumstances, this obligation is most pressing on the organized Bar of the State of Virginia as to Lewis F. Powell, Jr.; and

Whereas, Lewis F. Powell, Jr. has long been recognized as fully seasoned in responsible advocacy and counseling and in community problem solution, through his consistent application for some four decades to issues of legal and social obligation and right of a thorough grounding in history, precedent and experience; of a clarity and objectivity of analysis; of a sensitive realism as to the constancy of change and the accompanying necessity that all institutions responsibly accommodate change to remain viable; and of a judgment founded in his confident belief in the dignity of the individual and the ascendancy of principle, which judgment he has exercised free from crippling apprehension and polarization in the presence of sincerely held and championed differences; Now, therefore, be it

Resolved, That the Council of the Virginia State Bar in regular meeting assembled, does embrace this opportunity to endorse and support the nomination of Lewis F. Powell, Jr., to the Supreme Court of the United States for the reasons referred to in the preamble to this resolution; and be it further

Resolved, That the President of the Virginia State Bar is directed to send to members of the United States Senate from Virginia copies of this resolution with the request that the attention of the full Senate be invited thereto.

Adopted by the Council of the Virginia State Bar, October 29, 1971.

A Copy Teste:

N. S. CLIFTON, *Executive Director.*

**VIRGINIA TRIAL LAWYERS ASSOCIATION,
Richmond, Va., October 29, 1971.**

Sen. JAMES O. EASTLAND,

Chairman, Senate Judiciary Committee, Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: The Virginia Trial Lawyers Association on September 25, 1971, passed a Resolution endorsing Lewis F. Powell for appointment to the Supreme Court of the United States. In view of the fact that President Nixon has now appointed Mr. Powell, subject to Senate confirmation, I thought it would be appropriate for your Committee to have knowledge of our action. We think it also proper that your Committee be advised that our Association presented to Mr. Powell its Distinguished Service Award in 1965 for his outstanding contribution to the advancement of the administration of justice in America.

Our Association consists of approximately 1300 trial lawyers throughout the Commonwealth of Virginia. The action which we took in endorsing Mr. Powell for the Supreme Court was unanimously approved by our Board of Governors, and I can assure you that he has the greatest admiration and respect of all segments of the trial bar of Virginia.

We are sure that your Committee, once you are fully apprised of Mr. Powell's legal qualifications, will have no reservations about recommending his confirmation to the Senate.

Sincerely,

WILLIAM B. POFF, *President.*

**BAR ASSOCIATION OF THE CITY OF RICHMOND,
Richmond, Va.**

RESOLUTION

Whereas, Lewis F. Powell, Jr., of Richmond, Virginia, is eminently qualified in all respects to serve as a Justice of the Supreme Court of the United States; and

Whereas, Mr. Powell's record of leadership in the legal profession, exemplified by his distinguished service as President of the American Bar Association in 1964-65, President of the American College of Trial Lawyers in 1969-70 and President of the American Bar Foundation in 1969-71, and his outstanding contributions to the welfare of his community, state and nation in many and varied fields, including service on the National Commission on Law Enforcement and the Administration of Justice, on the Blue Ribbon Defense Panel, on the Virginia Constitutional Revision Commission and as Chairman of the Richmond City and President of the Virginia State Boards of Education, amply demonstrate his knowledge of the law and his dedication to the cause of justice, the maturity of his judgment, the breadth of his experience and the esteem in which he is held by all who know him; and

Whereas, Mr. Powell's most excellent character, simple humanity and unassuming modesty have remained unaffected by the high honors accorded him; and

Whereas, in 1969, the Bar Association of the City of Richmond unanimously recommended the appointment of Mr. Powell to the Supreme Court of the United States; now, therefore, be it

Resolved, That the Bar Association of the City of Richmond, by and through its Executive Committee, unanimously endorses and supports the President's nomination of Lewis F. Powell, Jr. to the Supreme Court of the United States and strongly urges his confirmation by the United States Senate; and be it further

Resolved, That a copy of this resolution be forwarded to the Chairman of the Committee on the Judiciary of the United States Senate, to the Attorney General of the United States, and to the two United States Senators from Virginia.

Given under my hand this 28th day of October, 1971.

[SEAL] RICHARD MOORE, JR., President.
Attest: HUNTER W. MARTIN, Secretary.

Senator SPONG. Lastly, I should like to thank you for your courtesy in allowing Senator Byrd and me to appear early this morning in order that we may attend the funeral of Senator Robertson. Thank you.

Senator BYRD. Mr. Chairman, may I say I have some inserts for the record, too.

The CHAIRMAN. They will be received.

(The material referred to follows:)

MATERIAL SUBMITTED BY SENATOR BYRD OF VIRGINIA

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- (2) The Richmond News Leader, October 22, 1971, "Mr. Justice Powell."
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- (4) WRVA Radio, Richmond, Editorial Opinion—October 22, 1971, "Mr. Justice Powell."
- (5) Norfolk Ledger-Star, October 22, 1971, "Excellence for the Court."
- (6) Richmond Times-Dispatch, October 23, 1971, "Powell: 1 of 100."
- (7) Newport News Times-Herald, October 23, 1971, "Exceptional Nomination . . ."
- (8) The Roanoke Times, October 23, 1971, "Hooray for Mr. Powell and Mr. Nixon!"
- (9) The Norfolk Virginian-Pilot, October 23, 1971, "Good Choices for the Court."
- (10) The Newport News Daily Press, October 23, 1971, "Summoned to Serve."
- (11) The Lynchburg News, October 24, 1971, "Mr. Nixon Nominates."
- (12) The Washington Sunday Star, October 24, 1971, "Those Surprising Supreme Court Nominations."
- (13) The Petersburg Progress Index, October 25, 1971, "Two Admirable Nominations."
- (14) Harrisonburg Daily News-Record, October 25, 1971, "An Excellent Choice."
- (15) The Roanoke World-News, October 23, 1971, "Curtain on Confounding Court Issue?"

- (16) The Bristol Virginia-Tennessean, October 23, 1971, "The Two Nominees."
- (17) The Strasburg Northern Virginia Daily, October 23, 1971, "Highly Qualified."
- (18) The Covington Virginian, October 25, 1971, "The Theme of Excellence."
- (19) The Lexington News-Gazette, October 27, 1971, "The Powell Appointment."
- (20) The Hillsville Carroll News, October 28, 1971, "Powell and Rehnquist."
- (21) Richmond Times-Dispatch, November 1, 1971, "Powell: Voice of Restraint."

[From the Richmond Times-Dispatch]

(1)

A BRILLIANT NOMINATION

In nominating Lewis F. Powell Jr. of Richmond for one of the two vacant seats on the U.S. Supreme Court, President Nixon has made a brilliant choice. No man in the country is better qualified—temperamentally, intellectually and professionally—to serve on the nation's highest bench.

Lewis Powell is an outstanding American, a man of reason, compassion and conscience. Time after time, he has demonstrated deep devotion to his city, his state, his nation and his profession. In crisis after crisis, his wise counsel has served as a beacon to guide men of goodwill to constructive solutions to difficult problems.

A review of Mr. Powell's distinguished civic career confirms his intense desire to serve his fellow man. As chairman of the Richmond School Board and president of the State Board of Education he contributed immeasurably to the advancement of public education in the city and in the state. As a member of the President's Crime Commission in 1967, he offered eminently constructive views on the causes and cures of one of the nation's most perplexing domestic problems. As a member of the President's Blue Ribbon Defense Panel, which submitted its report last year, he participated in a brilliant analysis of this nation's military problems and of its defense needs. As chairman of the Richmond Charter Commission in 1948, he helped prepare the framework of the council-manager form of government under which the city has progressed. In other ways, too—by serving on boards and commissions and by supporting numerous civic causes—Mr. Powell has contributed his knowledge and talents to society.

Professionally, Mr. Powell has attained impressive heights. He has served as president of the Richmond Bar Association, president of the American Bar Association and president of the American College of Trial Lawyers. Clearly, he commands the respect of his professional colleagues throughout the nation, a fact that underscores the wisdom of Mr. Nixon's decision.

A quiet and modest man, Mr. Powell has profound respect for the Constitution. He has profound respect also for the Supreme Court, believing that its decisions must stand as the law of the land until and unless they are changed by constitutional processes. His views on law and order reveal an abhorrence of extreme permissiveness and a belief that victims of crime and violence deserve far more consideration than courts have given them in recent years. For example, a supplementary statement which Mr. Powell and three others submitted in the crime commission's report noted that:

"We are passing through a phase in our history of understandable, yet unprecedented, concern with the rights of accused persons. This has been welcomed as long overdue in many areas. But the time has come for the rights of citizens to be free from criminal molestation of their persons and property. In many respects, the victims of crime have been the forgotten men in our society—inadequately protected, generally uncompensated, and the object of relatively little attention by the public at large."

That the Senate would find anything in Mr. Powell's record to justify his rejection for the Supreme Court is unthinkable. Senators, legal scholars and others have called upon Mr. Nixon to submit the names of qualified nominees. Lewis Powell is a man of excellence, and the Senate should have no trouble confirming him.

Mr. Nixon's second nominee, William H. Rehnquist, also appears to have the necessary qualifications to serve on the court. But his career and background are less familiar than Mr. Powell's and therefore require more extensive evaluation.

It is now the Senate's duty to act promptly and fairly on Mr. Nixon's nominees so that the court can be restored to full strength and begin to function normally.

[Editorial from the Richmond News Leader, October 22, 1971]

(2)

MR. JUSTICE POWELL

In the "Republic" Plato said, "States are as the men are; they grow out of human characters." So they do. Yet during the past few decades there has been a deepening feeling on the part of the public that this beloved nation—this state—suffers from a paucity of men possessing the sorts of character from which the state could draw strength. Today the American people should be proud of their President. Last night he spoke to their despairing sensitivities, and allayed them. He nominated Lewis Powell for a seat on the Supreme Court.

Many who know him have long believed that somewhere in his future there ought to be a judgeship for Lewis Powell. Indeed, many have flirted with the vagrant notion that if there were no place for him among the nine regular seats on the Supreme Court, an extra seat ought to be created for him. He is that qualified. But in recent years those sentiments have been put aside as forlorn dreams: At 64, the reasoning went, he is too old.

Such a deposition might be cited with a good deal of veracity in making a case against the pettifoggers in the legal profession, but not against Lewis Powell. Today's news columns are full of his achievements. He possesses an eminent record of distinguished public and professional service—a record of honor and excellence. His mammoth intellectual capacity has expanded with every passing year. We intend to hyperbole: No man could better serve this nation or the Court than Lewis Powell. As President Nixon said, "Ten years of him (on the Court) would be worth 30 years of most."

How does one describe him? One searches for the proper adjectives. Reflective, yes. Scholarly, yes. Judicious, certainly. Incisive. Quiet. Kind. A man about whom, in Emerson's phrase, there is "a certain toleration, a letting be and a letting do, a consideration and allowance for the faults of others, but a severity to his own." Yet the best word, the most apt, is careful. He regards the law, perhaps, as the ultimate result of human wisdom acting from human experience for the benefit of the public. And he has the ideal temperament for applying the law. He has zest. He has a frank, unfrittering aplomb which never is too shy to ask questions, to probe, sniff, peek under, look behind, and get at what is there. His personal tastes are strong, but they are not so subjective that they preempt prudent analysis.

The character of the citizen is the strength of the state. As that is true, so it is true that the Supreme Court requires strength of character. Lewis Powell, a careful and utterly honest man, is strong character personified. He has held more posts of honor than lesser men can count. He is a Virginian in the grand tradition, and that says it all. That says it with the full amount of pride that he and his nation are due. How absolutely fitting it is that in his seventh decade he should be nominated to ascend to the highest court in the land to take the title of Mr. Justice Powell.

[From the Washington Daily News, Oct. 22, 1971]

(3)

NEW CHOICES FOR THE COURT

On the basis of their public records, and in the light of their judicial and intellectual qualifications, President Nixon has selected two men for the Supreme Court perfectly in line with the type of justices he promised in his 1968 campaign.

Lewis F. Powell Jr. of Richmond is nationally known as a legal scholar and is a former president of the American Bar Association, a fact testifying to the esteem he has gained among lawyers.

William H. Rehnquist of Arizona is an assistant U.S. attorney general who once was law clerk to the late Justice Robert H. Jackson.

As the President said, both of these men have distinguished themselves in their profession, beginning in their student days. Mr. Rehnquist is a specialist in constitutional law and Mr. Powell has been a teacher as well as a practitioner.

Neither has had judicial experience, which is desirable, but otherwise they appear to have all of the attributes and legal competence necessary to fill the positions left vacant by two of the Supreme Court's giants—Justices John M. Harlan and the late Hugo L. Black.

Mr. Nixon described each as "conservative" in his judicial philosophy and that looks to be accurate. In the sense Mr. Nixon used the term, it means sticking to the Constitution and the law, which is what judges are supposed to do.

It always is possible, of course, for those so minded to find in any man's background a nit which can be blown up to ogre-size. Past civil rights activity, if any, seems to be a favorite hunting field.

Mr. Powell was chairman of the Richmond Public School Board when Negro students calmly were admitted to white schools. No nit harvest is apparent there. And none is apparent in Mr. Rehnquist's record.

Mr. Powell, at 64, may be a trifle old to be starting a new career. But Justice William O. Douglas is still there at 73.

In any event, the President seems to have chosen well for these major positions—quite well. And unless the Senate Judiciary Committee can find more than overgrown nits, Mr. Powell and Mr. Rehnquist should be promptly confirmed—so a full bench can get on with the court's heavy load.

What we don't understand about all this, tho, is why Mr. Nixon was so busy playing games before he was ready with his final decisions. All those names of "possibles" for the court didn't get into the papers because some Washington reporters were having nightmares—they deliberately were leaked by the administration.

And if the President sent two of the names to the bar committee to have them rejected, the only net of that is embarrassment all around. If any of this was necessary, the reason escapes us. Maybe Mr. Nixon eventually will explain it in his memoirs or somewhere.

But no decoys were necessary to enhance the caliber of Mr. Powell and Mr. Rehnquist.

[WRVA Radio, Editorial Opinion, broadcast, Oct. 22, 1971]

(4)

MR. JUSTICE POWELL

President Nixon has nominated Richmonder Lewis F. Powell, Jr., to the United States Supreme Court. We don't think the President's judgment could have been better.

Lewis Powell has added stature to his state, his city, and his profession. His presence will add stature to the Supreme Court. To be named to the Supreme Court is a high honor, to serve on the Supreme Court is a sacred duty. We believe it is an honor he well deserves and a duty he will scrupulously fulfill.

Mr. Justice Powell . . . it has a nice sound to it.

[From the Ledger-Star, Oct. 22, 1971]

(5)

EXCELLENCE FOR THE COURT

President Nixon's latest surprise for the country has brought much prompt, favorable reaction and carries highly constructive implications.

Suffolk-born Lewis F. Powell, one of Virginia's most eminent legal minds, who was announced last night as a Presidential nominee for one of the two vacancies on the U.S. Supreme Court is clearly an excellent choice—"fantastically good," Virginia's Republican Governor, Linwood Holton, called it. And the brilliant young assistant attorney general, William H. Rehnquist, though he is not so well known as Mr. Powell, is being described by those who are familiar with his Constitutional expertise as another fine selection by the President for the high court.

The unexpected aspect of these nominations lay in the fact that as late as yesterday, a field of six—not including Messrs. Powell and Rehnquist—was believed to contain the chief prospects, though the reported top candidates (a California woman judge and an Arkansas attorney) had just been found not qualified by an American Bar Association review committee, according to a Washington newspaper story.

In his turn away from the somewhat pedestrian possibilities on that list of six, the President came through with a remarkable display of ultimate good judgment. Unfortunately, the same can't be said of the White House decision, also announced yesterday, to abandon—because of displeasure over the leaking of names and

actions—the system for getting advance ABA appraisals on court candidates. This would seem to be still a quite useful way to screen out all but those of the highest caliber.

At any rate, the Powell and Rehnquist nominations, with their reach into the area of high legal scholarship, transcend the false starts, rumors and wrangling since the step-down (and then death) of Justice Hugo Black and the resignation of Justice John M. Harlan. And in his selections, Mr. Nixon has managed to incorporate some of his chief announced objectives, while not yielding to the temptation to try to do too much at once—such as acceding to demands for a female appointment or an ethnic one.

Mr. Powell has been prominent in Richmond's and Virginia's educational affairs, as well as in his profession, which carried him to a role of national importance as president of the ABA. So he is the Southerner of national distinction whom Mr. Nixon wanted. This is the aspect which is likely to get searching attention from those predisposed to criticism, but the nominee's moderation in racial matters, his reputation for compassion and, above all, for fairness will make him a difficult target.

Also, both Mr. Powell and Mr. Rehnquist possess the conservative judicial outlook Mr. Nixon sought. Mr. Powell's aversion to excess court activism is well documented, and the Rehnquist respect for the law as it is ("The law can turn him around on an issue," an aide commented) already comes through as a dominant characteristic.

Virginia, for its part, can take great pride in its share of the double court nomination. And the President as well as the country should find long-term satisfaction in the basic White House decision to make legal excellence an overriding consideration in the quest for two new Justices.

[From the Richmond Times-Dispatch, Oct. 23, 1971]

(6)

POWELL: 1 OF 100

In the entire history of the United States, only 98 persons have served on the nation's highest judicial body. If the nominations of Lewis F. Powell Jr. and William H. Rehnquist are confirmed by the Senate, it will bring to an even 100 the number of Americans who have held the coveted title of justice of the U.S. Supreme Court.

And yesterday, only hours after President Nixon's dramatic and surprise announcement of his selections, confirmation was being widely predicted.

Reaction to the nominations was almost, but not quite, universally favorable. It was to be expected that persons generally viewed as conservatives and as believers in a strict construction of the Constitution would hail the appointments; the question was: What would the liberals say?

For the most part, the liberals who commented endorsed the nominations, at least indirectly, by emphasizing how much better qualified they consider Powell and Rehnquist are than the two persons who were widely expected to get the nod, Herchel H. Friday of Arkansas and Mildred L. Lillie of California.

The New York Times, not noted for political conservatism, said that "Mr. Powell admirably combines the fundamental requirements of legal and intellectual distinction with Mr. Nixon's insistence on political conservatism and Southern origin." The paper was not quite as favorably inclined toward Mr. Rehnquist; it said he has a "brilliant professional background but a questionable record on civil rights."

But it would be too much to ask that George Meany adopt an agreeable attitude in a situation of this kind. The President of the AFL-CIO gave forth with the solemn observation: "On the face of it, these appointments seem to be part and parcel of the administration's effort to pack the court with ultra-conservatives who subscribe to the President's narrow views on human rights and civil rights . . ."

We're not intimately familiar with Mr. Rehnquist's record, but we do know Mr. Powell, and anyone who suggests that this distinguished Virginian is insensitive to human and civil rights is grossly ignorant on the subject. His long career of service, both in the law and in numerous civic and governmental undertakings, is filled with instances of demonstrated concern for protection of the people's rights and for meeting human needs, including the needs of persons of all races and of all economic levels.

Meanwhile, an Associated Press writer says that President Nixon was intent on naming Mr. Friday and Mrs. Lillie to the court until an adverse American Bar Association committee report on those two "forced a last-minute switch." Without reflecting on Mr. Friday and Mrs. Lillie, we do say that whatever circumstance led to the appointment of Mr. Powell, the Nation will richly benefit from it.

The only possible factor that could reasonably be said to be on the negative side in viewing Mr. Powell as a Supreme Court nominee is his age, 64. Both Gov. Linwood Holton and Virginia's U.S. Sen. Harry Byrd said yesterday that the Nixon administration on several recent occasions had expressed some thought that younger nominees should be sought for court vacancies. But as we said in an editorial in this paper Oct. 5, in light of Mr. Powell's superb qualifications "the President could well decide that the age factor is outweighed by other considerations."

That is exactly what happened. Referring to the fact that some people had said that Mr. Powell is too old. Mr. Nixon declared: "Ten years of him is worth 30 of anyone else."

Time, we are confident, will prove the President right.

[Editorial from Times-Herald, Newport News, Va., October 23, 1971]

(7)

EXCEPTIONAL NOMINATION

Now and then, in the passage of time, one comes across quiet men of indefinable stature, men stamped with an aura of ineffable brilliance, of a permeating competence that radiates a subtle capacity for leadership.

Such a man is Richmond's Lewis F. Powell, nominated by President Nixon, along with Arizona's William H. Rehnquist, to the current vacancies on the Supreme Court.

It was then, twenty years ago that the accomplished Richmond lawyer crossed our path, in the days when Prince Edward County and J. Lindsay Almond were steering an uncertain course through uncharted depths toward the Supreme Court decision of May 17, 1954. Powell had helped to write the new charter for the capital city, he was then on the Richmond School Board, as its chairman. It was here that he was to develop an abiding interest in education which was recognized by Governor Almond, who named him president of the Virginia State Board of Education during his eight years of service on that body. We remember Powell as a solid rock of reason against the swirling currents of emotion that clouded the various school-related issues that rose out of the Court's decision to overthrow the doctrine of "separate, but equal" rights for Negroes.

On every hand, his fellows immediately recognized his very special qualifications of leadership, and the passing years saw one after another responsibility handed him. The list is awesome: president of the American Bar Association, the College of Trial Lawyers, the American Bar Foundation. President Johnson named him to the President's Crime Commission. He and 16 others were named to a committee to establish minimum standards for the administration of criminal justice. Powell was a member of the President's Defense Commission, a student of our military needs.

But to Virginia, where his family has lived since the Revolution, these accolades were not surprising, for had he not led his class at Washington and Lee from his undergraduate days through to the time when he was awarded the doctorate?

Virginians know him, too, as a stout conservative dating from the days of the elder Byrd from Winchester.

Many were disappointed when Powell removed himself from consideration when the Haynesworth and Carswell nominations produced such bitter divisiveness in the Senate. These supporters felt Powell might well have restored some of the lustre to the tarnished image of the Court.

Certainly this towering judicial intellectual, truly a 20th Century Renaissance man of many parts, offers the Court a restoration of the classic function, which is a strict interpretation of the Constitution. Even in the dark days of 1954, when it seemed the Court was bent on destroying the social fabric of the nation (as subsequent events proved it very nearly has) Powell stood in Richmond quietly, adamantly telling his associates that the Court decision is in fact the law of this country until Congress and the states pursue the constitutionally-authorized processes for changing that law.

His judicial philosophy, weighed in light of recent Court permissiveness and the tendency to legislate instead of adjudicate, is contained best, we should think, in a discourse he made regarding civil disobedience shortly after stepping down from the presidency of the ABA:

"America needs to awaken to its peril" he said. "It needs to understand that our society and system can be destroyed . . . The rule of law in America is under unprecedented attack.

"There are, of course, other grave problems and other areas calling for determined and even generous action. The gap between prosperous middle classes and the genuinely underprivileged, both black and white, must be narrowed. Many mistakes have been made in the past, and there is enough blame for all to share. But we have passed the point where recrimination and bitterness will solve problems.

"We must come to grips realistically with the gravest domestic problem of this century. America has the resources, and our people have the compassion and the desire, to provide equal justice, adequate education and job opportunities for all. This, we surely must do.

"At the same time, we must avoid the mindless folly of appeasing and even rewarding the extremists who incite or participate in civil disobedience. There must be a clearer understanding that those who preach, practice and condone lawlessness are the enemies of social reform and of freedom itself. In short, the one indispensable prerequisite to all progress is an ordered society governed by the rule of law."

It is not surprising that Powell's name has surfaced before. It appeared here earlier this year, even as other strict constitutionalists cast about for candidates of monumental stature to help the Court regain its public acceptance. Then, to be honest, Powell's own wishes caused its withdrawal. More recently, the President's accent on youth seemed to except Powell, whose friends will never believe he is 64. His modesty, consummate grace and unfailing facility of manner mark him as one of those ageless men from whom his friends benefit immensely.

We have remarked upon Lewis F. Powell at length, for which we beg your forbearance. Of Mr. Rehnquist, perhaps more at a later time. After the hatchet-men of the liberal persuasion and the army of Democratic presidential candidates are through with him.

Meanwhile, the Senate should be moved to advise and consent to these nominations, for the President has very deftly disarmed his critics by offering two good names for approval.

[From the Roanoke Times, Oct 23, 1971]

(8)

HOORAY FOR MR. POWELL AND MR. NIXON!

After a dismal parade of mediocre possibilities for the United States Supreme Court, President Nixon has refreshed the scene by nominating Lewis F. Powell, of Richmond, former president of the American Bar Association; and William F. Rehnquist, an Assistant Attorney General of the United States.

Mr. Powell's qualifications need not be reviewed here; they have been presented in detail in the news and interpretative columns. He will be an asset to the Supreme Court. The Senate may review Mr. Rehnquist's qualifications in more depth. The problem is whether, in making some presentations to the Congress, he fully agreed with the debatable views of his client, the Department of Justice, and the White House.

In the general state of euphoria produced by what is, as compared to what might have been, a kind word should be said for Attorney General John Mitchell, the chief searcher for Supreme Court prospects. Like St. Paul on the road to Damascus, he seems to have been struck by a vision—in this case the vision that there ought to be *quality* on the Supreme Court of the United States.

In the case of St. Paul, the conversion was long-lasting and beneficial. If Mr. Mitchell's conversion is similarly permanent and dynamic, he will be of great assistance to the President and to the nation. The Senate might well consider getting on with the confirmation process. The court needs to be at full strength.

[From the Virginian-Pilot, Oct. 23, 1971]

(9)

GOOD CHOICES FOR THE COURT

If all's well that ends well, then the remarkable events that led to President Nixon's nomination of Lewis F. Powell, Jr. and William H. Rehnquist to the Supreme Court were in good order. Mr. Powell's fellow-Virginian, Representative Richard H. Poff, came off sadly bruised, it is true, and Hershel H. Friday of Arkansas and Mildred L. Lillie of California fell from obscurity to derision. The American Bar Association won a case and lost a client. But the overriding outcome of some puzzling Presidential politicking and some controversial lawyer-committee judging was to place before the Senate the names of two men who appear to be exceptionally equipped to fill the great voids left by the resignations of the late Justice Hugo Black and of Justice John M. Harlan.

Mr. Powell, indeed, should become what the Court now lacks: a giant. His professional success is well-documented; a member of a prestigious Richmond law firm, he has been president of the American Bar Association, the American College of Trial Lawyers, and the American Bar Foundation. Also, he has been publicly honored for his service to public education as Chairman of the Richmond School Board and a member of the State Board of Education. His race-affairs record, which a Southerner before the Senate must expect to be examined harshly, was built on good sense and good conscience; possibly Mr. Powell's outstanding contribution to Virginia was his leadership in the quiet sabotage by a business-industrial-professional group of Senator Byrd's Massive Resistance.

Mr. Nixon in announcing his choices for the Court linked them to his own persuasion that recent decisions there have weakened the peace forces against the criminal forces in society. That was an inadequate introduction to the Nation of Mr. Powell's judicial philosophy—and, no doubt, of Mr. Rehnquist's as well. Mr. Powell was president of the A.B.A. in the period when individual rights were being reinforced by a series of landmark criminal-case decisions, and more than once indicated personal dissent. As a member of the Katzenbach Commission on Law Enforcement and Administration of Justice, he joined several colleagues in expressing "Additional Views" concerned with "whether the scales have tilted in favor of the accused and against law enforcement and the public further than the best interest of the country permits." But consistently Mr. Powell has insisted that "it is fundamental to our concept of the Constitution that these basic rights [spelled out in the Bill of Rights] shall be protected whether or not this sometimes results in the acquittal of the guilty." Balance has been his objective. Fairness has been his creed. Scholarship has been his guide.

This facet of Mr. Powell's thinking inevitably will be explored out of a suspicion that Mr. Nixon, having lost to Senate inquiry and general outrage at least three Southern strict-constructionist prospects for the Court, has come up with a polite but hardnose law'n'order ascetic. Mr. Rehnquist's connection, as Assistant Attorney General, with the Nixon Administration's tough police legislation may further the illusion.

Mr. Powell of course would have been on the Harlan and not the Douglas side in *Escobedo* and *Miranda*. But any attempt to identify him with one segment of the Court's business would be to over-look the range of his experiences, his expertise, and his wisdom. Whatever issue that Mr. Powell as a Supreme Court Justice might consider, one may be certain, would be judged by him on its merits and the applicable law. Mr. Rehnquist, from what we can gather, similarly is a case man rather than a doctrinaire.

Both nominees, in any event, have distinguished themselves as students, as lawyers, and as public figures. The unusual circumstances of their selection—without White House consultation with the A.B.A., whose judiciary committee had rejected a slate of candidates—should not obscure Mr. Powell's proven greatness and the younger Mr. Rehnquist's foundation for attainment.

[Editorial from the Daily Press, Newport News, Va., October 23, 1971]

(10)

SUMMONED TO SERVE

When President Nixon, early in his administration, was pondering choices to fill Supreme Court vacancies, the name of distinguished Richmond attorney Lewis F. Powell Jr. was on his list of prospects; that he was passed over then could not have been because of any lack of merit. The chief executive's thoughts were directed toward elevating of men already serving at the intermediate level of the federal courts structure.

When two additional opportunities developed a few weeks ago, for the President to restore balance to the Supreme Court, he centered his selection process on men below the age of 60, on the basis that while maturity of judgment is all-important, younger men of his choosing would presumably have more years in which to serve the nation in accordance with the strict constructionist philosophy.

So it seemed that Mr. Powell, despite his outstanding credentials, would again be shunted aside, and particularly so when the names of six men and women were submitted to an American Bar Association whose stature would not equal the vastly respected Virginian.

So it was a great surprise to the nation when Mr. Powell was singled out as one of two nominees, though the ABA group's rejection of the administration's entire list of prospects left open the possibility that the President would turn to others to prevent a long and bitter confirmation battle in the Senate. But seldom has a bolt from the blue been of more obviously beneficial effect, and while the ABA committee angered the President by its refusing to endorse any of his original choices, this evolved into an indisputable boon for the American people. Everything in Mr. Powell's career as a lawyer and in a wide range of public service points to his being a truly brilliant choice.

As for the age factor, Mr. Powell keeps himself in superb physical condition, much more so than many a much younger man, and, as Mr. Nixon commented, he can provide more service to the country on the Supreme Court in 10 years than others might in 30.

The second nominee offered by Mr. Nixon, Assistant Attorney General William F. Rehnquist, is, like Mr. Powell, a judicial conservative. Among his responsibilities in government has been that of looking into the legality and constitutionality of all constitutional law questions in the executive branch. He is not so well known on the legal scene as Lewis Powell, a former president of the ABA; indeed it has been less than three years since he was a relatively obscure Phoenix lawyer. But he has gained much favorable attention as an outstanding legal scholar since then. We are obviously not as conversant with his capabilities and record as with those of Mr. Powell, but Assistant Attorney General Rehnquist looks to be of much superior calibre to any of the six previously mentioned. This appears also to be the overwhelming view in the Senate, where confirmation of both nominations looks like a certainty without the bitter wrangle into which the president for a time seemed to be headed.

[From the Lynchburg News, Lynchburg, Va., October 24, 1971]

(11)

MR. NIXON NOMINATES POWELL, REHNQUIST

Judicial conservatives will be heartened by President Nixon's nomination of Lewis F. Powell Jr. of Richmond and William H. Rehnquist of Milwaukee and Phoenix for the U.S. Supreme Court. Both have rated the "strict constructionist" views that Mr. Nixon has insisted upon in his Supreme Court appointees.

One must bear in mind that a judicial conservative is not, ipso facto, a political conservative—although this would seem to be the case with these two lawyers. The late Justice Hugo L. Black was a strict constructionist on the Bill of Rights—although a political and judicial liberal on other Constitution issues.

Mr. Powell's record is by far the more impressive, but then he is 64 while Mr. Rehnquist is but 47. A native of Suffolk, graduate of Washington and Lee University and law school, Mr. Powell is a former president of the American Bar Association. Of equal importance in regard to his qualifications is his service on the Richmond and Virginia school boards where he demonstrated a profound concern

for public education and took a moderate stand on racial matters. This experience should prove invaluable on the Court, mired in the muck of its recent rulings disrupting the educational process.

His public statements on law and order and justice are especially reassuring:

"The key problem is one of balance," he has said. "While the safeguards of a fair trial must surely be preserved, the right of society in general and of each individual in particular to be protected from crime must never be subordinated to others' rights."

Mr. Powell also rendered his country an invaluable service in 1970 when he and six other members of the President's Blue Ribbon Defense Panel issued a supplementary report warning of the growing Soviet nuclear menace.

Entitled "The Shifting Balance of Military Power," the reports warned that "It is not too much to say that in the 70s neither the vital interests of the U.S. nor the lives and freedom of its citizens will be secure . . ."

The report concluded that unless the U.S. acts to redress the imbalance it ". . . will become a 'second rate' power subordinate to manifest Soviet military superiority. In that case, the world order of the future will bear a Soviet trademark, with all peoples upon whom it is imprinted suffering Communist repressions."

Over the years this newspaper has had occasion to comment enthusiastically upon statements made by Mr. Powell—most of them addressed to the subject of the rule of law instead of the rule of men.

We are not as familiar with Mr. Rehnquist's public record, but some of his statements quoted in the first press reports of the nominations are gratifying, indeed. He has attacked radical protestors as the "new barbarians," and noted that "our freedom exists by reason of the law's guarantee that others must respect it." As does Mr. Powell, he appears to take the view that rights impose responsibilities—of which the first is to maintain those rights for all others.

As the President noted, their responsibility as justices of the nation's highest court will not be to him, or to any political creed, but to the Constitution. That document, of course, embodies a very definite political philosophy: it emphasizes individual rights and responsibilities and is based upon the premise that all rights derive from the people, that government exists only upon the consent of the governed.

We would like to add a footnote: It is reassuring, also, that Mr. Nixon has decided to end the policy of seeking the approval of the American Bar Association before nominating justices to the Supreme Court. The Constitution impowers this responsibility upon the President, with the consent of the Senate. Any delegation of this responsibility, of this authority, to a private professional organization, no matter how well qualified, is a clear violation of the Constitution. It would be wise to seek the views of the ABA, as the views of other organizations and individuals, but only for guidance. No one should be given what amounts to a power of veto. Supreme Court justices cannot be creatures of the ABA, any more than creatures of the President or the Senate. They must be their own men, whose only allegiance is to the Constitution. To the degree that it is, to that degree will the people prosper.

{Editorial from the Sunday Star, Washington, D.C., Oct. 24, 1971}

(12)

THOSE SURPRISING SUPREME COURT NOMINATIONS

To the astonishment of almost everyone, including the American Bar Association's judiciary committee, President Nixon has named to the Supreme Court Lewis F. Powell, Jr., of Virginia, and William H. Rehnquist, of Arizona. On the basis of the facts as presently known, both men are eminently qualified.

Early speculation had centered on Representative Richard H. Poff, a 10-term Republican from Roanoke who had sought nomination for a number of years. The Virginian was actively opposed by some civil rights and labor leaders and his opponents pointed out that he did not come close to meeting the high professional standards for the judiciary which he had urged Congress to write into law; Poff withdrew as the ABA's judiciary committee was about to consider his qualifications.

Mr. Nixon next sent to the committee, chaired by Lawrence E. Walsh, the names of six candidates, with instructions to concentrate its scrutiny on two

of them, California Judge Mildred L. Lillie and Arkansas bond attorney Herschel H. Friday.

When the ABA committee refused to recommend either Friday or Mrs. Lillie—and the results of their deliberations became public.—Mr. Nixon by-passed the committee and went on nationwide television Thursday night to announce his nominations of Powell and Rehnquist.

This is neither the time nor the place for a discussion of Friday's or Mrs. Lillie's legal credentials. Suffice it to say that the procedure of submitting the names of nominees to the ABA's committee in advance, agreed to last summer by Attorney General Mitchell, proved a poor way to establish a candidate's qualifications, inflicting unnecessary embarrassment and professional damage on both Friday and Mrs. Lillie, not to speak of the other four candidates.

There is, of course, no constitutional provision for the ABA to rule on any judge's qualifications. The responsibility for an appointment to the Supreme Court rests with the President and cannot be shared with any other body. Certainly the President has the right, perhaps the obligation, to seek and possibly act upon the advice of distinguished attorneys in such matters. But in view of the leaks in the "confidential" deliberations of the committee, we feel the President was right to instruct the attorney general to terminate the ill-starred experiment.

In naming the 64-year-old Powell to the court, Mr. Nixon is fulfilling his frequently restated vow to place a Southerner there, a matter of particular urgency with the retirement and death of Hugo L. Black.

The shy and courtly Richmond attorney, who reportedly turned down nomination for the seat presently held by Associate Justice Harry A. Blackmun, has ample intellectual and professional credentials: Phi Beta Kappa, first in his law class at Washington and Lee, a master's degree from Harvard, former president of the ABA (1964-65), of the American College of Trial Lawyers (1969) and of the American Bar Foundation (1969-71).

As chairman of Richmond's school board in the emotion-charged years from 1952-61, Powell, who is a Democrat, charted a moderate and reasoned course in desegregating the schools of the capital of the Old Confederacy. As 88th president of the ABA, he played a key role in bringing that body behind President Johnson's program of federal support for legal aid to the poor.

On law-and-order matters, he appears to be hard-nosed and, in our view, this is no bad thing. While he has supported the right of every accused person to a fair trial, he has placed great stress on "the rights of citizens to be free of criminal molestation" in an age which he has described as one "of excessive tolerance," to all of which we say amen. His experience in corporate law will be a real asset to the court.

Rehnquist, at 47, is too young to have achieved the national reputation which Powell enjoys within the legal fraternity. But his academic reputation is the equal of the older man's. Born in Milwaukee, he picked up his Phi Beta Kappa key at Stanford, where he also finished first in his law school class.

In 1952 he came to the Supreme Court to clerk for the late Associate Justice Robert H. Jackson. A Goldwater Republican, Rehnquist practiced law in Phoenix before joining the Justice Department in 1969 as assistant attorney general in charge of the Office of Legal Counsel, a post described by the President Thursday as making him "the President's lawyer's lawyer," or legal father-confessor to Mitchell.

Because he had the good fortune to be born in Wisconsin, educated in California and employed in Arizona—and has never held elective office—it is unlikely that any racist skeletons will be discovered in Rehnquist's closet. But he has been the legal architect of many of Mitchell's most controversial policies, including those dealing with police surveillance, the handling of anti-war demonstrations and the general toughening of criminal procedures. He is, in fact, a conservative theoretician who is bound to draw some flak from Senate liberals.

But while Rehnquist's record as an assistant attorney general is legitimate fuel for those who would light fires of opposition to him, that record is no sure indication of how Rehnquist might vote on the court when he is his own man. And his intellectual qualities and youth surely promise at least the possibility of development into a great jurist.

The initial reaction to Powell and Rehnquist, both on the Hill and elsewhere, has ranged from cautiously favorable to enthusiastic. This, of course, will not last. It is reasonably safe to predict that both civil rights activists and elements of organized labor will oppose Powell. Civil libertarians will try to make things hot for Rehnquist. In the hell hath no fury department, Women's Lib will be after both nominees.

As has been indicated, the academic credentials of both men seem excellent. As to their professional qualifications, the only valid criticism that could be made of either is that neither has any experience on the bench. Nor did seven of the 12 Supreme Court justices recently rated as "great" by a panel of 65 academic experts examining the records of 96 of the 98 men who have served on the court. In any case, Mr. Nixon's two previous appointments, of Chief Justice Warren Burger and Blackmun, went to sitting judges.

The latitude which the Senate should have in granting or refusing confirmation on political grounds is subject to dispute. Clearly, the President does not and should not have the same total freedom to name justices as he does cabinet members. The latter, in historical terms, are for but a day and serve at the pleasure of the President. The former, once they are confirmed, are on the Supreme Court for life and are expected to function as members of an independent, coordinate branch of government. Justices are not, in short, the President's men; they are and ought to be their own men, owing allegiance only to the Constitution, the nation and their consciences.

Nevertheless, when a President nominates men whose intellectual and professional qualifications are clear, men who are free of the taint of corruption and whose political views cannot be characterized as being of either the extreme right or the extreme left, then a strong presumption operates in favor of the President's nominees. It is, in short, up to the Senate to demonstrate that the nominees are morally or intellectually unsuitable. It is not up to the President to prove that there is no finer jurist in the land.

We do not have at our disposal at this time sufficient information to give our full and unqualified endorsement to either Powell or Rehnquist and we will return to the subject as the Senate debate develops. But on the basis of what is known at this point, both men would seem worthy to sit on the Supreme Court. The President did well to name them and the Senate ought to approach the debate on their confirmation with a largeness of spirit and lack of political rancor worthy of the upper house. We believe it will.

[From the Progress-Index, Petersburg, Va., October 25, 1971]

(13)

TWO ADMIRABLE NOMINATIONS

Not long ago we wrote something here, in comment on speculation over names suggested for the Supreme Court, about the difference between notoriety in the sense of being widely known and distinction in the sense of eminence of achievement.

It was suggested by comments to the effect that the President in making nominations to the Supreme Court should seek out persons who are widely known; as if that were the test of fitness and proof of qualifications. Notoriety can be good or bad, while distinction can exist without taking the form of notoriety.

In making his two nominations to the Supreme Court, President Nixon has honored the difference which we were discussing and has applied the criterion which impresses us as more important for the purpose. To be sure, there is nothing obscure about Lewis F. Powell, Jr., Richmond lawyer and former president of the American Bar Association, and William H. Rehnquist, an assistant attorney general. Yet neither bears a name which evokes instant recognition of some kind or other throughout the land while both have credentials which are readily apparent.

From law school days to the present the two exhibit evidences of the word "excellence" which now so often is bandied about, sometimes in usage which makes for wonder whether the user has any idea what "excellence" ever means.

Although the generalizations apply to both nominees, it is the nomination of Mr. Powell which gives especial satisfaction in this part of the country. His name has not gone unmentioned in the speculation—a few weeks ago a national news weekly published his picture among others—but it has not been juggled in the line-ups like the name of a horse in an approaching race. Indeed one might have suspected that the lack of a political background would disqualify him from anything more than respectful mention.

That it was not so is cause for rejoicing. He is a successful lawyer, a legal scholar, and a leader in organizations of his profession. Beyond that, he is a person of broad and philosophical interests and a man who has given important service to public causes.

Mr. Powell is described as a judicial conservative. Probably "conservative" should be applied as a general adjective, but our impression is that, like quite a few conservatives, he is more given to studying problems on their merits than in applying ready-made opinions found hanging on a party line.

The President's comment that Mr. Powell is not just a Virginian strikes us as supererogatory. We suppose it may be in order to view of the rampant and often so unnecessary sectionalism which flourishes in the country today, owing largely to the fanning of its fires by irresponsible politicians.

The recent and heavy-handed criticism of the President that he was seeking to downgrade the Supreme Court, indeed to the extent of trying to undermine the form of government, is absurd and unjust in light of the two nominations which he has made. Plainly he is hoping to improve the quality of the Supreme Court, not plotting to subvert it.

Awaited with interest is how the established opponents of his nominations will treat the two which have just been made. They may be sharpening their knives, getting the tar and feathers ready, or putting up the gallows.

But it is awfully hard to see how they could go into that act this time.

[From the Daily News-Record, Harrisonburg, Va., October 25, 1971]

(14)

AN EXCELLENT CHOICE

President Nixon's announcement Thursday night that he was nominating Lewis F. Powell Jr. of Richmond to the Supreme Court of the United States is most welcomed news. We cannot think of a more able person to sit on the highest court of the land.

Mr. Powell, a native of Suffolk, was admitted to the Virginia Bar in 1931 after cramming three years of law school at Washington and Lee into two. He was president of the Richmond Bar Association in 1947-48 and in 1964 served as president of the American Bar Association, one of the highest distinctions an attorney can receive.

Mr. Powell, no opponent of change but one who calls for it within orderly process, contributed greatly to legal aid for the poor while ABA president. In comments on sweeping court decisions protecting the rights of the accused, he has reminded legal theorists that, while rights of the accused are important, society must protect the rights of victims of crime too.

His term as head of the American Bar Association came at a time of much civil unrest. He was a Southerner and ordinarily might have been the target for those charging prejudice at every turn. Yet his quiet but effective approach disarmed would-be critics, and his leadership was hailed nationally.

We are confident the Senate will confirm this excellent appointment. We only hope it will be accomplished in short order without emotionalism because he is a Southerner. Certainly his record deserves this.

[A clipping from VPA News-Clip Bureau, Richmond, Va., in the World-News, Roanoke, Va., October 23, 1971]

(15)

CURTAIN ON CONFOUNDING COURT ISSUE?

The Nixon Administration—after a series of tumbles, feints, back flips and handstands—has managed to land upright in its Supreme Court nominations.

The agony and ecstasy that the administration has put the nation through the past several weeks (partly of its own doing, partly through the new system of checking out prospective court members) makes the period one of the most confusing in Supreme Court history.

But in view of some of the recent possibilities mentioned by the administration and hinted by Members of Congress, the choice of Lewis Powell, a Virginian and past president of the American Bar Association, and Assistant Attorney-General William Rehnquist must rank high.

Both men are respected in legal circles, both are known for their careful presentations before the bar's bench and congressional committee and both are thoroughly at home with constitutional questions.

Both men fit the President's notion of conservatives, though neither is the kind of doctrinaire footnote-flogger who is likely to incur the wrath of the coalition that formed about the nominations of Harrold Carswell and Judge Haynsworth.

Because both men appear to be well qualified for the high court, there is a sense of relief, a feeling that now, at last, the whole question can be laid to rest.

But other nagging questions still hang around, like whiffs of powder after a battle. What was all that twisting and turning, back and filling about, anyway? The administration, by letting the ABA know that it would no longer be in need of its services in screening prospective court nominees, is apparently trying to put the major blame on the ABA system that Attorney General Mitchell decided upon.

But though there were doubtless leaks in the process by which the committee of the ABA looked into the long list of potential nominees, we find it difficult to believe that at least part of the trouble didn't stem from the constant scurrying of the administration. Several of the names were credited to administration sources.

The administration, in exasperation, has gone too far, we believe, in scuttling the ABA review system. That some leaks are inevitable, as the ABA warned, is true; but some leaks are possible in any system. The ABA review has had time to do little more than get its feet wet, and the administration should have sought to tighten up the present system rather than tossing it out.

There is one other burning question for southerners: Can a conservative nominee from below the Mason-Dixon line make it through the mean 'ol Senate? Sen. William Spong thinks Mr. Powell can make it, and we have a distinct feeling, and a special hope, that he is right.

[From the Virginia-Tennessean, Bristol, Va., October 23, 1971]

(16)

THE TWO NOMINEES AS WE SEE IT

President Nixon has played it relatively safe and as a result his two nominees to the U.S. Supreme Court will probably be confirmed by the Senate.

Lewis F. Powell Jr. and William H. Rehnquist are both so unknown nationally that the average man in the street probably isn't going to react one way or the other.

But especially in Mr. Powell, President Nixon has found that rarity he has been seeking for so long—a prominent, conservative southerner who does not have the taint of bitterly fighting racial integration.

Indeed, Mr. Powell is probably only one of a handful of prominent southerners who has a clean record, so to speak, on the issue of race.

To Mr. Nixon's benefit, obviously, is the unusually high regard with which Mr. Powell is held in the legal field, not only in the South but all over the nation. A Democrat, he is not likely to set off much if any partisan squabbling and Republicans who might like to see both nominees of their own party are likely to keep quiet if it looks like the Senate will approve Mr. Nixon's choices. They would probably keep silent rather than risk setting off any bitter partisan fighting.

But for the average citizen the names of Rehnquist and Powell mean nothing. Mr. Powell's reputation is almost exclusively confined to the legal profession and those members of Congress who have had association with the American Bar Association or the College of Trial Lawyers.

By the same token Mr. Rehnquist's reputation is confined mostly to the federal government because of his role as an assistant attorney general.

Perhaps this is good, perhaps not, but it is essential that qualified replacements be named quickly to the Supreme Court because of the backlog of cases including a long anticipated historic ruling on the legality of capital punishment.

It is no surprise, really, that President Nixon chose relative unknowns. Indeed, of all his nominees and potential nominees, only Judge Clement Haynsworth and U.S. Sen. Robert Bird really had any degree of general name identification.

The nominees, if approved, would serve Mr. Nixon's intended purpose of injecting a conservative balance to the Supreme Court which has leaned toward liberal interpretations of the Constitution since President Roosevelt "stacked" the Court during the New Deal.

But as we know years on the court can change a man's philosophy as with the late Hugo Black who had once belonged to the Ku Klux Klan while in Alabama and yet was the chief architect of many of the rulings which have stirred the ire of the KKK ever since.

We don't expect prolonged debate over the two nominees. Mr. Rehnquist has angered some Senators because of his view that President Nixon has almost unlimited executive powers and because of his advocacy for the use of wire-tapping.

But if those two points begin to develop into a battle, Administration forces can probably make a good case that Mr. Rehnquist was mainly doing his job and that his views as an assistant attorney general do not absolutely reflect his true views on these subjects.

The biggest disappointment, perhaps, is that Mr. Nixon did not name a woman, especially after dropping broad hints that he would. But there will be other vacancies, perhaps sooner than expected.

Meanwhile, we hope for speedy approval of the two nominees.

[A clipping from VPA News Clip Bureau, Richmond, Va., in the Northern Virginia Daily, Strasburg, Va., Oct. 23, 1971]

(17)

HIGHLY QUALIFIED

President Nixon's nomination of Lewis F. Powell, Jr., of Richmond, for one of the vacancies on the United States Supreme Court is an event in which all Virginians can take pride.

On at least one occasion in the recent past Mr. Powell was mentioned as a possible nominee to the high court, but this time his was not among those names sent to the American Bar Association by the White House for qualification checks. Thus, his nomination came as something of an unexpected development in the Supreme Court sweepstakes.

However, there is little doubt, in Virginia or elsewhere, as to his qualifications for the high bench. Mr. Powell is nationally recognized for his ability in the field of jurisprudence. His services as president of the Richmond Bar Association, the American Bar Association, and the American College of Trial Lawyers attest to the high regard in which his colleagues in the legal profession hold him.

These attainments added to a lifetime of highly valuable civic services to the city of Richmond, the state of Virginia, and the Nation, mark Mr. Powell as a candidate who will grace the high court.

The very able Chief Justice Warren Burger, appointed in 1969, was the first Virginian to serve on the high court bench since 1860. Mr. Powell would be the second, and in our opinion his appointment would be as richly deserved.

We hope that confirmation of this distinguished Virginian by the senate will come swiftly.

[A clipping from VPA News Clip Bureau, Richmond, Va., in the Covington Virginian, Covington, Va., Oct. 25, 1971]

(18)

THE THEME OF EXCELLENCE

When he announced his two Supreme Court nominees in a surprise broadcast, President Nixon took occasion to stress the theme of outstanding excellence as the great requisite for service on the court. Observing that its members ought to be among our very best lawyers, the President remarked that "the Supreme Court is the fastest track in the nation."

This commendable stress on excellence apparently motivated Mr. Nixon in making his choice. Had he given this consideration more weight at the start of the search for persons to fill the court vacancies, the whole embarrassing business of having earlier prospects rejected by an American Bar Association committee might have been avoided.

Lewis F. Powell of Richmond, Va., is an able and greatly experienced trial lawyer who served as president of the American Bar Association a few years ago. In past years he has often been mentioned as a Supreme Court possibility, and his name came up again when Justices Black and Harlan resigned in September.

William H. Rehnquist, an assistant attorney general who had previously practiced law in Phoenix, Ariz., for 14 years, had not been rumored as a possible choice, his nomination came as a surprise to observers, including members of the Senate. In his Justice Department post he is said to have served capably as (in Mr. Nixon's words) "the chief interpreter of the Constitution for the whole government." He is held in high esteem by many fellow members of the Arizona bar, including some who disagree with his conservative philosophy.

Both Rehnquist and Powell stood at the head of their respective law classes, and have since done much to bear out that early indication of quality. Each of Mr. Nixon's choices, then—and this is said without regard to their attitudes on civil rights and related matters, which will be scrutinized in due course—is a man of stature who seems basically well qualified for the court.

The same could not be said for the four men and two women whose names the President had earlier presented to the American Bar Association for its assessment. Whatever their capabilities, none measured up to the high standards Mr. Nixon is now insisting upon. Sen. Robert C. Byrd, for example: far from being one of the nation's top lawyers, he is a night school product who has not practiced law. When things boiled down to Herschel H. Friday, a Little Rock bond lawyer, and California Appeals Court Judge Mildred L. Little, the ABA committee gave both a rating of "not qualified." The lesson of the Haynesworth and Carswell episodes is thus reiterated: excellence, not politics, should be the top consideration.

[A clipping from VPA News-Clip Bureau, Richmond, Va., in the News-Gazette, Lexington, Va.
Oct. 27, 1971]

(19)

THE POWELL APPOINTMENT

President Nixon has been charged in some quarters with a penchant for appointing mediocrity to public office, but he certainly did not follow that precedent in nominating Lewis Powell for the United States Supreme Court. We can think of no better qualified appointee.

Mr. Powell began his distinguished career early, while he was a student at Washington and Lee. Here he was elected president of the student body and after leading his law class was named to Phi Beta Kappa. He spent six years at the college here, completing his academic course in 1929 and law studies in 1931.

He has often revisited the campus both as an alumnus and a member of the university board of trustees, and more recently because he has a son who is a sophomore in the present student body who plays on the football team. Mr. Powell has many warm friends in Lexington who will be highly gratified that his outstanding abilities in the field of law have been properly recognized.

Powell is a Democrat, but a conservative one and a strict constructionist of the Constitution. One of his strongest feelings of late has been that the victim of lawlessness is not properly protected and compensated. He may be expected to try to rectify this situation that has tended to give maximum protection to the criminal.

In the field of public service the scholarly lawyer has also made an outstanding contribution. He has been chairman of the Richmond School Board and president of the State Board of Education during a time of great stresses because of minority problems. He helped inaugurate the successful Richmond council-manager form of government as chairman of the Richmond Charter Commission. He served constructively as a member of the President's Crime Commission in 1967 and the President's Blue Ribbon Defense panel which made a report last year.

A member of Richmond's most respected law firm, he has been president of the Richmond Bar Association, president of the American Bar Association and president of the American College of Trial Lawyers. He is a moderate on questions of civil rights.

Except in the eyes of those taking extreme positions, it is generally agreed that he will add strength and prestige to the Court. It may be anticipated that he will be confirmed speedily by the Senate with little opposition.

A clipping from VPA News Clip Bureau, Richmond, Va., in the Carroll News, Hillsboro, Va., October 28, 1971]

(20)

POWELL AND REHNQUIST

The process of a president appointing replacement justices to the U.S. Supreme Court—with the only approval required—that of a majority of the Senate—may

never be a foregone conclusion again, and this is good. However, the recent skeet-shooting procedure of "toss them up, shoot them down" can only undermine confidence in the nation's highest court. Somewhere there is a middle ground, where responsible senators may endorse the right men for the high court, free from political considerations and the pressures of too much early publicity.

Last Thursday, Oct. 21, President Nixon nominated 64-year old Lewis F. Powell of Richmond and 47-year old William Rehnquist as his latest selections for the Supreme Court.

Powell, a practicing attorney since 1931, is a former president of The American Bar Association. The president was high in praise, saying:

" . . . Like Chief Justice Marshall, also of Virginia, Powell is recognized as a man who will represent not just Virginia and the South but all America."

Nixon said he rated Rehnquist as "having one of the finest legal minds in the whole country today," and praised him as being "at the very top as a constitutional lawyer and a legal scholar."

Both men were described by the president as "conservatives, but only in a judicial, not a political sense."

U.S. Attorney General John Mitchell announced that his office is ending the practice of consulting the American Bar Association before making nominations to the court to avoid further "premature publication of information" on the list of possible nominees. This does not mean creation of a new policy, but a return to an old one.

Extremely careful screening of candidates by the president and his advisors before submitting nominees to the senate for approval, and responsible, sober evaluation by the senate of those nominees must go hand in hand.

We hope these nominations will be given the attention they deserve by the Senate, free from all outside pressures.

The president said "it is our obligation to obey the law, whether we like it or not, and our duty to respect the Court as the final interpreter of the law, if America is to remain a free nation."

The Carroll News feels that confirmation of Powell and Rehnquist could go a long way toward building and maintaining confidence in the Supreme Court.

[From the Richmond Times-Dispatch, November 1, 1971]

(21)

POWELL: VOICE OF RESTRAINT

(By Henry J. Taylor)

In considering President Nixon's nomination of Lewis F. Powell Jr. for the Supreme Court the Senate is considering a remarkably able man.

Conservative? Liberal? These abused labels are vague and somewhat like a fog; they cover a lot of territory, but badly.

Moreover, true liberalism is actually a frame of mind and so-called conservatism must be receptive to change if it is successfully to conserve. Accordingly, the mere labels are as confused and confusing today as the gypsies in Spain who dance at funerals and cry at christenings.

The essential point is that this former president of the American Bar Association and scholar of our Constitution knows history, knows our laws, our country and the world today and most certainly will not cop out from responsibility.

That the Liberty Bell in Philadelphia's Independence Hall is cracked can always be regarded by us as a suitable warning. The hallowed bell was cracked on July 8, 1835, while tolling at the funeral of Chief Justice John Marshall.

At first the Supreme Court's rights were hardly solid. This great jurist made it possible, in his time and thereafter, for the Supreme Court to claim the power to supersede the acts of Congress.

But in recent years the Supreme Court has been pushing itself increasingly into questions that are really for the legislative branch to decide. It has been writing its own majority's social and economic views into law. It has been advancing its own social-economic preferences, not restrained by the Constitution or limited to the laws Congress enacted.

Chief Justice Charles Evans Hughes once wrote that our Constitution "is what the justices say it is." But the court has clearly departed from its constitutional moorings and, in effect, legislated as if it were a legislative body itself.

Even within the court, Justice John M. Harlan stated: "This court can increase respect for the Constitution only if it rightly respects the limitations which the Constitution places on this court. In the present case we exceed that. Our voice becomes only the voice of power, not constitutional opinion."

By legislating as well as adjudicating, the court has amazed and alarmed many of our country's finest constitutional lawyers, regardless of party or social-economic viewpoints. They saw destroyed the three fundamental separations of power in our government.

The court's decisions are actually another matter entirely. And widely publicized public resentments against these—very severe—are a separate and different issue. How severe? At the time President Nixon was inaugurated a Gallup poll indicated that about 60 per cent of the American people disapproved of the Supreme Court's positions.

The court's continued twisting of the Constitution and the statutes in the cases judged has made a shambles of government by law in our country. It has so manhandled the First, Fifth and Fourteenth Amendments that the country is powerless to live and operate except in ways literally originated by the court.

The Court has leaned over backward in behalf of criminals and shown much more concern for the felons than for their victims. The lower courts, of course, have had to conform. Yet, are the "rights" of troublemakers more important than the rights of the sufferers?

Listen, for example, to Pennsylvania Chief Justice John C. Bell: "The Supreme Court's decisions which shackle the police and courts make it all but impossible to protect society from criminals and also are among the principal reasons for the near-revolutionary conditions."

The end product? The consequent loss of the freedoms which are the supposed goal of judicial lawmaking.

Law is never able to catch more than a part of life; an important and vital part usually defies and escapes legal definition. Moreover, the Supreme Court's decisions are not "the law of the land," as so often erroneously described. They are the law of the case. But, in announcing Powell's nomination and that of William H. Rehnquist, Nixon truly stated: "Presidents come and go but the Supreme Court through its decisions goes on forever." And Powell's character gives him standards for the public welfare and the ageless questions of the common good.

Lewis F. Powell believes in those standards and has followed them throughout his distinguished career, come what may.

STATEMENT OF HON. DAVID E. SATTERFIELD III, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. SATTERFIELD. Mr. Chairman, I appreciate this opportunity also to appear here this morning.

I realize the press of time on this committee and I shall not impose upon it.

It is not only an honor and a privilege to appear in behalf of Lewis Powell, but I also have the privilege to act as spokesman for the entire Virginia delegation who endorse his nomination.

I think it is a measure of the depth of that support, the fact that all of them are here this morning in person to convey their feelings and to express their endorsement of his nomination to this committee.

I cannot let the moment pass without making one brief observation.

I have known Lewis Powell all of my life and I have known him somewhat intimately the last 25 years through the practice of law and I would like to tell you that I know that he is a man of impeccable integrity. I know him to possess a tremendous intellectual capacity, a keen analytical mind which is remarkable in its inquisitive and perceptive capacity. He has an eminent record for distinguished public and professional service which has demonstrated time and again an objective, orderly, and judicious approach to problems.

Because of that record and his personal character, he is held in high esteem by the members of his profession and all who know him and have observed his service to his State and Nation. He is eminently qualified to serve as a Justice on the Supreme Court of the United States and I have no doubt he will discharge his duties in that high position with distinction.

I respectfully recommend his nomination to you without any qualifications whatsoever.

Thank you.

The CHAIRMAN. Thank you, sir.

Now, there are number of witnesses present in behalf of the nominee. I am going to call their names, ask them to stand up, and they will be granted permission to file a statement for the record.

Hon. Andrew P. Miller, attorney general of Virginia;

Oliver W. Hill, Hill, Tucker and Marsh, Richmond;

Carlisle H. Humelsine, president, The Colonial Williamsburg Foundation;

Robert E. R. Huntley, president, Washington and Lee University;

A. E. Dick Howard, professor of law, University of Virginia Law School;

J. Edward Lumbard, former chief judge of the Second Circuit Court of Appeals, New York City;

Joseph D. Tydings, I haven't seen you in a long time;

Orison S. Marden, former president of the American Bar Association;

Bernard G. Segal, former president of the American Bar Association;

Hicks Epton, president, American Trial Lawyers;

Maynard J. Toll, former president of National Legal Aid and Defenders Association; O'Melveny and Myers, Los Angeles;

Dean Phil C. Neal, University of Chicago Law School;

Geoffrey C. Hazard, Jr., Yale University Law School;

William T. Gossett, former president of American Bar Association;

E. Smythe Gambrell, former president of American Bar Association;

Earl F. Morris, former president of American Bar Association, Columbus, Ohio;

Dean Monrad G. Paulsen, University of Virginia Law School;

Dean James P. White, Jr., William and Mary Law School;

Hon. Armistead L. Boothe, former Virginia State senator,

Dean Roy L. Steinheimer, Jr., Washington and Lee University Law School.

Charles S. Rhyne, former president of the American Bar Association, Washington, D.C.;

Whitney North Seymour, former president of the American Bar Association, New York City;

Sylvester Smith, former president of the American Bar Association, New Jersey;

David F. Maxwell, former president of the American Bar Association, Pennsylvania;

Leon Jaworski, present president of the American Bar Association, Houston, Tex.;

Edmund Campbell, former president of the D.C. Bar Association, Washington, D.C.

Gentlemen, we are glad to have you.
 You will be permitted to place statements in the record. Thank
 you.
 (The statements referred to follow:)

STATEMENT OF HON. ANDREW P. MILLER, ATTORNEY GENERAL OF VIRGINIA

Mr. Chairman, members of the Judiciary Committee, the opportunity to add my own endorsement of Lewis F. Powell, Jr., to those already presented to you is a source of great pleasure for me.

One does not have to practice law in Virginia for very long before he becomes aware of Mr. Powell and his great contributions to our profession. Indeed, those contributions have been of such magnitude that the name of this worthy man is known in law offices in every state of the union.

Historically, Virginia has given our country some of its greatest leaders: Jefferson, on whose brilliant concept of government our democracy is founded; George Mason, whose vision produced the constitutional articles that guarantee to all Americans the rights we hold so dearly; and Washington, whose name honors this capital and symbolizes this country throughout the world.

Virginia, too, gave the nation its first great Chief Justice, John Marshall. It is fitting that Lewis F. Powell, Jr., practices law within a few blocks of the house in which Chief Justice Marshall lived in Richmond.

Mr. Powell is known today as the outstanding practicing attorney of the Commonwealth of Virginia. He represents an unparalleled combination of integrity, ability, and attainment—qualities that led him to the presidency of the American Bar Association in 1964 and to the presidencies of the American College of Trial Lawyers and the American Bar Foundation in 1969.

But more importantly, Lewis F. Powell, Jr., possesses the judicial temperament for the great task to which the President of the United States has nominated him. He has the quality of mind which will enable him to serve with distinction as a Justice of the Supreme Court of the United States.

It is not given to all men to have that quality of mind, yet I know of no man better endowed with it than Mr. Powell. Many men exhibit a knee-jerk reaction to the issues of the day, and render cliched treatment in response, but not the nominee before you.

Throughout his career, Mr. Powell has been concerned about the relationship of the law to public issues. This concern has prompted him to offer his services to his state and his country on many occasions. For example, he was appointed by President Lyndon B. Johnson to the National Advisory Committee on Legal Services to the Poor. In 1968, the Federal Office of Economic Opportunity presented him its annual award for contributions to the national legal services program.

Virginia called upon him in 1967 to serve on the commission which revised the Commonwealth's constitution for the first time since 1928. Mr. Powell's imprint is clearly reflected in this new constitution, approved by Virginia voters in 1970. He has long advocated equal educational opportunities for all children and, as Chairman of the Richmond City Public School Board between 1952 and 1961, guided the smooth transition from a segregated school system to a system of integrated schools.

Now, Lewis F. Powell, Jr., has the opportunity for a new role of public service—an opportunity to serve his nation as a Justice of the Supreme Court of the United States. I respectfully urge you to give favorable consideration to his nomination. I am certain that legal historians in the future will regard him as one of the outstanding members of the Court in this century.

STATEMENT OF PRESIDENT ROBERT E. R. HUNTLEY OF WASHINGTON AND LEE UNIVERSITY

I am pleased to have this opportunity to appear before this Committee to speak in behalf of confirmation of the President's appointment of Lewis F. Powell as an Associate Justice of the United States Supreme Court. Primarily my comments might be helpful to the Committee in bringing to your attention information which you might not otherwise have, about Mr. Powell's effective role with relation to his *alma mater*.

As you may know, he is a graduate of both the undergraduate and law schools of Washington and Lee. His record in both stands as an augury of his later career. His academic distinction was of the highest order: He was a member of Phi Beta Kappa, was graduated *magna cum laude* from the School of Commerce and Administration, and was first in his graduating class in the School of Law. His qualities of character and his capacity for leadership were also evident: he served as President of the Student Body and was awarded the Algernon Sydney Sullivan Medallion which is bestowed by the faculty upon the graduates who "excels in high ideals of living, in spiritual qualities, and in generous and disinterested service to others."

You will of course have from other sources the unique record of his distinction as a lawyer, his service to his profession and to American jurisprudence, and his creative influence for good in the public affairs of his city, state and nation.

What I would like to emphasize to you is that during these years of professionally and nationally acclaimed achievements, he has continued to bring to his *alma mater* a full measure of devotion, not merely the typical nostalgic devotion of an alumnus but rather an intelligent well-informed concern. Through the administrations of three presidents of Washington and Lee and through many times of crisis and decision, he has stood by with sound advice when advice was useful and with forceful leadership when leadership was needed.

For example, in May of 1970, when campuses across the land were experiencing convulsions of an unprecedented variety, the student body at Washington and Lee was gripped by a tension which seemed to many to pose an immediate threat to the institution's stability and integrity as a center of learning. At the peak of this excitement and concern, it was Lewis Powell to whom I turned for advice—not mainly because he was then as he is now a member of our Board of Trustees, but because I knew full well from past experience of his capacity to bring to an emotionally charged problem calm objectivity and lucid insight. I do not think I have ever told him this but I should like to do so now. His quick understanding, his intuitive empathy and his seasoned confidence in the student body and the faculty gave me a perspective for which I shall be always grateful and which, I think, allowed Washington and Lee to come through those days with little bitterness and with new strength.

For the past ten years Mr. Powell has been a member of the University's Board of Trustees, a group of 18 men which works actively to provide intelligent and responsive governance for the institution. In large part because of Mr. Powell's influence, our Board is in my opinion a model exemplifying the ways in which such organizations of lay trustees can function usefully.

In routine matters and in matters of critical dimension for Washington and Lee no one could have performed more effectively. His characteristic posture of firm fairness facilitated the University's decision to seek enrollment of qualified black students. In the Board's deliberations about planning for this institution's next decade, he has repeatedly made the kinds of suggestions and raised the kinds of questions which serve to focus attention on the significant matters of policy, thus helping to guide the Board to a sharpened appreciation of its proper role. He was one of several trustees who provided leadership in a decision to reorganize the Board to provide for term membership in place of the more traditional life appointment.

Because I am a lawyer by training, I cannot resist adding a brief word about Mr. Powell's capacities as a man of the law. He has without exception the keenest analytical mind I have encountered, and is able to apply this disciplined talent with a disinterested judgment which is underpinned by deep commitment to humanity and concern for the rights of man in society. The President has made an outstanding appointment.

SUPPLEMENTARY DOCUMENTS FROM WASHINGTON AND LEE UNIVERSITY

A RESOLUTION

In recognition of President Nixon's appointment of Lewis F. Powell, Jr. as an Associate Justice of the United States Supreme Court, the Board of Trustees of Washington and Lee University wishes to enter into the official annals of this 222-year-old institution its approbation of the President's wise choice and this commentary on the great esteem in which we hold our alumnus, our friend, and our fellow Trustee.

A record of unparalleled distinction marks every association that Lewis Powell has had with the University he chose for both his undergraduate and his professional education. He was an honor graduate—Phi Beta Kappa and *magna cum*

laude—of the School of Commerce and Administration in 1929; in 1931 he graduated first in his class in the School of Law. During his first year in the School of Law, Lewis Powell served as President of the Student Body, and at commencement he was awarded the coveted Algernon Sydney Sullivan Medallion, bestowed by the faculty upon the graduate who "excels in high ideals of living, in spiritual qualities, and in generous and disinterested service to others."

This dedication to the disinterested service of his fellow man and his total commitment to the highest ideals of his profession brought Lewis Powell again to the commencement platform of Washington and Lee University in 1960, when an admiring Alma Mater conferred upon him its honorary degree of Doctor of Laws. The following year he was elected to the University's Board of Trustees. Upon the completion of his notable administration as President of the American Bar Association in 1964–65, Lewis Powell was invited to deliver the eighteenth annual John Randolph Tucker Lecture in Law at Washington and Lee. His brilliant discourse on a lawyer's view of civil disobedience ranks among the finest of these annual lectures by many of the nation's most highly regarded justices, attorneys, and legal educators.

While the many achievements of Lewis Powell both within and without his profession have drawn our respect and admiration, it is in his capacity as a Trustee of Washington and Lee University that he has won our highest regard for the qualities of analytical discernment, wise judgment, and sympathetic understanding that are found in him in rare and abundant concert. His voice in our deliberations has always been the voice of finely-tempered reason, and we have responded to this voice with trust and confidence.

While we endorse here without qualification Lewis Powell's appointment to the bench of our nation's highest court, we must confess to a measure of selfish reluctance. We shall no longer feel able to call upon him for such a generous commitment of his time and his attention, and Washington and Lee University will be the poorer for this. But we take comfort and joy in the fact that those attributes of Lewis Powell we admire so much, both professional and otherwise, shall now be directed to the best interests of our entire nation.

These sentiments, approved unanimously by the Board of Trustees in regular session October 29, 1971, shall be spread upon its minutes, a copy forwarded to the Committee on the Judiciary of the United States Senate, and a copy presented to our honored friend and colleague.

WASHINGTON AND LEE UNIVERSITY,
Lexington, Va., October 27, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Senate Office Building, Washington, D.C.

MY DEAR SENATOR EASTLAND: I hope I am not presumptuous in venturing to send you a brief comment apropos the President's nomination of Lewis F. Powell, Jr. to the Supreme Court. It has been my privilege to know him as a personal friend and fellow citizen of the City of Richmond, Virginia, for thirty-three years.

I feel sure you know of his distinguished services to the City of Richmond, along with those to the state and to the nation. It has occurred to me, however, that you might be less familiar with his services as an alumnus of Washington and Lee University and, for the last ten years, a member of its Board of Trustees. Ever since his graduation, his many talents have always been available to his alma mater, but since his election to the Board in 1961, the University has laid claim upon them to a very extensive degree. He was particularly helpful in his advocacy of the opening of the University to qualified black students in the early 1960's and was undoubtedly a major factor in the decision of the Board of Trustees to follow that course.

My major purpose in writing this letter is to comment upon what I should regard as his ideal judicial mind. In Board discussions, committee meetings, and in other relations with him, I have observed his calm, objective approach to all problems, including those charged with some emotion. I have never seen a more patient probing for facts on which to base a decision nor a more careful interpretation or penetrating analysis of them when presented. His reasoned judgments following his analyses reveal a brilliant sense of the significant factors and of their relationship to others. Time and time again in group discussion it has been he whose formulations expressed the mind of the group.

I feel sure that I reflect the sentiment of his fellow members on the Board when I express the earnest hope that your committee will recommend confirmation of his nomination.

Respectfully yours,

JOHN NEWTON THOMAS, *Rector.*

WASHINGTON AND LEE UNIVERSITY,
SCHOOL OF LAW,
Lexington, Va., November 1, 1971.

Hon. JAMES O. EASTLAND,
*Chairman, Senate Judiciary Committee, U.S. Senate,
Senate Office Building, Washington, D.C.*

DEAR SENATOR EASTLAND: As a student in the School of Law of Washington and Lee University, Lewis F. Powell, Jr. had a consistent record of excellence in each of his three years, receiving his LL.B. degree with top standing in 1931. It is significant that he was able to achieve this record in his first year of law study while serving as President of the University Student Body, the highest elective office in student government. For his outstanding contribution as a student to the welfare of the institution, the University faculty in 1929, when he received the baccalaureate degree and was elected to Phi Beta Kappa, voted to award him the Algernon Sydney Sullivan Medallion. This honor is conferred each year on that student in the graduating class who "excels in high ideals of living, in spiritual qualities, and in generous and disinterested service to others."

The words of this award were a portent of Lewis Powell's subsequent career as a member of the legal profession and public spirited citizen, maintaining those high ideals and qualities in the practice of his profession. He also gave generously of his time and talents in serving as Chairman of the School Board of the City of Richmond and on the State Board of Education of Virginia. He made the same generous contribution to the affairs of the organized bar of his state and of the nation, in recognition whereof he was elected President of the American Bar Association and served with great distinction in that office in 1964-65.

We sincerely believe that Lewis Powell possesses those attributes which eminently qualify him for service on the Supreme Court of the United States.

Very truly yours,

ROY L. STEINHEIMER, JR., DEAN 1968-
CHARLES P. LIGHT, JR., DEAN 1960-1968.

STATEMENT OF CARLISLE H. HUMELSINE

I am honored to have the opportunity to appear today to testify before you in support of the President's nomination of Lewis F. Powell, Jr. of Richmond, Virginia, to the Supreme Court of the United States.

Lewis Powell and I have been personal friends and business associates for many years. Mr. Powell, a gentleman of impeccable credentials, is, in my judgment, one of the nation's most scholarly, perceptive and capable lawyers. Furthermore, he has applied his academic and legal education and experience in both professional and related fields, so that his home state of Virginia and, indeed, the whole country have benefited from his public service.

As a trustee of the Colonial Williamsburg Foundation, Mr. Powell has also served for many years as general counsel and as a member of the executive and finance committees. In this period, I have had the privilege of working intimately with him in the development of long-range plans for the fulfillment of the educational aims and goals of Williamsburg. To these matters he has brought qualities of judgment and farsightedness that, in large measure, are reflected in all that Williamsburg stands for and means to the American public today.

In his profession, of course, he has served first as president of the American College of Trial Lawyers, president of the American Bar Foundation, the research agency of the American Bar Association, and, finally, as president of the American Bar Association, in which position he served with great dedication and distinction.

In Richmond, his home city, he served for nine years as chairman of the Richmond Public School Board, before his appointment to the Virginia State Board of Education. In these capacities, Mr. Powell's influence was an important factor in guiding the Richmond school system successfully and smoothly through the years of change and adjustment following the Brown decision in 1954—years in

which so many other school systems in Virginia and elsewhere were torn apart by disagreement and racial distrust.

As a senior member of his firm in Richmond, Mr. Powell has participated either directly or indirectly in an almost boundless variety of legal matters touching both the public and private sectors, in which his judgment, devotion to reason, and sense of fairness have been consistently applied. He has served so many public and private groups both in Virginia and elsewhere, in fact, that he will be sorely missed when his responsibilities on the Court make it no longer possible for him to continue to share his wisdom, intelligence, and integrity with those who have relied so heavily upon him in the past.

I know that I speak for many thousands of Virginians and Americans when I say that the appointment of Lewis F. Powell, Jr., as a Justice of the Supreme Court of the United States is in the finest and highest traditions of public service in this country.

STATEMENT OF A. E. DICK HOWARD

I am A. E. Dick Howard, professor of constitutional law at the University of Virginia. I appear today to support the nomination of Lewis F. Powell, Jr., to be Associate Justice of the Supreme Court of the United States.

For two years, from 1962 to 1964, I served as law clerk to Mr. Justice Hugo Black of the Supreme Court. I came away from that experience with a deepened appreciation for the Court as an institution and for the richness of the judicial process. I also came away with some appreciation of the qualities which one would hope to find in a Justice of the Supreme Court.

The affection I had for Justice Black and the respect I have for the Court are among the reasons I am here today. But a further reason is that I believe I have had an unusual perspective on Lewis Powell—a perspective from which I can draw some observations about his fitness for the position for which he has been nominated.

Lewis Powell's record of public service is already well known to you. I prefer to speak instead of qualities in Mr. Powell which I have seen at firsthand through a close working relationship—qualities which will make Lewis Powell a superb Justice of the U.S. Supreme Court.

I worked with Lewis Powell in a context not unlike that of the Court itself. In 1968-69 I was Executive Director of Virginia's Commission on Constitutional Revision, on which Mr. Powell served as a member. That commission produced the recommendations which, as revised by the General Assembly and approved by the people, became Virginia's new Constitution, effective July 1 of this year.

This revision was the first complete overhaul of Virginia's Constitution since the turn of the century. It produced a document which will help Virginia respond to the needs of education, state finance, the environment, and other areas in the closing decades of the twentieth century. Lewis Powell was a key figure in this revision.

I worked with the Commission continuously for a year. The commissioners met at frequent intervals, sometimes for two or three days at a time, to debate basic problems of constitutional government as reflected in a state constitution—the powers of government, limits on those powers, the liberties of the people. In many ways the deliberations of that Commission were as close an approximation as one could imagine to a conference of the Supreme Court.

This was no ordinary study commission. It included two former Governors of Virginia, a law dean who is now a judge of the World Court at the Hague, two men who now sit on the federal bench, three who sit on the Supreme Court of Virginia, and others of like calibre.

It is no disrespect to the other members of the Commission to say that Lewis Powell brought exceptional talents and qualities of mind to the work of the Commission. It is those talents and qualities which, with Lewis Powell's record as a lawyer and a public servant, make him so eminently qualified to take a seat on the nation's highest court.

INTEGRITY

To begin with, Lewis Powell is endowed with an unusual sense of integrity and values—a sense which has been reflected throughout his career. In the deliberations of the Commission, he sought always to appreciate the philosophical foundations and the social and ethical implications of any proposal. No man could have made a more honest and assiduous attempt to free himself of personal, business, or other considerations extrinsic to the merits of a question before the Commission.

CONSCIENTIOUSNESS AND HARD WORK

All the members of the Commission were busy men, but none more so than Lewis Powell. Yet every time he spoke to a question, the thoroughness of his research and preparation was evident. Lewis Powell is something of a legend as regards his capacity for hard work. He couples that capacity with an unwillingness to do anything but the most conscientious job of understanding a question, its alternatives, its likely consequences.

CRAFTSMANSHIP

The Commission divided itself into five subcommittees, each proposing drafts to revise various parts of the Constitution. Lewis Powell's drafts were prepared with a meticulousness and craftsmanship which any lawyer would envy. He has a keen sense of the uses of legal analysis and a marked flair for the articulation of an idea. The craftsmanship of his opinions as a Supreme Court Justice are likely to be in the admirable tradition of Mr. Justice Harlan.

JUDICIOUS TEMPERAMENT

Qualities of integrity, conscientiousness, and craftsmanship are all important to a judge. But there is one more quality which peculiarly characterizes the judicial process: the quality of judiciousness—the ability to hear and decide cases with a sense of proportion and balance, the ability to be detached and even-tempered which is so essential to the Anglo-American tradition of justice.

Lewis Powell has that judicious temperament. Time after time I have seen him able to state with clear logic a legal or constitutional question, to sum up and evaluate competing interests or factors, and to propose a moderate and judicious solution. He prefers reason to emotion, reflection to impulse, and moderation to extreme. In a tribunal beset by so many sensitive and thorny questions, Lewis Powell would be a joy for his fellow Justices to work with.

To make my generalizations more concrete, I could readily give specific examples drawn from the Commission's deliberations. However, the attorney-client relation which I had with the Commission precludes my speaking to specific questions which were resolved within the Commission. For illustrations of Lewis Powell's approach to legal problems, I turn therefore to examples drawn from matters of public record.

I believe that my own impressions—drawn from a close working relationship—are borne out by Lewis Powell's public record. I believe, moreover, that his articles and speeches, which are many, reflect the qualities which I have described.

In preparing to testify before this Committee, I have read Mr. Powell's articles and speeches. In the pages that follow, I have touched on several areas which he has developed in speeches or articles, including the administration of criminal justice, respect for law and for due process of law, availability of legal services, race and civil rights, speech and press, wiretapping, and the Supreme Court itself.

These areas are developed here, not so much to analyze Mr. Powell's views on specific issues, but more to show the manner in which he goes about addressing himself to legal and constitutional questions. What he has said in the totality of his articles and speeches tends, in my judgment, to bear out my personal impressions of him and to suggest those qualities of mind which will serve him well on the Supreme Court.

In short, I believe Lewis Powell to be superbly qualified to sit on the Supreme Court of the United States. The man readily measures up to the most exacting standards which we might ask of a judicial nominee. I hope it will be the pleasure of the Senate to confirm Mr. Powell's appointment.

Criminal justice. Mr. Powell has on several occasions voiced a doubt about the extent to which the Supreme Court has gone in interpreting the constitutional rights of the accused in criminal cases. For example, he was one of four members of the National Crime Commission who, in an additional statement to the Commission's 1967 Report, were critical of the Court's decisions in the *Escobedo*¹ and *Miranda*² cases. Voicing concern about the "adverse impact" of the decisions on law enforcement, those who signed the additional statement made several pro-

¹ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

posals, including the judging of confessions on the ground whether they are genuinely voluntary.³

At the same time, Mr. Powell and the other signers took care to say that decisions such as *Miranda* and *Escobedo* must be respected and enforced as the "law of the land" unless and until changed by processes available under our form of government. Likewise, the signers lamented the "unfair—and even destructive—criticism of the Court itself" and urged that those who would criticize particular decisions of the Court must recognize "the duty to support and defend the judiciary, and particularly the Supreme Court, as an institution essential to freedom."⁴

Finally, in seeking to redress what was seen as an imbalance between the rights of the accused and the interests of society in being protected against crime, Mr. Powell and the other signers concluded that

... concern with crime and apprehension for the safety of their persons and property, as understandable as these are today, must be weighed carefully against the necessity—as demonstrated by history—of retaining appropriate and effective safeguards against oppressive governmental action against the individual, whether guilty or innocent of crime.⁵

On several occasions, Powell has voiced a concern that "the pendulum may have swung too far" in the effort to assure a fair trial for the accused.⁶ He has reiterated his view that "the right of society in general and of each individual in particular must never be subordinated to other rights."⁷

On each of these occasions, Powell has invariably taken care to put his concern into a larger, and carefully balanced, perspective. In seeking a judicial approach which will help protect society from crime, Powell has urged that "there must be no lessening of this concern for the constitutional rights of persons accused of crime"; our object must be "the striking of a just and reasonable balance" between the rights of the accused and the protection of the citizen from crime.⁸ In fact, he has recognized that some of the very decisions under criticism may come to be viewed as "milestones" in the defense of civil liberties:⁹

The right to a fair trial, with all that this term implies, is one of our most cherished rights. We have welcomed the increased concern by law enforcement agencies and the courts alike in safeguarding fair trial. Many of the decisions of the Supreme Court which are criticized today are likely, in the perspective of history, to be viewed as significant milestones in the ageless struggle to protect the individual from arbitrary or oppressive government.

Further, Powell has been acutely conscious of the Court's difficult role in deciding such cases and the need, even while disagreeing with a decision of the Court, to lend one's full support to the Court as an institution:¹⁰

While there is room for considerable difference of opinion with respect to some of these decisions—and lawyers differ widely as do members of the Court on occasions—it is both unproductive and even destructive to criticize the Court itself. It must be remembered that in all of these cases, the Court was confronted with the difficult question of protecting the constitutional rights of the individual against alleged unlawful acts of government. While lawyers must feel free to express disagreement with its exercise in particular cases, few Americans would wish to undermine or limit this historic function of the judiciary.

As president of the American Bar Association in 1964-65, Powell gave concrete expression to his interest in the administration of criminal justice. On assuming the presidency in August 1964, he suggested three top priorities for the ensuing year, one of them being the launching and financing of a project to formulate minimum standards for the administration of criminal justice.¹¹ The Association's House of Delegates authorized such a project, and a number of studies, under a budget of \$750,000, got underway. Fifteen separate studies have been published;

³ President's Comm'n on Law Enforcement and Adminn of Justice, *A Report: The Challenge of Crime in a Free Society* (1967), pp. 303-08 (Additional views of Messrs. Jaworski, Malone, Powell, and Stoever). There were, of course, dissents on the Court itself, both to the decision in *Escobedo*, 378 U.S. 478, 492-99 (Hasten, Stewart, White, Clark dissenting), and in *Miranda*, 384 U.S. 436, 499-545 (Clark dissenting and concurring; Hailan, Stewart, White dissenting).

⁴ *Report*, pp. 308, 309.

⁵ *Id.*, p. 308.

⁶ "An Urgent Need More Effective Criminal Justice," 51 A.B.A.J. 437, 439 (1965).

⁷ *Ibid.* See also "The President's Annual Address: The State of the Legal Profession," 51 A.B.A.J. 821, 827 (1965). "Civil Liberties Repression Fact or Fiction?" *FBI Law Enforcement Bulletin*, Oct. 1971, p. 12.

⁸ "The President's Annual Address: The State of the Legal Profession," 51 A.B.A.J. 821, 827 (1965).

⁹ "An Urgent Need More Effective Criminal Justice," 51 A.B.A.J. 437, 439 (1965).

¹⁰ *Ibid.*

¹¹ See "The President's Page," 50 A.B.A.J. 81 (1964).

many of them have already had considerable impact on standards of criminal justice in this country.¹²

It is especially revealing of Powell's reasoned reaction to developments in criminal law that, despite his being critical of the *Escobedo* decision, he gave as ABA president his vigorous backing to the Association's search for means to assure that counsel be provided for indigents accused of crime. Noting that the timeliness of this effort had become more evident as a result of such decisions as *Gideon v. Wainwright*¹³ and *Escobedo*, Powell called the Association's program "essential to the realization of equal justice under law. It merits the full and active support of the entire profession."¹⁴

Powell has also expressed himself thoughtfully on other aspects of criminal justice, including fair trial and free press, and trial by jury. Powell's careful effort to seek means of avoiding publicity prejudicial to the rights of an accused while at the same time not impinging on rights of a free press I have discussed below under the heading "Speech and press." Powell has also spoken eloquently in defense of the right to jury trial in criminal cases. The jury he sees as a popular check on government, as a safeguard against political trials, and as a means to help maintain public respect for the legal system.¹⁵

RESPECT FOR LAW AND DUE PROCESS

Powell has devoted several speeches and articles to voicing his concern about civil disobedience, civil disorder and unrest, and lack of respect for the law and its orderly processes. It is obviously a subject which has engaged his particular attention. Most of these articles and speeches were written in the mid-1960's at a time that many sit-ins and other demonstrations were taking place as part of the civil rights movement. Powell has been markedly critical of the doctrine of civil disobedience, which he has called "a heresy which could weaken the foundations of our system of government, and make impossible the existence of the human freedoms it strives to protect."¹⁶ Powell has pronounced civil disobedience to be one of the "contributing causes" to "the disquieting trend—so evident in our country—toward organized lawlessness and even rebellion."¹⁷ He has documented in some detail what he believes to be the "escalation and proliferation" of civil disobedience so that civil disorder and even mob violence is committed in its name.¹⁸

Powell's strong distaste for civil disobedience is evident in his writings. But it is important to see his remarks in their larger setting. His central concern is about disrespect for law, whatever form it takes and whoever practices it. And his object is to reassert the intrinsic relation between respect for law and a free society in which individual liberties are safeguarded.

Powell's writings make this abundantly clear. He has been as quick to criticize white Southern officials as he has civil rights leaders who he believes have prompted disrespect for the processes of the law. He points out, for example, that the "first example of disobedience relating to civil rights may have been set by the Southern legislatures and officials who attempted to disobey or evade court-decreed integration of schools"—conduct which "was—as it should have been—struck down by the courts."¹⁹

Powell's writings reflect an abiding faith in the "rule of law"—one which binds judges, elected officials, and citizens alike. It is, as he sees it, a standard which is the same regardless of one's race or cause. An address which he gave in Florida in 1965 is especially revealing, for he lists a number of segments of society whom he holds equally to blame for a rising spirit of disrespect for law. These include law enforcement officers who by illegal conduct violate their duty to uphold the law, businessmen who flagrantly violate the anti-trust laws, lawyers who fail to

¹² Most of the reports of the Project on Standards for Criminal Justice have been approved by the ABA's House of Delegates, making them official ABA policy; others are in the process of approval. Reports have been prepared on (1) fair trial and free press, (2) post-conviction remedies, (3) pleas of guilty, (4) appellate review of sentences, (5) speedy trial, (6) providing defense services, (7) joinder and severance, (8) sentencing alternatives and procedures, (9) pretrial release, (10) trial by jury, (11) electronic surveillance, (12) criminal appeals, (13) discovery and procedure before trial, (14) probation, and (15) the prosecution function and the defense function.

¹³ 372 U.S. 335 (1963).

¹⁴ "The President's Page," 50 A.B.A.J. 1103, 116 (1964).

¹⁵ "Jury Trial of Crimes," 23 Wash. & Lee L. Rev. 1 (1966).

¹⁶ "A Lawyer Looks at Civil Disobedience," 23 Wash. & Lee L. Rev. 205 (1966).

¹⁷ "Civil Disobedience: Prelude to Revolution?" 40 N.Y. St. B.J. 172 (1968).

¹⁸ "A Lawyer Looks at Civil Disobedience," 23 Wash. & Lee L. Rev. 205, 216-28 (1966).

¹⁹ *Id.*, p. 210. For like criticisms of defiance of the courts as part of "massive resistance," see "Respect for Law and Due Process—The Foundation of a Free Society," 18 U. Fla. L. Rev. 1, 4 (1966); "The President's Annual Address: The State of the Legal Profession," 51 A.B.A.J. 821, 827 (1965).

defend the Supreme Court against unfair attacks, those who promoted massive resistance to *Brown v. Board of Education*, those who counsel civil disobedience and others.²⁰

Nor, in his criticisms of civil disobedience, is Powell insensitive to the fact that civil unrest manifests deeper social problems the root causes of which ought to be attacked as such. "The central causes of unrest in urban areas involve complex and deep-seated social and economic problems."²¹ Similarly, in another talk on civil disobedience, Powell concluded his remarks with a "caveat" to his plea for civil order:²²

Now, a final caveat. I have spoken as a lawyer, deeply conscious that the rule of law in America is under unprecedented attack. There are, of course, other grave problems and other areas calling for determined and even generous action. The gap between the prosperous middle classes and the genuinely underprivileged—both white and black—must be narrowed. . . .

We must come to grips realistically with the gravest domestic problem of this century. America has the resources, and our people have the compassion and the desire, to provide equal justice, adequate education, and job opportunities for all. This, we surely must do.

Asking respect for the law of those who have no genuine access to the courts or other judicial machinery is, of course, a one-sided and unfair proposition. Hence it is noteworthy that, as will be discussed below, Powell, as president of the American Bar Association, actively promoted bar efforts to make legal services more readily available to the poor and to the middle classes and was sensitive to such questions as the right and duty of lawyers to represent unpopular clients.

In many respects, Lewis Powell's uneasiness about the threat which he sees civil unrest to pose to the rule of law and to individual liberties resembles the views stated so forcefully by Mr. Justice Black in a number of Supreme Court opinions in the sit-in and demonstration cases of the 1960's.²³ Indeed, it is interesting that Powell has so often quoted from Justice Black's opinions in those cases.²⁴ The debt to Justice Black is obvious in such statements of Lewis Powell as:²⁵

And here, as a lawyer, may I emphasize that the right to dissent is surely a vital part of our American heritage. So also are the rights to assembly to petition and to test the validity of challenged laws or regulations. But our constitution and tradition contemplate the orderly assertion of these rights. There is no place in our system for vigilantism or the lawless instrument of the mob.

AVAILABILITY OF LEGAL SERVICES

One who urges that disputes be channeled into legal avenues ought properly to ask whether those legal forums are freely available to all regardless of race or economic status. Lewis Powell has taken a special interest in seeking ways of overcoming economic and other barriers to obtaining legal services and counsel.

Referring to a survey undertaken in Missouri in 1960, Powell found it especially disquieting that 74 percent of the lawyers surveyed "believed that wealth, social position, and race may affect standards of justice."²⁶ At a law and Poverty Conference held in June 1965 under the sponsorship of the Department of Justice and the Office of Economic Opportunity, Powell dwelled on the failure of the American legal system to live up to the ideal of equal justice under law:²⁷

Equal justice for every man is one of the great ideals of our society. This is the end for which our entire legal system exists. It is central to that system that justice should not be withheld or denied because of an individual's race, his religion, his beliefs, or his station in society. We also accept as fundamental that the law should be the same for the rich and for the poor.

²⁰ "Respect for Law and Due Process—The Foundation of a Free Society," 18 U. Fla. L. Rev. 1, 2-5 (1965).

²¹ "A Lawyer Looks at Civil Disobedience," 23 Wash. & Lee L. Rev. 205, 228 (1966).

²² "Civil Disobedience: Prelude to Revolution?" 40 N.Y. St. B.J. 172, 181 (1968).

²³ See, e.g., Black's opinions in *Bell v. Maryland*, 378 U.S. 226, 318 (1964) (dissent); *Cox v. Louisiana*, 379 U.S. 536, 575 (1965) (dissent); *Brown v. Louisiana*, 383 U.S. 131, 151 (1966) (dissent); *Addieley v. Florida*, 385 U.S. 39 (1966). For an analysis of Black's views in these cases, see A. E. Dick Howard, "Mr. Justice Black: the Negro Protest Movement and the Rule of Law," 53 Va. L. Rev. 1039 (1967).

²⁴ See "The President's Annual Address. The State of the Legal Profession," 51 A.B.A.J. 821, 827-28 (1965); "Respect for Law and Due Process—The Foundation of a Free Society," 18 U. Fla. L. Rev. 1, 7 n. 18 (1965); "A Lawyer Looks at Civil Disobedience," 23 Wash. & Lee L. Rev. 205, 226-27, 231 (1966); "Civil Disobedience: Prelude to Revolution?" 40 N.Y. St. B.J. 172, 173 (1968).

²⁵ "Respect for Law and Due Process—The Foundation of a Free Society," 18 U. Fla. L. Rev. 1, 7 (1965).

²⁶ "The Challenge to the Profession," 51 A.B.A.J. 148, 149 (1965).

²⁷ "The Response of the Bar," 51 A.B.A.J. 751 (1965).

But we have long known that the attainment of this ideal is not easy. It requires sensitivity, vigilance, and a willingness to experiment. Looking at contemporary America realistically, we must admit that despite all of our efforts—and these have not been insignificant—far too many persons are not able to obtain equal justice under law.

As president of the American Bar Association in 1964-65, Powell spurred steps to make legal services more generally available. On assuming the presidency in August 1964, Powell proposed three items of priority for his term of president, one of the three being an acceleration and broadening of efforts to assure the availability of legal services, in both civil and criminal cases, to all who need them.²⁸ In the president's annual address in August 1965, Powell was able to report on the steps which had been taken during the preceding year toward that goal.²⁹

Powell's August 1965 address is interesting not only for the narrative of events but also for Powell's attitude to them. Speaking of the entry of OEO into the area of legal services for the poor, Powell candidly admitted his own preference for "local" rather than "federal" solutions to the problem. But he chose to lay aside his personal preferences in the face of the demonstrable need for federal involvement without which a sufficient program of legal aid was unlikely.³⁰

It is true that most lawyers would have preferred local rather than federal solutions. Certainly, this would have been my own choice. But the complexities and demands of modern society, with burdens beyond the will or capacity of states and localities to meet, have resulted in federal assistance in almost every area of social and economic life. There is no reason to think that legal services. Might be excluded from this fundamental trend of the mid-twentieth century. Lawyers must be realistic as well as compassionate.

Turning his attention to the problems encountered by middle-income groups in obtaining legal services, Powell implied some reservations about the rise of new trends, such as the increasing reliance on group legal services—trends which might clash with "long-established standards of the legal profession."³¹ But again he seemed to want to avoid a doctrinaire position; even as study of the problem of legal services was proceeding, he asked the bar to

press ahead with every available means to improve existing methods—through greater emphasis on lawyer referral services and through wider experimentation with neighborhood law offices and legal clinics.³²

Availability of legal services can also be a special problem in the case of unpopular causes or individuals. In his president's annual report to the ABA, Powell urged revision of the Canons of Legal Ethics so that the Canons might "with sufficient clarity and particularity express this duty of individual lawyers" [to represent unpopular defendants] as well as "the broader obligations of the Bar generally to discourage public condemnation of the lawyer who represents an unpopular defendant."³³

RACE AND CIVIL RIGHTS

The sense of proportion and balance which is reflected in Powell's writings and speeches is equally present when he touches on questions of race. As already noted, in his condemnation of civil disobedience as it emerged in the civil rights movement, Powell has carefully and consistently laid a full measure of blame at the doorstep of Southerners who undertook massive resistance to court-ordered integration.³⁴ And, in speaking of civil disobedience, Powell has been sensitive to the fact that Negroes often had ample reason to distrust the processes of the law:³⁵

It is true that the Negro has had, until recent years, little reason to respect the law. The entire legal process, from the police and sheriff to the citizens who serve on juries, has too often applied a double standard of justice.

²⁸ See "The President's Page," 50 *A.B.A.J.* 891 (1964).

²⁹ "The President's Annual Address: The State of the Legal Profession," 51 *A.B.A.J.* 821 (1965).

³⁰ *Id.*, p. 823.

³¹ *Id.*, p. 824. On questions raised by Powell concerning the implications of Brotherhood of Railway Trainmen v. Virginia, 377 U.S. 1 (1964), see *id.*, p. 825; "The President's Page," 51 *A.B.A.J.* 3 (1965); "Extending Legal Services to Indigents and Low Income Groups," 13 *La. St. B.J.* 11-17 (1965).

³² "The President's Annual Address: The State of the Legal Profession," 51 *A.B.A.J.* 821, 824 (1965). See also Powell's conclusion that the bar must "explore broadly, and with an open mind" a range of possible solutions. "The President's Page," 51 *A.B.A.J.* 3, 20 (1965).

³³ *Id.*, p. 825.

³⁴ "Respect for Law and Due Process—The Foundation of a Free Society," 18 *U. Fla. L. Rev.* 1, 4 (1965); "A Lawyer Looks at Civil Disobedience," 23 *Wash. & Lee L. Rev.* 205, 210 (1966).

³⁵ *Id.*, p. 206.

Even some of the courts at lower levels have failed to administer equal justice. Although by no means confined to the southern states, these conditions—because of the history, economic and social structure of that region, and its population mix—have been a way of life in some parts of the South. Many lawyers, conforming to the mores of their communities, have generally tolerated all of this, often with little consciousness of their duty as officers of the courts. And when lawyers have been needed to represent defendants in civil rights cases, far too few have responded.

There were also the discriminatory state and local laws, the denial of voting rights, and the absence of economic and educational opportunity for the Negro. Finally, there was the small and depraved minority which resorted to physical violence and intimidation.

These conditions, which have sullied our proud boast of equal justice under law, set the stage for the civil rights movement.

Accordingly, Powell has urged that the "full processes of our legal system must be used as effectively, and with as much determination" against those who would use "violence and intimidation to frustrate the legal rights of Negro citizens" as against any other form of lawlessness.³⁶ And Powell has lamented the "particularly acute" problem of racial prejudice frustrating fair trial and has urged steps to assure fair selection of jurors and impartial administration of justice.³⁷

Powell has reason to know something of the South's passage through the troubled years following *Brown v. Board of Education*. He was chairman of the Richmond School Board from 1952 to 1961, during which time Richmond was able to take the initial steps toward desegregation of its schools without the closing of schools and like traumas through which some other Virginia localities went in the late 50's and early 60's. On the occasion of Powell's nomination to the Supreme Court, the national press, inquiring locally into Powell's role in the desegregation events in Richmond during his chairmanship of the school board, has reported its conclusion that his role was a moderating and constructive one which made possible eventual desegregation without closed schools or other crippling effect on the quality of public education.³⁸

SPEECH AND PRESS

Powell has not taken many occasions to express himself directly on rights of freedom of expression. But in several contexts his views reflect a tendency, in suggesting solutions to whatever problems may be at hand, to be sensitive to the implications for First Amendment freedoms.

For example, in approaching the question of fair trial and free press, Powell is unwilling to see the matter as a "contest between two competing rights." Rather he sees the task as one of seeking an accommodation of both rights "in the limited area where unrestrained publicity can endanger fair trial."³⁹

In response to the problem of release of information which tends to prejudice the accused, Powell has rejected the British approach of emphasizing control of the media itself, e.g. by subjecting the publisher to fine or imprisonment for contempt of court. Powell obviously shares the "uneasy distrust" which Americans seem to have shown for the contempt power.⁴⁰

Moreover, he is not willing to use an approach inconsistent with the "privileged position" which this country affords freedom of speech and press. He prefers instead to emphasize the duty of the bar to police itself and to reach at the source (whether prosecution or defense) information which might prejudice a trial.⁴¹ Even here, his solution is not to bar information permanently, rather to delay it until the jury can reach a verdict, untainted by prejudicial publicity.⁴² Powell's search for a reasoned solution to the question of fair trial and free press is summed up in his statement:⁴³

It is important that the media and the Bar should not view this as a "controversy" or as an attack by one upon the other. We have here a common problem requiring thoughtful and reasoned solutions in the public interest.

³⁶ "The President's Annual Address: The State of the Legal Profession," 51 A.B.A.J. 821, 827 (1965).

³⁷ "Jury Trial of Crimes," 23 Wash. & Lee L. Rev. 1, 11 (1966).

³⁸ See, e.g., Washington Post, Oct. 24, 1971, p. A1, col. 1; New York Times, Oct. 22, 1971, p. 25, col. 5; New York Times, Oct. 16, 1971, p. 1, col. 6; Time Magazine, Nov. 1, 1971, p. 18; Newsweek, Nov. 1, 1971, p. 18.

³⁹ "The Right to a Fair Trial," 51 A.B.A.J. 534, 535 (1965).

⁴⁰ *Jd.*, p. 536. For an instance of Powell's concern about the contempt power, see "Jury Trial of Crimes," 23 Wash. & Lee L. Rev. 1, 10 (1966).

⁴¹ "The Right to a Fair Trial," 51 A.B.A.J. 534, 536 (1965). See also "The President's Annual Address: The State of the Legal Profession," 51 A.B.A.J. 821, 826 (1965).

⁴² "The Right to a Fair Trial," 51 A.B.A.J. 534, 536 (1965).

⁴³ "The President's Page," 51 A.B.A.J. 199 (1965).

Powell's views on civil disobedience have already been noted. The intensity with which he holds those views about confining dissent to legitimate channels raises questions about the implications of Powell's arguments for First Amendment rights. Powell has recognized that problem and has said that his proposals should not be applied in such a way as to infringe on those First Amendment freedoms, although he does not conceive incitement to willful violation of draft laws, income tax laws, or court decrees to be encompassed as rights of free speech.⁴⁴

WIRETAPPING

Powell's views on wiretapping have occasioned some notice. In an article written for the *Richmond Times-Dispatch* and reprinted in the *FBI Law Enforcement Bulletin*, he advanced reasons why requiring a court order for wiretapping in cases involving national security "would seriously handicap our counter-espionage and countersubversive operations." Powell recognized that there could be "legitimate concern" whether a President should have the power of wiretapping in internal security cases without court order and that "at least in theory" there was a potential for abuse. But, apparently resting content with the government's claim of its need for secrecy, Powell dismissed the outcry over wiretapping as a "tempest in a teapot." Citing figures showing that there are only a few hundred wiretaps annually, Powell concluded, "Law-abiding citizens have nothing to fear."⁴⁵

The FBI article, a journalistic piece, was apparently solicited as a rebuttal to an article expressing the opposite point of view.⁴⁶ Powell's article has the ring of a rebuttal about it. It is in the nature of a rebuttal to assume that one side of an argument has been stated and accordingly to argue the other side. Powell's views on wiretapping are more fully and fairly stated in a speech he gave to the Richmond Bar Association on April 15, 1971.⁴⁷ There (as he did also in the FBI article) Powell noted that the more serious wiretapping question arises in internal security cases, as Title III of the Omnibus Crime Control Act of 1968⁴⁸ requires a court order when electronic surveillance is sought to be used in cases not involving national defense or internal security. Believing that it is difficult to draw a distinction between external and internal threats to the country's security, Powell noted that the question whether the President has inherent power to order a wiretap in internal security cases is pending in the courts. He therefore looked to the courts to lay down guidelines in this "perplexing" area.

Taking the totality of Powell's views on wiretapping, it is clear that he recognizes and approves the place of prior court order, with carefully fashioned limitations and safeguards, when wiretaps are used against domestic crime. His position on wiretapping in internal security cases is less clear. His FBI article would suggest he has resolved that question in favor of the President's inherent power in such cases, but his Richmond bar speech would imply a more guarded and tentative position. The bar speech, the tone of which is far more characteristic of his other speeches and writings and which was made to a legal audience, would seem to be the more accurate indicator of Powell's approach to the constitutional aspects of wiretapping. It would suggest that as a Justice he would approach the question of wiretapping with an awareness of the various, arguably competing factors which bear on a judicial resolution of the question.⁴⁹

SUPREME COURT

Like most lawyers, Powell has felt perfectly entitled to criticize decisions of the Supreme Court, for example, the *Escobedo* and *Miranda* decisions. But he has a lawyer's reverence for the Court as an institution. Repeatedly he has called upon lawyers to avoid destructive criticism of the Court and has rebuked them for their failure to defend the Court against such criticism.⁵⁰

⁴⁴ "Civil Disobedience: Prelude to Revolution?" 40 N.Y.S.B.J. 172, 189 (1968).

⁴⁵ "Civil Liberties Repression: Fact or Fiction?" *FBI Law Enforcement Bulletin*, Oct. 1971, pp. 9, 10-11.

⁴⁶ Bernard Gavzer, "Is Individual Freedom Threatened by Growth of Government Probes?" *Richmond Times-Dispatch*, June 6, 1971, p. Fl, col. 1.

⁴⁷ Manuscript of text of speech.

⁴⁸ P.L. 90-351, 90th Cong., H.R. 5037, June 1968.

⁴⁹ The question of the President's power to authorize wiretaps without judicial supervision in cases involving internal security is now pending before the Supreme Court. See *United States v. U.S.D.C. for E.D. Mich.*, 444 F.2d 651 (6th Cir.), *cert. granted*, 408 U.S. 930 (1971).

⁵⁰ E.G., "Respect for Law and Due Process—The Foundation of a Free Society," 18 U. Fla. L. Rev. 1, 4 (1968); "An Urgent Need: More Effective Criminal Justice," 51 A.B.A.J. 437, 439 (1965); President's Comm'n on Law Enforcement and Admin. of Justice, *A Report: The Challenge of Crime in a Free Society* (1967), pp. 303, 304 (Additional views of Messrs. Jaworski, Malone, Powell, and Storey).

He shows a like sensitivity to ensuring that the Court's independence not be undermined because of criticism of unpopular decisions. In this vein, Powell expressed pointed disapproval of Congress' exclusion of the Justices of the Supreme Court from the general pay raise for other federal judges in 1965—an "unfortunate example" of the pressures which even in an enlightened system can be brought to bear on the judiciary.⁵¹

Powell's belief in an independent and unfettered judiciary is also reflected by criticism of the 1963 proposal to create a "Court of the Union" to review certain kinds of Supreme Court decisions—a proposal which Powell compared to the court-packing proposal of the 1930's. "These," said Powell, "were attacks on the fundamental principles of our government involving the independence of the judiciary and the separation of powers doctrine."⁵²

Summary. To repeat, the burden of the above discussion has not been to give a comprehensive issue-by-issue discussion of Lewis Powell's philosophy or to dissect the position which he has taken on every issue. Rather the purpose has been to take central themes which he has developed in his articles and speeches and to enquire what qualities of mind and temper they reflect. In my judgment, Lewis Powell's writings reflect the qualities which I have seen the man display at firsthand—a devotion to the uses of reason, a finely developed set of principles and values, a skilled craftsman's ability to analyze and articulate, an enduring dedication to the law and the judicial process, and a well-modulated and judicious temperament. Few men are so well qualified by temperament and training to sit on the bench as is Lewis Powell.

STATEMENT OF J. EDWARD LUMBARD, SENIOR JUDGE OF THE SECOND CIRCUIT

My name is J. Edward Lumbard. I am a senior circuit judge of the United States Court of Appeals for the Second Circuit. From December 9, 1959 to May 17, 1971, I was Chief Judge of this Court. I have been a circuit judge since July 18, 1955.

I have known Lewis Powell since December 1963 when the American Bar Association embarked on its project to formulate standards for the administration of criminal justice. I have been closely associated with Lewis Powell in that project during the past eight years. I believe he possesses in high degree all the qualities one would hope to find in a Justice of the Supreme Court. He has integrity, scholarship, an informed and independent mind, a keen sense of civic and professional responsibility, clarity of expression, a tolerance and understanding of the views of others and, above all, such wisdom and judgment as can come only from having played a leading role in the legal profession and in the public affairs of this country.

As President-Elect of the American Bar Association in 1963-1964, Lewis Powell was an active member of the committee which made preliminary studies to determine the range of the criminal justice project. In August 1964 the Board of Governors approved the project and at the same time Lewis Powell became President of the ABA.

I need hardly remind this Committee of the great public concern regarding criminal justice in 1963. By that time numerous court decisions, judicial standards and reports in the news media had made it all too clear that the administration of criminal justice throughout the country was becoming ineffective; it was also apparent that too little was being done to protect individual rights according to constitutional requirements of due process.

The purpose of the ABA project was to formulate and recommend standards which the states and the federal government could apply. In his speeches and writing Lewis Powell repeatedly emphasized the dual purpose of the project: to permit effective law enforcement and adequate protection of the public and simultaneously to safeguard and amplify the constitutional rights of those suspected of crime. Speaking to the New York Bar Association in January 1965, he noted: "the problem—complicated by our dual system of state and federal laws—is how to strengthen our criminal laws and render their enforcement more effective and at the same time accord to persons accused of crime the rights which are a proud part of our Western heritage."

An ABA President, Lewis Powell immediately went to work to recruit the necessary men and money for the criminal justice project. To finance three years

⁵¹ "Jury Trial of Crimes," 23 Wash. & Lee L. Rev. 1, 9-10 (1966).

⁵² "The President's Page," 51 A.B.A.J. 101 (1965).

of effort, he was instrumental in securing grants in equal amounts of \$250,000 from the American Bar Foundation, the Avalon Foundation (now part of the Andrew W. Mellon Foundation) and the Vincent Astor Foundation.

Lewis Powell appointed me Chairman of the Special Committee which was to oversee the six advisory committees charged with formulating the standards. For the advisory chairmen he selected men of the highest calibre only. Paul C. Reardon, justice of the Supreme Judicial Court of Massachusetts; Federal District Judge Richard Austin of Chicago; Alfred P. Murrah of Oklahoma, then Chief Judge of the Tenth Circuit; Walter V. Schaefer of the Illinois Supreme Court; Warren Burger, then United States Circuit Judge in the District of Columbia, and Gerald Flood of the Pennsylvania Superior Court. (Upon Judge Flood's death in 1965 Simon Sobeloff, then Chief Judge of the Fourth Circuit, took his place.)

The Committee on Fair Trial and Free Press, chaired by Justice Reardon, was appointed first because of the urgency of the problems in that field. I mention the names of the men selected for that committee because they show the importance Lewis Powell attached to the project and his ability to summon men representative of all views to resolve difficult problems. Along with Justice Reardon, the following served: Grant B. Cooper, eminent California trial counsel; Chief Judge Edward J. Devitt, of the United States District Court for Minnesota; Dean Robert M. Figg, Jr., of the University of South Carolina Law School; Abe Fortas, then in private practice in Washington, D.C. (who served until he became a Justice of the Supreme Court); Ross L. Malone, former Deputy Attorney General and ABA President, 1958-1959; Judge Bernard S. Meyer, of the New York Supreme Court; Wade H. McCree, Jr., then United States District Judge, Eastern District of Michigan, now Circuit Judge for the Sixth Circuit; Robert G. Storey, former ABA President, former law school dean at South Methodist University; Lawrence E. Walsh, former Deputy Attorney General, and former District Judge in Southern New York; and Daniel P. Ward, then State's Attorney for Cook County, now Justice of the Illinois Supreme Court.

Lewis Powell's paramount considerations were that each Committee should enlist the most knowledgeable members of the various disciplines of the profession and that it should be representative of all sections and all points of view. Thus the 78 members of the project included 15 federal judges, 15 state judges (including three state chief justices), 6 state prosecutors, 2 public defenders, 29 practicing lawyers, 8 criminal law professors and 3 law enforcement officials. In addition, he called upon law schools from every section of the country to furnish reporters and advisors.

When Lewis Powell finished his term as ABA President in August 1965, he was appointed to and served with me on the Special Committee, and has remained a member ever since.

When the ABA project began in 1964, Lewis Powell freely conceded that he knew little about criminal procedure and had had virtually no experience in the field. But as standards were drafted and proposals were made, he studied them carefully, participated in the debates and expressed an informed view on the issues to be resolved. In the course of the Special Committee's review of the proposed standards, Lewis Powell became the Committee's most knowledgeable member. He played a leading role in supporting the Committee's recommendations during debates in the House of Delegates, after which the standards were approved.

In July 1965, President Johnson appointed Lewis Powell to the President's Commission on Law Enforcement and Administration of Justice. Of the 19 members of the President's Commission, seven were already participants in the criminal justice project. One happy consequence was that the Commission and the project frequently exchanged views to avoid duplication of effort. Lewis Powell was one of the most influential and active members of the President's Commission. When the final report was issued in February 1967, Lewis Powell joined with six other members of the Commission in filing a Supplemental Statement of Constitutional Limitations. In this statement the seven members of the Commission expressed their grave concern about the imbalance between law enforcement and protection of the public and the measures which were being mandated by the courts to protect individual rights. While the statement made concrete proposals for constitutional change to strengthen law enforcement, it also pointed out the necessity to retain "appropriate and effective safeguards against oppressive government action against the individual, whether guilty or innocent of crime." Lewis Powell was the principal draftsman of this Supplemental Statement.

In October 1966 the first standards, on fair trial and free press, were issued. Since then there has been a steady succession of reports on all the important areas of criminal justice. Separately bound, these standards are to be found in the libraries of most of the judges of this country; they are cited frequently in judicial opinions of trial and appellate courts, including the Supreme Court of the United States.

Two examples will suffice to show the far-reaching impact of the project's work. The standards on Pleas of Guilty, recommending in detail the procedure which a court should follow in receiving and acting upon guilty pleas, went further than the Rules of Federal Criminal Procedure. Recently, the Advisory Committee on Federal Rules of Criminal Procedure recommended additional provisions regarding pleas of guilty which closely follow the ABA criminal justice proposals. These proposals will next be acted upon by the Judicial Conference of the United States and the Supreme Court before being presented to Congress.

Second, when the judges of the Second Circuit, troubled with the problem of prompt disposition of criminal cases, announced new rules to become effective on July 5, 1971, they based their action on the ABA standards calling for definite time limits within which criminal cases must be disposed. Similarly, just a few days ago, on Friday, October 29, 1971, the Judicial Conference of the United States approved a new federal rule requiring each district court in the country to make rules for the prompt disposition of criminal cases, with the approval of the appropriate circuit council.

I think it fair to say that with respect to pleas of guilty and the prompt disposition of criminal cases, the ABA standards have greatly expedited action by state and federal authorities.

Of course, it took many of us working over a period of years to produce the ABA standards, and the work still goes forward. But this work would have fallen far short of the impact it has achieved and the acceptance it has won from the public, as well as the bar and the bench of this country, had it not been for the leadership, the wisdom, and the legal ability of Lewis Powell.

In conclusion, Mr. Chairman, it is my opinion that Lewis Powell is highly qualified in every respect to serve as the Justice of the Supreme Court of the United States.

STATEMENT OF JOSEPH D. TYDINGS

It is a pleasure to appear before my former colleagues on the Judiciary Committee in the happy posture of supporting the nomination of Lewis Powell of Virginia to be Justice of the Supreme Court of the United States.

Lewis Powell not only is a distinguished lawyer, he is a truly fine human being. My contacts with him during the years I was chairman of the Subcommittee on Improvements in Judicial Machinery were many. Without exception, we were involved in the same efforts to improve the judicial system of our country and to insure that all Americans had equal justice. It's very doubtful that the Legal Services for the Poor Program of OEO could have been instituted without the support and leadership of Lewis Powell who, at the time the Congress considered the initial authorization and funding, was president of the American Bar Association. Lewis Powell not only supported the neighborhood legal services concept, he pioneered it.

The work of my Subcommittee in drafting the Title of the Civil Rights Act of 1966, which related to Federal Jury Selection, was greatly bulwarked by Lewis Powell's support.

Whenever a particularly difficult problem of legislation concerning Federal Judicial Reform was before our committee, Lewis Powell was always available to counsel and assist.

Last year when the Senate refused to advise and consent to the nomination of J. Harrold Carswell to be Justice of the Supreme Court, President Nixon took occasion to criticize the United States Senate for failure to follow his mandate and, in fact, accused the Senate of blocking the nomination because Mr. Carswell was "a Southerner and a conservative." In response to that intemperate outburst, I delivered a speech on the floor of the United States Senate in which I enumerated the names of a number of distinguished Southern conservative judges and lawyers who would be enthusiastically received as nominee for our country's highest court by me and I felt many of my colleagues in the Senate on the basis of their legal background and qualifications. Some of you may recall that I headed that list with the name of Lewis Powell of Virginia. I felt that

way in 1970. I feel that way today. I urge you to report his nomination favorably to the Senate and urge the Senate to advise and consent to Lewis Powell to be Justice of the Supreme Court of the United States.

STATEMENT OF ARMISTEAD L. BOOTHE: SOME OF LEWIS POWELL'S CONTRIBUTIONS TO EDUCATION AND CIVIL RIGHTS IN VIRGINIA

As Virginia entered the 1950's, some of her lawyers and legislators were convinced that the Commonwealth and the South had not been adequately informed or prepared for the social changes that faced them. Students of the U.S. Supreme Court decisions after 1935 were aware of the possible imminence of a social revolution. Lewis Powell was one of the moderate, cool, farsighted students of the law who shared this realization.

From the date of the *Brown* decision in 1954, he was a stalwart member of an elite group of Virginians who saw that the Commonwealth's schools must not be closed. From July 1954 onward, the issue in the State was just as sharp as a new knife blade between an assignment (or freedom of choice) plan, to keep the schools open, or massive resistance, to cripple them. During the next five crucial years Lewis Powell, then Chairman of the Richmond School Board, placed himself effectively with the minority who felt obligated to uphold the law and the Virginia public school system.

He was one of two Virginia citizens more responsible than others for impressing businessmen and influential persons of all classes that irreparable damage would be done to human beings and to economic resources of Virginia resulting from the collapse of education. By March of 1959, 14,000 Virginia children were out of school. Thanks to the sterling work, often behind the scenes, done by executives in Norfolk, Virginia, and by Lewis Powell and Harvie Wilkinson in Richmond, Governor Almond was convinced that the state's educational salvation lay in superseding the massive resistance laws with a workable assignment plan. This plan in April of 1959, passed the House of Delegates by a slim margin and was enacted by the Senate by a single vote. Powell should be given full credit for convincing a good many of the necessary conservatives that they should be members of the group which finally turned out to have a one-man majority.

Perhaps today there are some younger people who do not remember the 1950's or the humanity, the regard for law, and the farsightedness of a few people like Lewis Powell, who helped Virginia, in a Virginia way, to survive the Commonwealth's severest test in this century. Many accolades could be given to Powell's judgment, fairness, intelligence, and other judicial attributes. Men and women who can vouch for his virtues are legion. This statement is simply intended to be a brief word picture of a courageous American legal soldier under fire.

I note from the news that the congressional black caucus is opposing Powell. If the distinguished members of that group could remember the 1950's and could get all the available facts, they would not oppose him. They would approve of his selection and thank the good Lord they would have him on the Supreme Court.

STATEMENT OF ORISON S. MARDEN¹

I reside in Scarsdale, New York and have practiced law in New York City since 1930.

I have known Lewis F. Powell, Jr. for upwards of twenty years. As fellow members of the House of Delegates of the American Bar Association and, for a time, as fellow officers of that Association and of the National Legal Aid and Defender Association, I have had ample opportunity to observe and to appreciate the qualities of this truly great lawyer and citizen. I sincerely believe that all who have had an opportunity to observe his qualities share my opinion that he is superbly equipped for service on the highest court of our land. A new acquaintance will find that it takes very little time to discover the strength of his integrity, the keenness of his mind, his well balanced judgment and, most refreshing, his friendliness and lack of pomposity.

Another quality which I have observed in Mr. Powell—a rare quality, unfortunately—is his ability to reconcile differing views. I have seen this happen frequently at meetings of the Board of Governors and the House of Delegates of

¹ Former President of the American Bar Association, the New York State Bar Association, The Association of the Bar of the City of New York, and The National Legal Aid and Defender Association.

the American Bar Association. Lawyers have a tendency to be independent thinkers and to express their views vigorously. Time and time again I have seen Mr. Powell reconcile differing views to the satisfaction of all concerned.

As others will no doubt speak of the qualities I have mentioned, I will limit this statement to two episodes within my personal knowledge which, I think, demonstrate Lewis Powell's deep concern for the true administration of justice and in assuring equal access to justice for all our citizens, rich and poor alike, and of whatever color, creed and religion.

I will refer first to Mr. Powell's part in establishing the Legal Services Program of the Office of Economic Opportunity. This occurred in February 1965 during his presidency of the American Bar Association. The Office of Economic Opportunity, then under the command of R. Sargent Shriver, proposed the funding of legal assistance offices wherever such offices would be welcomed by local community groups and there was a demonstrated need for legal assistance for those who could not pay for legal advice and assistance. Many lawyers were skeptical of the program, fearing it as an attempted socialization of the profession or an intrusion by the Federal Government in local affairs.

Mr. Powell, however, saw the program as a practical means of implementing a basic ideal of the profession, providing legal assistance to all in need of legal help. He, therefore, took the leadership in proposing to the House of Delegates of the American Bar Association that the profession give wholehearted support to the program, assist in its development and give the direction and leadership needed to assure that the services would be provided in a professional manner. This was statesmanship of high order at a time when it would have been easier to have temporized or opposed the program.

Mr. Shriver has publicly acknowledged that Mr. Powell's leadership assured the wide acceptance needed to properly launch the program. Despite growing pains and local problems, it is now generally accepted that the Legal Services Program is perhaps the most successful of the various programs initiated by the Office of Economic Opportunity. Much of the credit for this success rightfully belongs to Mr. Powell.

The second instance to which I will refer is Mr. Powell's part in setting up the Section of Individual Rights and Responsibilities of the American Bar Association. This also had its origin during his time as President and Immediate Past President of the Association. In February 1965 a proposal had been submitted by Dean Jefferson Fordham of the Law School of the University of Pennsylvania for the establishment of a Section of Individual Rights. The proposal was considered by a subcommittee of the Board of Governors and by the Board itself at various meetings. It was determined, largely at the suggestion of Mr. Powell, that the objectives of the proposed Section should be balanced and broadened to include the responsibilities of citizens as well as their civil rights. Accordingly, as the Section was finally organized and approved by the House of Delegates of the Association in August 1966, the Association's Standing Committees on American Citizenship and the Bill of Rights, as well as its Special Committee on Civil Rights and Racial Unrest, were all merged into a new section known as the Section on Individual Rights and Responsibilities.

The principal purposes of the new Section, as set out in its By-Laws are:

"(a) To provide an opportunity within the Association for members of the profession to consider issues with respect to recognition and enjoyment of individual rights and responsibilities under the American constitutional system;

"(b) To encourage public understanding of the rights and duties of American citizenship and of the correlative nature of both rights and duties;

"(c) To further public and lawyer understanding of rights and duties under the Constitution and the Bill of Rights with respect to freedom of speech, freedom of religion, freedom of assembly, freedom of movement, enjoyment of property, fair trial, and equality before the law;

"(d) To encourage public respect for law and due process and an appreciation that the vindication of rights must be accomplished by lawful and orderly means;

"(e) To nurture a sense of responsibility on the part of lawyers, individually and as a profession, in the recognition and enforcement of individual rights and duties and in the discharge of their responsibilities with respect to assuring fair trial and equality of justice for all persons;

"(f) To study and recommend methods of maintaining a proper balance between the rights of those accused of crime and the rights of the general public to be protected in life, person, and property;

"(g) To study the need and recommend appropriate action for the protection of individual rights against the arbitrary exercise of power at any level of government."

The first Chairman of the new Section, Dean Jefferson Fordham, acknowledged the leadership given by Lewis Powell in his first letter to the membership. He wrote, in part:

"There is no question but that the leadership of Past Presidents Lewis Powell and Edward Kuhn * * * were highly significant in giving strong support for the Section. I acknowledge this with warm appreciation."

At the meeting of the House of Delegates in August 1966, a time when I happened to be President of the Association, I publicly acknowledged his leadership in these words:

"I think the man you should hear from at this time is the real architect of the Section as it has finally emerged from the Board of Governors and that is our Past President, Mr. Powell."

I submit that the two examples which I have briefly described give ample evidence of Mr. Powell's deep concern for justice and that it be made equally available to all; and, further, that he is concerned with the responsibilities of citizenship as well as with the civil rights of individuals. His well balanced belief in our constitutional system and in equal justice under law, coupled with exceptional integrity and high competence as a lawyer, give ample assurance that Mr. Powell meets the highest standards for appointment to the Court.

STATEMENT OF BERNARD G. SEGAL

My name is Bernard G. Segal. I am a practicing lawyer in Philadelphia, Pennsylvania, and a member of the Bar of the Supreme Court of the United States. Of relevance in view of the purpose of my testimony may be the fact that I have served as President of the American College to Trial Lawyers; Chairman of the Board of the American Judicature Society; currently Vice President, having been for thirteen years Treasurer, of The American Law Institute; and President of the American Bar Association, having been for six years Chairman of its Standing Committee on Federal Judiciary and six as Chairman of its Standing Committee on Judicial Selection, Tenure and Compensation. I serve as a charter member of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

Commencing with my testimony as Chairman of the Commission on Judicial and Congressional Salaries created by the 83rd Congress, I have been privileged to appear before this distinguished Committee a great many times over the past two decades. I have never appeared with greater enthusiasm or deeper dedication than today. For I believe that the duty of this august group in passing upon the fitness of a Presidential nominee to serve as a Justice on the Supreme Court transcends in its momentousness and concern to the Nation any other obligation which devolves upon the Committee. It is therefore with profound satisfaction that I speak in support of a nominee who in my judgment is as eminently qualified to serve on our highest judicial tribunal as anyone who has come before the Committee since I have been concerned with such matters, and I daresay for many years before that as well. In legal education, legal experience and legal competence, he ranks among the elite of the nation's bar.

When I appeared before this Committee on another occasion, I pointed out that there exists a multitude of views on the essential qualities which a nominee to the highest Court of the land should have. An even more divergent pattern of views concerns the nature of the professional experience, the background that best equips a lawyer for service on the Supreme Court. There is no universally accepted formula on these subjects, and to my mind, there can be none. Indeed, any effort to devise a fixed set of prerequisites for this high office, or to establish any particular background of experience should be possessed by all nominees, would in my opinion be inherently unwise. As Mr. Justice Frankfurter, perhaps the outstanding student of the Court in this century, has concluded after a searching study into the backgrounds and the qualities of the Justices who have served on the Supreme Court, lawyers of the stature justifying appointment to the Supreme Court have been found in a variety of professional careers. Once certain basic prerequisites are met, it is not the particular career which a lawyer has had, he points out, but rather his capacious mind and reliable powers for disinterested and fair-minded judgment, his functional fitness, his disposition to be detached and withdrawn, his inner strength to curb any tendency to reach results agreeable to desire or to embrace the solution of a problem before exhausting its comprehensive analysis. My own view has always been that one of the great

strengths of our Supreme Court has derived from the rich cross-section, the diversity, of the backgrounds from which its members have been drawn—judges of lower courts, Federal and State; members of the Congress; on occasion a towering figure in the law drawn directly from the law school.

Lewis F. Powell, Jr. comes to the Court directly from an active and vigorous law practice and a very large participation in the extracurricular activities of the profession. I have known him professionally and personally, for many years. In my opinion he is admirably qualified to assume the office of Justice of the Supreme Court and to fulfill with singular distinction the obligations of that crucial position.

Mr. POWELL's superb intellectual capacity is well known to judges and lawyers throughout the land; and it has been abundantly demonstrated by scholarly achievements both in his academic life and in the legal profession. In college he was elected to Phi Beta Kappa and at law school he won honors as a student and was graduated at the top of his class, after which he earned the LL.M. degree at the Harvard Law School.

Lewis Powell is a man skilled and respected in the law. His practice as a lawyer has been as extensive and diversified as it has been distinguished. As a senior member of a Richmond firm, he has represented corporate clients, civic and charitable interests, and impoverished individuals with equal ability and devotion. He enjoys an extremely high reputation as a courtroom advocate at both trials and appellate levels. I have referred to him clients requiring professional service in Virginia and on such occasions to work with him and observe at first hand his all around excellence as a practicing lawyer.

Next, I list Mr. Powell's awareness of his public obligations as a citizen. Here, too, he has been preeminent. To call the roll of the voluntary public services he has worked on, headed and developed, would be to name hospitals and churches, schools and universities, charitable and civic projects of all kinds. These appear in the biographical material before the Committee and I shall therefore not impose upon the Committee's time by repeating them. I merely observe that the public causes which he has headed or worked in have benefitted richly from his participation. It is a deep sense of community that makes a man devote so much of himself so selflessly to so many good causes.

And again without detailing his outstanding service to his country in World War II, I merely point out in passing that his thirty-three months of intensive activity in the USAAF overseas brought him the Legion of Merit, the Bronze Star (United States), the Croix de Guerre with Palms (France), and promotion to the rank of colonel.

In his profession he has been rewarded with the highest offices in the power of his fellow lawyers to bestow—the Presidency of the American College of Trial Lawyers, the highly prestigious honorary organization of courtroom advocates; the Presidency of the American Bar Foundation, the very active and useful research arm of the American Bar Association; and of course, the Presidency of the American Bar Association, now comprised of more than 150,000 dues paying members and having in its House of Delegates, of which Mr. Powell is a Life Member, representatives of organizations comprised of more than 90% of the lawyers in America. These honors came to him after he first received recognition in his own community by election as President of the Richard Bar Association. Of the numerous other high offices he has held in leading organizations of the profession, I mention only his Vice Presidency of the National Legal Aid and Defender Association and his directorship in the American Judicature Society.

In stating that Mr. Powell is conceded by everyone knowledgeable in ABA affairs and history as having been one of the most effective, most dedicated, and most beloved Presidents the American Bar Association has ever had, I do not lose sight of the fact that past Presidents of the American Bar Association include such men as William Howard Taft, Elihu Root, John W. Davis and Charles Evans Hughes. Rather than rank him with them, I think I can say with authority, having so recently spent two intensive years in the American Bar Center and traveling around the country that there is no one who is held in greater admiration or more genuine respect than he by the present and former officers and staff of the American Bar Association.

During the two years that he was ABA President-Elect and President, he placed the Association in a new position of leadership in terms of pragmatic institutional recognition of the vast social and technological changes that characterize our times, and in the adoption among others of highly significant programs and policies designed to improve the administration of criminal justice, to fulfill

the obligations of lawyers to provide legal services to the needy members of our society, to reevaluate and reevaluate the ethical standards of the profession, and to enhance the general reputation of lawyers.

The Criminal Justice Act of 1964, providing for compensated counsel in federal courts for indigent defendants charged with felonies or serious misdemeanors, having been enacted and gratifying progress having been made in a number of states, Mr. Powell, as President of the Association, alerted the profession to the magnitude and urgency of the need for counsel in criminal cases; and he skillfully stimulated action by the organized bar to meet that need. He also reminded the bar that its responsibility was no less crucial in the civil justice field.

When the Economic Opportunity Act was enacted in 1964, authorizing community action programs designed to help the impoverished through legal services and other means in local communities across the country, there was considerable concern among some members of the profession as to whether the legislation, because it involved massive participation by the federal government in legal aid, would receive the support of the organized bar. Most lawyers would have preferred local rather than federal solutions. But under the leadership of Lewis Powell, who recognized that the complexities and demands of modern society required legal services assistance that were beyond the will or capacity of the profession, or even states and municipalities to meet, the American Bar Association assumed the national leadership in persuading the organized bar at all levels to embrace the OEO Legal Services Program then before the Congress. This not only helped rekindle the conscience of the bar in a critical area in which it had certainly not distinguished itself, it provided the support the program needed to get off the ground.

In a letter I received from Mr. Sargent Shriver last September, he referred to the magnificent leadership of Mr. Powell in the formulation and the effectuation of the national program. He has praised, too, Mr. Powell's statesmanship in the identification and critical appraisal of its obvious problems and uncertainties. Mr. Shriver added that he had "come to believe that the Legal Services Program small though it is, will rank in history with the great triumphs of Justice over Tyranny . . . (and) one of the brightest achievement in our nation's history."

In recognizing the need for broader and more efficient legal services for the poor, Mr. Powell did not overlook the mounting problems of other segments of the public in obtaining adequate legal services—the millions of persons who are not so impoverished as to be qualified for legal aid but who nevertheless require legal services and cannot afford to pay for them. And so, at his instance the American Bar Association created still another agency, this time to ascertain the availability of legal services to all segments of the society, the adequacy of existing methods and institutions for providing them, the need for group legal programs and their relation to the profession's ethical standards, the most expeditious and effective way to provide such services to a greatly enlarged clientele. "But even as study progresses", Mr. Powell urged, "the organized bar at all levels must press ahead with every available means to improve existing methods. . . It is axiomatic that those (the legal profession) who enjoy a monopoly position have higher duties and responsibilities. In discharging these the ultimate test must be the public interest."

Recognizing the need for updating the Canons of Professional Ethics including their observance and enforcement, Mr. Powell appointed a new Special Committee on Evaluation of Ethical Standards to deal with that subject. In doing so, he directed the Committee's attention to three examples of the need: (1) Wider discourse on fair trial and free press, lawyers being "a major source that may affect the fairness of trials". (2) The representation of unpopular causes and the providing of aid even to the most unpopular defendants. (3) The need to revise the Canons of Ethics to recognize the need for group legal services through lay organizations such as those involved in the recent decisions of the Supreme Court.

Reporting a growing dissatisfaction with the discipline maintained by the legal profession, he courageously acknowledged that the dissatisfaction was justified and requested that the new canons lay down clear, peremptory rules relating directly to the duty of lawyers to their clients and the courts.

One of the most massive undertakings in the history of the Association undertaken during Lewis Powell's administration as President of the American Bar Association was the project to provide minimum standards for the administration of criminal justice. This encompassed the entire spectrum of the criminal justice process—from prearraignment and bail to sentencing, postconviction remedies and correctional treatment. Today, with only one phase remaining to be concluded, the historic Reports of the distinguished committee of judges, lawyers,

and other initially appointed by Mr. Powell provide innovative and effective standards to improve the criminal process. They are under active consideration by legislatures, courts, and law enforcement authorities, and will, in Mr. Powell's prophetic words "help materially in improving the fairness, the certainty and swiftness of criminal justice."

In the area of race relations, the following paragraphs from Mr. Powell's Annual Address are noteworthy: "One cannot think of crime in this country without special concern for the lawlessness related to racial unrest that casts a deep shadow across the American scene. This takes many forms. That which is most widely publicized is the criminal conduct of the small and defiant minority in the South—a diminishing minority that still uses violence and intimidation to frustrate the legal rights of Negro citizens. This conduct is rightly condemned and deplored throughout our country. The full processes of our legal system must be used as effectively, and with as much determination, against racial lawlessness as against all other crime."

He continued: "Every lawyer recognizes that the right of dissent is a vital part of our American heritage. So also are the rights to assemble, to protest, to petition and to test the validity of challenged laws or regulations. But our Constitution and tradition contemplate the orderly assertion of these rights."

There are those who have characterized Lewis Powell as a conservative. I do not like such designations; they are uncertain in meaning and so much of their interpretation lies in the eyes of the beholder. But if Lewis Powell is a conservative, he is one in the classical sense—a man who would preserve the best of existing institutions and forms of government, but not one who has been or ever will be subject to the tyranny of slogans and outmoded formulas. Rather, he is a realist but one who does not merely bow to the inevitability of change; he is hospitable to it, even going out to meet it when appropriate. In the face of changes that are impending, or indeed are already here, which seem overwhelming to many, Lewis Powell is the kind of person who is both undisturbed and unsurprised. He sees such changes as the business of the law and the business of the courts. For while he would recognize that we are headed for a volume and a degree of change in the whole fabric of our life that is wholly without precedent, he would urge that we be equipped in our legal usages, in our vision, in the breadth of our reference, to deal with them, and in view of the urgency to deal with them more speedily than ever before.

He would, I think, call attention to the profound statement of Edmund Burke, who surely would be designated a conservative and who was not an innovator. "We must all obey the great law of change," Burke said, "it is the most powerful law of nature, and the means perhaps of its conservation." It would be Lewis Powell's position, I suggest, that the perpetual challenge to the courts is to accommodate the law to change—in Sir Frederick Pollock's words, "to keep the rules of law in harmony with the enlightened common sense of the nation."

In his public addresses and in his writings, Lewis Powell has expressed forthrightly and candidly his views regarding many of the complex and manifold problems of our society. Based upon those statements and my observations of him, for many years, I am prepared, insofar as ultimate judgment of any man may be forecast by his contemporaries, to predict with confidence that Lewis Powell will be a judge with great fidelity to the best traditions of the Supreme Court, not as a worshipper of the past but as a stimulus toward promoting the most fruitful administration of justice.

I anticipate that his opinions as a judge during these and other troubled times will reflect, not the friction and passion of the day, but devotion to the "abiding spirit of the Constitution". In addition, his extensive experience at the bar and his admirable sense of balance will bring wisdom to the disposition of a considerable body of litigation, outside the passions of popular controversy, that comes to the Court each year. A man of uncompromising honesty—intellectual as well as moral—a man of wisdom and dedication to his convictions, Lewis Powell's singular attributes as a lawyer, his clearheadedness, his resourcefulness, his disciplined intellectual habits, all combined with a due sense of proportion, will, I am sure, enable him to fulfill Mr. Justice Frankfurter's definition of the "duty of justices . . . not to express their personal will and wisdom . . . (but rather) to try to triumph over the bent of their own preferences and to transcend, through habituated exercise of the imagination, the limits of their direct experiences." And at the same time he will in my considered judgment meet Chief Justice Marshall's solemn warning: "We must never forget that it is a Constitution we are expounding . . . a Constitution intended to endure for ages to come and consequently to be adapted to the various crises of human affairs."

Mr. Chairman, it has been uncommonly true in the history of our Court that the challenge of Federal judicial service touches the deepest, most fundamental sensitivities of the men trained in the law who come to the bench. The judge with his personal system of private values will, of all citizens, stand nearest the Constitution with its public system of public values. He will equate the one with the other and in doing so, he will have his unique and precious chance to make sure that American jurisprudence shall have added what Mr. Justice Jackson so eloquently termed "a valuable and enduring contribution to the science of government under law." "Law" he said, "as the expression of the ultimate will and wisdom of the people has so far proven the safest guardian of liberty yet devised." And, Mr. Chairman, I have no doubt that as a Supreme Court Justice, law, as the will and wisdom of the people, is the client Lewis Powell will serve. I believe that as he assumes the lonely and awesome responsibility of making what so often will be irreversible decisions on great and far-reaching questions, he will bring to his task extraordinary capacities, a wise and understanding heart, and a deep and abiding sense of justice. I predict that at the end of his term, Lewis Powell will have joined "the enduring architects of the federal structure within which our nation lives and moves and has its being".

STATEMENT OF HICKS EPTON¹ OF WEWOKA, OKLA.

My name is Hicks Epton. By way of identification I was admitted to the Oklahoma Bar Association in 1932. Ever since I have lived in and practiced law out of the County Seat town of Wewoka, Oklahoma. I have devoted almost all my professional life to the preparation and trial of litigated matters. For five years I was Chairman of the Board of Admissions to the Oklahoma Bar Association. For 12 years I was a member of the National Conference of Commissioners of Uniform State Laws. I was a member of the first Civil Rights Commission of my state and was defending the unpopular cause before it became popular or profitable to do it. By the grace of my peers I am the President of the American College of Trial Lawyers and appear here at the directions of the distinguished Regents of the College who themselves are today on their feet in Court-rooms scattered over the United States.

The American College of Trial Lawyers is an honorary organization of approximately 2300 members called Fellows. It is national in scope and membership is by invitation only. No one is considered for Fellowship in the College who has not successfully and honorably tried adversary causes for at least 60 percent of his time over a period of 15 years. Only those with the highest ethical standards and of impeccable character are considered. Even then the membership is numerically limited to one percent of those licensed to practice law in any State.

The College concerns itself with the improvement of the administration of justice. Illustrative of its specific work is the monumental Criminal Defense Manual which it sponsored and produced, in cooperation with other legal organizations, a few years ago and its later sponsoring of the College for Prosecuting Attorneys. Another example of its work is the careful study, report and recommendations on the Disruption of the Judicial Process published in July, 1970, and which has become a basic document in this vital area. Even now it is studying the prolonged criminal trial and the Class Action problems.

Lewis F. Powell, Jr., has been a long-time Fellow of the American College of Trial Lawyers. He served with great distinction as its President in 1969-1970. Indeed, it was he who conceived the study of the Disruption of the Judicial Process and appointed the Committee which made the study and report.

It has been my good fortune to know Lewis F. Powell, Jr., and his family for many years. I have been intimately associated with him in the work of the College and the American Bar Association. I therefore am pleased to add my personal approval to the official endorsement of the College which at this time I have the honor to lead.

In our opinion Lewis F. Powell, Jr., is easily one of the best qualified men in America for the Supreme Court. He was a superior student in one of the finest law schools in America. Today he is just as serious a student of the law as he was while he was in law school. This seems important because we believe one must first be a good carpenter before he becomes a great architect.

Powell has been and is one of America's outstanding trial lawyers. They come in all sizes, colors, and dispositions; and from every conceivable background. The trial lawyer dips of many sciences and hopefully is blessed by a portion of at least

one art. There are no child prodigies in the field of trial practice. Of necessity a great trial lawyer is a man of compassion because jurors usually are compassionate and the law must assay the facts so the tryer of the facts knows where to bestow the compassion. He must be a man of humility. The writer of Proverbs must have had the trial lawyer in mind when he wrote, "pride goeth before destruction and a haughty spirit before a fall."

The trial lawyer must not always expect to win friends and influence people. He gets his case after infection of the social or business relationship between his client and others. Seldom is there an easy answer and often there is no right answer. He works within the framework of an imperfect adversary system for the simple reason it is all we have and appears to be the best now known. It is small wonder that the English appoint all their high Court Judges from the Bar which is the trial branch of their legal profession. All of this training and self discipline eminently qualifies Lewis F. Powell, Jr., for outstanding work on the Supreme Court. Every Courtroom Powell has entered has been a classroom preparing him for this high purpose.

Although carrying his full share of the heavy practice of a large and busy law firm for many years Powell has always taken time for community work. Even more importantly, we think is his work in the improvement of his own profession and the administration of justice. He believes the members of the legal profession are trustees of it, for the benefit of the public and those who will labor after him, and they have a non-delegable duty to leave the vineyard better than when they entered it. No man has given more than he of his time and energy in the improvement of the administration of justice.

Lewis Powell is endowed by nature with a great mind. By training and self-discipline he has developed what we are pleased to call a judicial temperament. Perhaps it consists of competence, courage and compassion.

Others have asked me to tag him as a liberal or conservative. Frankly, I do not know. I know that he is first, last and always a lawyer, a gentleman and industrious and has the courage to do his duty "as God gives him the light to see it".

STATEMENT OF MAYNARD J. TOLL

My name is Maynard J. Toll. I have practiced law in Los Angeles for more than 40 years, and am one of the senior partners in the firm of O'Melveny & Myers of that city.

I am sure this committee would prefer that I avoid glittering generalities about Mr. Lewis A. Powell, and speak of specifics about which I have personal knowledge. This I shall do.

First, and of utmost importance, is the prime role he played in leading the lawyers of this country to take an affirmative position regarding the proposed Legal Services Program of the Office of Economic Opportunity, and to this accomplishment I will direct the bulk of my testimony. My qualification to speak authoritatively on this subject is that from the Fall of 1966 to the Fall of 1970, I was President, and for several preceding years had been Vice-President, of National Legal Aid and Defender Association, whose sole objective is to bring first class legal services to those who cannot afford a fee.

Shortly after the Economic Opportunity Act became law in 1964 it became apparent that the Act could be used to channel federal funds into the provision of legal services for the poor. At that time the legal aid program was limping along on an annual budget, nation-wide, of the order of magnitude of \$5 million. Here was the first hope for a massive infusion of new money, with a view to the immediate amelioration of the legal problems of thousands of people who previously were wholly without access to a lawyer.

Even more important was the promise that the interests of the poor as a total group would be competently and aggressively asserted for the first time before our courts and legislative bodies, leading to reforms which, over a period of time, might alter basically and drastically the status of the poor in our legal-economic-political system.

The proponents of these plans recognized that their successful implementation would be impossible if it encountered the opposition of the organized Bar of the nation. Given the generally conservative orientation of the Bar such opposition was a real possibility. Only the most optimistic dared hope for an affirmative endorsement by the legal profession as a whole.

Happily, Lewis Powell, President of the American Bar Association from 1964 to 1965, understood the need and had the vision and the courage to see and to seize the opportunity. Refusing squarely to follow the example of the medical profession, and refuting the alarmist argument that this would be socialization of the law, Mr. Powell exerted persuasively and effectively the great prestige of his office and achieved the support of both the Board of Governors and the House of Delegates of the American Bar Association for this new program.

The result was a tenfold increase in the quantity of legal services available to the poor, widespread participation in the program by lawyers throughout the country, active leadership in individual programs by scores of state and local bar associations, the observance of high professional and ethical standards in the interests of poor clients, and a quality of legal representation that is generally on a par with or better than that available to many paying clients.

All this could not have happened without the blessing of the American Bar Association. While Lewis Powell cannot be credited solely with the result, one must have very serious doubt that it could have been brought off without his aggressive leadership. It is beyond doubt that had he been in opposition the proposal would have failed.

During the four years of my presidency of National Legal Aid and Defender Association we had many occasions to express our corporate gratitude to Lewis Powell for what he had done, and I am pleased to bring that same witness to this honorable body today.

Secondly: At the same time that civil legal services were proliferating under the spur of OEO funds, the National Legal Aid and Defender Association was sponsoring a series of demonstration projects in the field of legal services for poor persons accused of crime. This so-called National Defender Project, financed by the Ford Foundation, attracted Mr. Powell's interest and enthusiasm, which assured full cooperation and participation by the American Bar Association. This Project has brought as significant help to poor people, although not as dramatic, as the OEO Legal Services Program.

Finally, I am sure others have testified, or will do so, regarding Lewis Powell's immeasurable contribution of talent, patience, wisdom and common sense to the American Bar Foundation. Of this important adjunct of the ABA he has been President for the past two years, during which I have had the privilege of serving as a director. In this role, time and again he has displayed these qualities, which will make him a great Justice of the United States Supreme Court.

STATEMENT OF PHIL C. NEAL, DEAN AND PROFESSOR OF LAW, THE UNIVERSITY OF CHICAGO LAW SCHOOL

My name is Phil C. Neal. I am Dean of the Law School of the University of Chicago, and I have been a law teacher for approximately 22 years, first at Stanford Law School and for the past ten years at the University of Chicago. My principal fields of interest during this period have been Constitutional Law, Administrative Law, and Antitrust Law. I am one of a group of law teachers working on a history of the Supreme Court commissioned by Congress under the bequest of Mr. Justice Holmes and being carried out under the general editorship of Professor Paul A. Freund of Harvard University. Perhaps it may be relevant to add that my special interest in the Supreme Court, and probably the views I hold as to the role of the Court and the standards its members should meet, owes a good deal to my experience in the 1943 and 1944 Terms of the Court in which I had the good fortune to serve as law clerk to the late Justice Robert H. Jackson.

I am grateful for the opportunity to appear before the Committee today in support of the nomination of Mr. Lewis F. Powell, Jr., to be an Associate Justice of the Court.

I am sure the Committee is fully informed from other and better sources as to the details of Mr. Powell's professional accomplishments, his public service, and his role as a leader of the organized legal profession. I should like only to add a few words in the nature of a personal appraisal, based on the particular relationship in which I have had the privilege of knowing him.

My association with Mr. Powell has been through the work of the American Bar Foundation. The Bar Foundation is a research organization, devoted to improving the understanding and workings of our legal system through scholarly investigation and publication. When it was established by the American Bar Association, the Foundation was located at the American Bar Center on the

University of Chicago campus, partly in the thought that such an enterprise would gain from being carried on in proximity to a national law school. The relationship between the Foundation and the University of Chicago Law School has been a close one. As dean of the Law School I have been a member of the board of directors, of the executive committee, and of the research committee of the Foundation for the past seven years. Mr. Powell has been a member of the board of directors during that entire period. For the past two years he has been President of the Foundation. I have had the opportunity not only to observe Mr. Powell during many meetings of the board but also to work closely with him on numerous problems of joint concern to the Law School and the Foundation. My impressions have also been formed indirectly through two of my colleagues on the faculty of the Law School who have served as Executive Directors of the Bar Foundation during Mr. Powell's tenure.

I can best summarize my views by saying that there is no practising lawyer of my acquaintance whom I would think better fitted to serve on the Supreme Court than Mr. Powell. I may add that this is a view that I have held since long before Mr. Powell's nomination.

I believe Mr. Powell has that exceptional strength of intellect that ought to be the first requirement in a Justice of the Supreme Court. His knowledge of the law has always struck me as that of a first-class generalist. He has a sharp sense of relevance, and a gift for putting his finger on the crux of a problem. He is an attentive listener; his receiving apparatus is fine-tuned. I expect it would be a joy to argue cases before him, for I believe no lawyer could fail to feel that his argument was being heard and understood. Among his other qualities, Mr. Powell is a master of precise and economical expression, a talent that I am afraid is not to be taken for granted among lawyers, even among Justices of the Supreme Court.

Apart from his technical and intellectual proficiency, Mr. Powell has always impressed me as a man with breadth of vision, understanding of current problems and forces in our society, and balanced judgment. He is scrupulously fair. His unfailing courtesy is a reflection, I believe, not merely of good manners but of an instinctive regard for the dignity and worth of other human beings. In his role at the American Bar Foundation he has demonstrated an appreciation for scholarly values and a capacity to recognize the long-range significance of ideas. He has shown a deep concern for improving the legal system, especially in relationship to such major problems as the administration of criminal justice and the adequacy of representation of the poor.

So far as my observation goes, Mr. Powell is a man without dogma or prejudice or any predetermined approach to issues. His concern is with problems, not doctrine. I recall an occasion, Mr. Chairman, when Mr. Justice Jackson was referred to in a newspaper column which was attempting to classify members of the Supreme Court in one way or another. The columnist spoke of Justice Jackson in a somewhat derogatory way as being "unpredictable." The Justice was considerably amused. He remarked that he had never thought it the highest compliment you could pay a judge to say that he was predictable.

I believe that was Mr. Justice Jackson's way of saying that he regarded himself first and foremost as a lawyer. I suspect the same thing is true of Mr. Lewis Powell. I believe that that outlook is a promising foundation for wise and enduring contributions to the development of our fundamental law. My conviction is that Mr. Powell's qualifications justify the expectation that he would become a distinguished Justice of the Supreme Court of the United States.

STATEMENT OF GEOFFREY C. HAZARD, JR., YALE UNIVERSITY, NEW HAVEN, CONN.

My name is Geoffrey C. Hazard, Jr. I have been Professor of Law at Yale University since 1970, and teach in the fields of procedure, judicial administration and the responsibilities of the legal profession. I am a member of the bars of Oregon and California and practiced in both those states. Prior to coming to Yale University, I have taught in the law schools of the University of California, Berkeley (1958-64), and the University of Chicago (1964-70). In addition, from 1960 to 1970 I was Executive Director of the American Bar Foundation, the research affiliate of the American Bar Association. In that capacity I came to know Lewis F. Lowell, Jr.

Mr. Powell was a member of the board of directors of the American Bar Foundation during the entire period in which I was Executive Director. He was a member of the Foundation's Executive Committee for most of those years. He was the President of the Foundation beginning in 1968 and through the end of my service

with that organization. By reason of his responsibilities in this regard, I had the opportunity to work closely with him on a wide range of problems affecting the Foundation, the legal profession and the administration of justice. In virtue of his unusually open mind and generous spirit, the exchanges of ideas that took place between us were frequent and extensive. As a result, I believe I have as full and accurate an estimate of Mr. Powell's qualities of mind and character as anyone whom I have known in the course of my professional life.

Lewis Powell is the finest man of the law I know. He has first class powers of intellect, being able to grasp the essentials of any problem quickly and to pursue its complications to their end. He has judiciousness of temperament equalled by few and exceeded by none that I have met. He has great patience. He is able to give genuine consideration to ideas with which he does not agree and to alter his own views when persuaded. He has very broad knowledge, not only of the law but of the affairs of life and mind generally. He has unfailing concern for others and their interests. He is easy to work with and for.

At the same time, Mr. Powell is very practical, decisive and persevering. He believes in doing things well and properly. He does his work conscientiously, diligently and with great energy. In the affairs of the American Bar Foundation, among the company of some of the country's leading judges, lawyers and legal scholars, his judgment on any matter of moment was always heeded and usually held sway.

Mr. Powell's views differ from my own on many points. In general, I would describe him as considerably more conservative. Yet I have always had the greatest confidence in presenting ideas and proposals to him. He invariably seeks to establish at once the areas of agreement, to illuminate the areas of disagreement as distinctly as possible, and to formulate solutions that do the least avoidable damage to considerations which others feel are important. He is thus at the same time a thoughtful interlocutor, a firm arbitrator and a peace-maker. These qualities seem to me especially fit in a member of the Supreme Court.

STATEMENT OF DEAN MONRAD G. PAULSEN

Gentlemen:

I wish to make a short statement in support of the confirmation of Mr. Lewis Powell of Richmond as an Associate Justice of the Supreme Court of the United States.

Mr. Powell's record has, of course, been fully documented and laid before this Committee. There is no need for me to attempt the comprehensive statement of the reasons I think Lewis Powell should be confirmed. The purpose of my statement is to add emphasis from a particular interest of mine.

For a number of years, I have been studying the general question of the availability of legal services in the United States. When Lewis Powell was President of the American Bar Association one of the great issues laid before the House of Delegates was the question whether the federal program for legal services for the poor operating out of the Office of Economic Opportunity should be supported by the Bar. Mr. Powell's energetic leadership and firm conviction that equal justice for the poor man as well as the rich man prevented the Bar from making the serious mistake which the medical profession has made time and time again in resisting programs for publicly-supported health care.

Today, over 2,000 lawyers in several hundred offices are serving the needs of the poor with the cooperation and help of members of the Bar. The program has been greatly improved by the contributions and guidance which the Bar has given.

Throughout its history, the Office of Economic Opportunity Legal Services Program has been supported by organized Bar and an effective plan for realizing justice has become a reality.

More than any single person, Lewis Powell is deserving of the praise which is appropriate to the founder of an enterprise.

SENATOR BYRD. Mr. Chairman, may I say for the information of the committee that some of the names which the chairman called are persons who are not in the room because they had not been informed of the change in the schedule. That is the reason that some did not rise when their names were called. I wanted to make that clear.

Senator McCLELLAN. Mr. Chairman, I would like to state for the record at this time that I have received letters endorsing both of these nominees, and one letter in particular from Mr. Edward L. Wright of Little Rock, Ark., immediate past president of the American Bar Association. I will ask to be permitted to introduce this into the record at this time. Since all of these witnesses are here this morning to testify or place statements in the record for Mr. Powell, I think it appropriate at this time to introduce this communication from the immediate past president of the bar association.

The CHAIRMAN. It will be admitted.

(The letter referred to follows.)

LITTLE ROCK, ARK.,
November 2, 1971.

Hon. JOHN L. McCLELLAN,
U.S. Senator,
Washington, D.C.

DEAR JOHN: I wish to reiterate my deep and continued appreciation for the affirmative interest you took in proposing me as a possible nominee to the Supreme Court of the United States. From the beginning I felt that my age was an insurmountable obstacle.

While all of us here have a natural and understandable disappointment in the failure of the President to nominate Herschel H. Friday, I am glad that the President came forth with the names of two excellent men. I have known Lewis F. Powell, Jr., intimately for many years and have worked extremely closely with him in many American Bar Association matters. He is a truly great man, whether measured by his impeccable character, his outstanding intellect, or his unselfish activities in the genuine public interest. In my opinion he will become one of the outstanding and recognized jurists of all times to sit on the Supreme Court of the United States.

I am not well acquainted personally with Mr. William H. Rehnquist, but I feel that he has all of the proper credentials to make an excellent member of the Supreme Court. For these reasons I trust that the Senate will promptly confirm both of them.

With warm regards and every good wish, I am
Sincerely,

EDWARD L. WRIGHT.

Senator BAYH. Mr. Chairman, is it appropriate to inquire for the benefit of the committee members what the schedule is going to be?

I was left with the gavel last evening and I advised our colleagues that some of our brethren on the Republican side would have an opportunity to address themselves to the previous witness.

The CHAIRMAN. You were not present when we began. The two Virginia Senators want to go to Senator Willis Robertson's funeral and they are presenting the nominee at this time.

We will go back to Mr. Rehnquist as soon as—

Senator BAYH. That is perfectly fine with me, Mr. Chairman. I just wanted to know what we could expect for the rest of the day.

The CHAIRMAN. Thank you, gentlemen.

Senator BYRD. Thank you.

TESTIMONY OF WILLIAM H. REHNQUIST—Resumed

The CHAIRMAN. Senator Burdick is recognized.

Senator BURDICK. Mr. Chairman, I would like to congratulate the nominee selected by the President.

Much of this ground has been gone over already. I would like to ask one question. Would you like to elaborate on your concept of stare decisis?

Mr. REHNQUIST. I do not know that it would be elaboration. Senator, but I will certainly do my best to give you my ideas on the subject from, as you might imagine, a very general point of view which I feel is all that I could say at this time.

I think that in interpreting the Constitution, one goes first to the document itself, to the historical materials that may be available, casting light on what its framers may have intended, and to the decisions made by the Supreme Court construing it, and I think that precedent is very important in the case of all branches of the law.

I think it is important in constitutional law although I think traditionally it is regarded as less binding in the area of constitutional law than it is, for example, in the area of statutory construction.

I think it is nonetheless important and an important factor to be considered because basically it represents the judgment of what nine other Justices who took the oath of office to faithfully administer the Constitution thought it meant on the facts before them then. And I think any decision rendered in that matter is entitled to great weight by a subsequent Court in considering the same question.

Senator BURDICK. I believe you said yesterday that a unanimous decision would have greater weight than a 5-to-4 decision?

Mr. REHNQUIST. Yes; I did.

Senator BURDICK. But you also attributed weight to the 5-to-4 decision?

Mr. REHNQUIST. Yes; I would.

Senator BURDICK. What did you mean in saying that you thought that precedents had a greater weight in statutory construction than in constitutional construction?

Mr. REHNQUIST. I would hark back, and it seems to me it was Justice Brandeis in the *Ashwander* case, although I may be mistaken both as to the Justice and as to the case, where the observation was made that in the case of statutory construction, *stare decisis* should be given virtually controlling weight because it is always within the power of Congress to change a decision should it feel that the Court has misinterpreted congressional intent, whereas in the area of constitutional law, with the great difficulty of constitutional amendment as opposed to mere revision or amendment of the law by Congress, there is a tendency to be more willing to review a prior precedent on its merits.

Senator BURDICK. Thank you.

That is all I have.

The CHAIRMAN. Where were you, Birch, on the Republican side?

Senator BAYH. When we recessed yesterday, I think Senator Cook or Senator Mathias—why don't we let them decide, Mr. Chairman. Senator Fong was not here.

The CHAIRMAN. I understood you granted the right to be recognized to two Senators.

Senator BAYH. I think we ought to let the minority decide that amongst themselves, Mr. Chairman, if I might respectfully suggest.

The CHAIRMAN. Go ahead, Senator.

Senator FONG. Mr. Rehnquist, I want to join my colleagues in congratulating you on your nomination. You had a visit with me in my office and we discussed a few things. Primarily we talked about the wiretapping law.

You have a great responsibility when you assume the position of a Justice of the Supreme Court. This is a grand nation because it has a great Constitution and very strong Bill of Rights and a Supreme Court which dispenses equal justice under law.

The Supreme Court, as you know, is the last bulwark of freedom and justice for our citizens. Other countries have constitutions like ours. They have copied provisions of our Constitution, our Bill of Rights, but in the execution of these provisions sometimes they forget some of their citizens and render many of them very, very disadvantaged.

I refer to cases, where the Supreme Court of the United States has not only safeguarded the rights of citizens, but aliens too are given the equal protection of our laws.

In some other countries, aliens cannot even inherit what their fathers and mothers have left to them; they must sell their businesses within 6 months.

I know of countries where aliens cannot pursue innumerable different types of business callings. Even being butchers or barbers is barred to them because the Constitution does not give them that right.

I know of countries where people who are born there do not acquire citizenship.

One of the latest cases I have read about is that of two journalists who were born in the Philippines. They were allegedly espousing, I believe, some communist doctrine in a newspaper in Manila and were picked up by the Philippine Government. Even though they were born in the Philippines and had never been in Taiwan, they were put on an airplane and sent to Taiwan to be tried by the Government of Taiwan for communist activities. This despite the fact that they had been born in the Philippines and their activities had taken place in the Philippines.

Yes, there are many countries which have a great constitution—on paper, and yet the citizens are not protected. They do not have the same kind of rights as the people have in these United States.

Here you have a nation with a great Constitution and a glorious history and a fine Supreme Court which has not yielded to pressure from either the executive or the legislative in rendering its decisions.

You have been given a fine recommendation by the American Bar Association. All of the members of the standing committee on Federal Judiciary have felt you are competent; that you are a man of integrity; that you are very capable and you have judicial temperament; but some do not agree with your personal philosophical views.

As you know from our discussion in my office, I was one of four Senators who voted against the omnibus crime bill, I did so because I thought that title III, of that bill went far beyond what should be enacted into our laws. I refer to the wiretapping and the surveillance provisions of that bill.

Am I right in saying, Mr. Rehnquist, that you support the Justice Department's position that the President has an inherent right to use wiretap against those the Department deems to be domestic radicals, whatever that term may include, as well as support no-knock entry by the police and preventive detention?

Mr. REHNQUIST. Senator, I have made public statements as Assistant Attorney General in support of the constitutionality of pretrial detention and in support of the Department's position with respect to wiretapping in national security cases.

Senator FONG. Yes; you support the Justice Department position in that respect, is that correct?

Mr. REHNQUIST. I have done that, yes.

Senator FONG. In fact, certain papers and columnists have averred that you were instrumental in developing the theory that there is an inherent right in the Executive to such use of wiretap or surveillance, even without prior court order. Is that correct?

Mr. REHNQUIST. I would say "No, Senator, I think that five administrations have taken that position from the time of Franklin Roosevelt until the time of President Nixon. We worked in an advisory capacity in our office on the Government's brief to be presented to the U.S. Supreme Court in defense of that authority. We worked with the Internal Security Division people. But we were dealing with materials that had been evolved previously."

Senator FONG. In other words, you are saying you followed the thinking that was evolved by other administrations, that such power was inherent in the Executive?

Mr. REHNQUIST. That certainly was our reading of the exchanges of correspondence between the Attorneys General and the Presidents.

Senator FONG. When you addressed the week-long symposium on law and individual rights held last December at the University of Hawaii, you were quoted in the Honolulu Advertiser as stating in an interview on Hawaiian Educational TV:

I'm not sent out to be objective. I simply do what the Attorney General tells me to do.

That was your feeling at that time when you were a member—as you now are a member of the Justice Department. You did these things and made these speeches according to the wishes of the Justice Department, is that right?

Mr. REHNQUIST. That is correct, with this qualification, Senator: had I felt the positions I was taking or the doctrines I was espousing were utterly obnoxious to me personally, I simply would not have continued in that position, but I did regard myself as an advocate.

Senator FONG. You concurred with the Justice Department position?

Mr. REHNQUIST. I spoke for it as an advocate.

Senator FONG. Yes.

As I said, you are aware that I was one of four Senators who voted against the final passage of the omnibus crime bill because of its far-reaching wire-tap provisions. I was joined only by three of my colleagues in this opposition to the Omnibus Crime Act. My three colleagues were Senator Hart, Senator Cooper, and Senator Metcalf.

As early as May 1968 when the omnibus crime bill was under consideration, I voiced my strongly held opinion that wiretapping and electronic surveillance were enormously dangerous practices presenting an extraordinary threat to our individual liberties. I pointed out that: "In a democratic society, privacy of communication is absolutely essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas."

I then pointed out that: "When we open this door of privacy to the Government—when the door is widely agape, * * * it is only a very short step to allowing the Government to rifle our mails and search

our homes. A nation which countenances these practices," I said, "soon ceases to be free."

As early as May 1968, I pointed out that I was fearful that if wiretapping and eavesdropping practices were allowed on a widespread scale, we will soon become a nation in fear—a police state.

At the hearings this year before the Constitutional Rights Subcommittee it was clearly indicated, whether based upon fact or fancy, we are coming very close to being a nation in fear. All the way from Congressmen, to mayors, to soldiers, to students voiced their fears that they were under surveillance.

I am therefore particularly interested in hearing from you directly as to your personal position in regard to wiretapping and electronic surveillance in general as it relates to the fourth amendment, and your philosophical and legal reasons for such position.

Mr. REHNQUIST. Senator, I was asked the same question yesterday by another Senator and I told him that I felt having been an advocate for the Department in the matter and being presently in the position of a nominee, it would be inappropriate for me to answer that question.

If I might add this observation, having headed for a while last year the Justice Department's program of campus visitations and on one of which I had the pleasure of going to the University of Hawaii, I could not help but realize from talking to some of the student audiences that there was a very real fear in this area.

You made the comment, "whether based on fact or fancy." My impression from what I know about the facts and figures of the Federal Government's wiretapping activities is that it is not based on fact, but as you point out, whether it is based on fact or fancy, it can nevertheless have a chilling effect on one's feeling of freedom to communicate through the telephone and other such means.

And my own hope would be that by a campaign of bringing the facts to the attention of the citizenry, of the actually extraordinarily limited use of these mechanisms by the Government, that some of the fear based not on what is actually done but on third and fourth hand accounts of what is done could be put to rest.

I regret that I feel it inappropriate to answer your primary question.

Senator FONG. Do you feel that the crime bill which we passed has really gone far beyond what you feel we should do in pursuing criminals; that we have really allowed almost an indiscriminate use of wiretapping and surveillance, especially when we go to felonies which do not deal with organized crime or national security?

Mr. REHNQUIST. Senator, that very issue has been decided in two separate district courts and I would assume is probably on its way through the courts of appeal and ultimately to the Supreme Court. I just do not think it would be appropriate for me to answer.

Senator FONG. I see.

Now, do you feel that being such a strong advocate of statutes authorizing the use of wiretapping and surveillance you could sit as a Supreme Court Justice to decide on these cases should these cases come before the Court?

Mr. REHNQUIST. As I suggested yesterday in response to a question, having personally participated in an advisory capacity in the preparation of the Government's brief in the national security wiretapping case, and applying the standards laid down in the memorandum prepared for Mr. Justice White when he went on the Court, I would think

without obviously positively committing myself that I would probably be required to disqualify myself in that case.

Insofar as simply having generally advocated before students, student audiences, or otherwise defended the Government's use of the authority given it by Congress, I believe that I could divorce my role as an advocate from what it would be as a Justice of the Supreme Court should I be confirmed.

Senator FONG. Now, I would like to read you amendment IV to the Constitution of the United States: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

When it comes to searches and seizures, we have one search and one seizure of particular tangible evidence at one particular time and place and it is over. But when it comes to electronic surveillance or where wiretapping is concerned, it is almost unlimited and it is unlimitable because if you have a wiretap on my telephone or you keep me under surveillance, you are also keeping other people who associate with me or call me under surveillance too and wiretap their conversations as well. Do you see that there is a big difference here?

Mr. REHNQUIST. There certainly is a difference between a search warrant for particular tangible evidence thought to be located in a particular physical location and a court order for a wiretap, albeit limited in time, for the reasons that you state, Senator.

Senator FONG. Do you regard wiretapping and surveillance as very dangerous practices?

Mr. REHNQUIST. I think it would be inappropriate for me to answer that question, Senator, in view of my role as advocate. I can certainly say that promiscuous wiretapping I would regard as a very dangerous practice.

Senator FONG. Yesterday, I think, a question was presented to you by either Senator Hart or Senator Kennedy to which you replied that the only—I believe you called it "the only proper role" for secret surveillance was in pursuing criminals.

I should like to explore with you, what you deem to be such "pursuit" of criminals.

One of my objections to the surveillance provisions of the omnibus crime bill was that it permitted the continued surveillance of a person even after indictment, right up to the time of trial.

Again, I quote my statement of May 23 as it appeared in the Congressional Record, page 6196, with the paragraphs rearranged to give continuity of thought here.

I then said.

"The purpose of electronic surveillance is to collect evidence in order to obtain indictment. But under the initial bill (and it was so enacted), we would continue to hound the accused—nailing down the case and copper-riveting it by continuous surveillance—even after the indictment is secured. The bill would allow tapping and bugging even after the date of the indictment, right up to the time of trial.

". . . to so hound a defendant until the day of trial, after he has been indicted, is abhorrent to our enlightened system of jurisprudence.

These are surely police state tactics.

"I am fearful that if these wiretapping and eavesdropping practices are allowed to continue on a widespread scale, we will soon become a nation in fear—a police state.

"This is contrary to our Anglo-Saxon traditions of fair play and justice.

"This is contrary to our most deeply cherished liberty—the right of privacy."

Where does your philosophical approach to this pursuit of criminals end so as not to invade a person's right of privacy under the fourth amendment?

Would you say that after indictment we still have a right to pursue a person, to eavesdrop on him, to keep him under surveillance right up to the time of trial?

Mr. REHNQUIST. With the reservations I previously stated, Senator, and with my lack of familiarity with the detailed provisions of the bill which you are describing, I think I must keep my answer general.

Certainly any sort of electronic surveillance that would interfere with the lawyer-client relationship of a defendant after he has been charged would be very disturbing.

Senator FONG. I am glad to hear that view.

At the present time, Mr. Rehnquist, I am studying several reforms of our system of Federal grand jury proceedings so as to assure greater legal protection to persons subpoenaed to testify as, and I quote, "witnesses on behalf of the Government," with a view to introducing such legislation.

Without considering any specific legislative proposal, would you care to express your views on the practice of subpoenaing a witness to testify before a grand jury on behalf of the Government when the Government has already produced evidence to that grand jury upon which an indictment is sought against this so-called witness on behalf of the Government?

Is not the Government really asking a person to testify against himself in violation of the fifth amendment?

Mr. REHNQUIST. Senator, I have had, I think, one grand jury in my life and I am not intimately familiar with the practices or procedures governing grand juries. I would be hesitant to express a view simply from lack of knowledge on that point.

My impression from the situation which you describe is that at least in some cases the witness would be adequately protected by the invocation of the fifth amendment. However, I can imagine it being used in a harassing manner also.

Senator FONG. But in cases where the witness does not know the nature of the hearing, where he is brought in cold and he is asked questions, when they already have evidence to indict him and they are going to indict him and yet they call him as a witness "for the Government," do you think it is proper for them to subpoena him as a witness for the Government and try to get him to testify against himself?

Mr. REHNQUIST. Oh, I certainly do not think any witness should be tricked by the Government. If your question goes further than that, I would have to almost say I would want to see the particular facts.

Senator FONG. Then, you would say that if what I have described was the procedure of the Government, it would be trickery on the part of the Government.

Mr. REHNQUIST. Well, I would want to know a more detailed set of facts, Senator, to say in a particular case trickery was engaged in by the Government.

I certainly don't think it should be and certainly the type of situation which you describe could in some circumstances amount to that.

Senator FONG. Thank you, Mr. Rehnquist.

The Washington Post on November 3 quotes a Phoenix Democrat as stating that "in terms of legal ability," you are "simply top-notch," that your character is "absolutely unimpeachable," and that he has "no serious doubts" that you should be confirmed, but then he is quoted as continuing, and I quote him again:

Bill has been an intellectual force for reaction. I do not believe he will put the manacles back on the slaves but I am sure from his point of view it will be more than a pause. There will be a backward movement. In terms of race relations I would expect him to be retrograde. He honestly does not believe in civil rights and will oppose them.

On criminal matters he will be a supporter of police methods in the extreme.

On free speech Bill will be restrictive.

On loyalty programs, McCarthyism, he will be one hundred percent in favor.

This type of comment typifies some of the letters that I have been receiving in my office. In fairness to you, Mr. Rehnquist, would you care to comment on this type of statement?

Mr. REHNQUIST. My first comment would be I can defend myself from my enemies but save me from my friends. [Laughter.]

I think that that is not a fair characterization even of my philosophical views. My hope would be if I were confirmed to divorce as much as possible whatever my own preferences, perhaps, as a legislator or as a private citizen would be as to how a particular question should be resolved and address myself simply to what I understand the Constitution and the laws enacted by Congress to require.

Senator FONG. I believe I am satisfied. Mr. Rehnquist, that you will do just that.

Thank you very much.

The CHAIRMAN. Senator Cook?

Senator COOK. Mr. Chairman, may I defer to Senator Scott?

Senator SCOTT. Mr. Chairman, yesterday I reserved the right to offer certain information into the record. I read from it in part yesterday. It was a statement of Attorney General Robert F. Kennedy on the 22d of May 1962, in support of H.R. 10185 which he had caused to be introduced and on which bill he was testifying in favor before this committee.

There were a number of other witnesses and fairly lengthy hearings and I will not again revert to the material except the paragraph which has been mentioned by the witness here, that "All Attorneys General since 1940 have been authorized by the President to approve wire-tapping in national security cases. Attorney General Clark, with President Truman's concurrence, extended this authorization to kidnapping cases," and that "National security requires that certain investigations be conducted under the strictest security safeguards."

I would like to offer that into the record.

The CHAIRMAN It is admitted.

(The material referred to follows.)

STATEMENT OF HON. ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

Mr. Chairman, the problem of wiretapping is most perplexing because it involves the difficult task of balancing protection of individual privacy with the needs of law enforcement to keep pace with modern scientific advancement.

But I am here today because I believe that this balance can be found and because I wish to urge this Committee and the Congress to enact a wiretapping bill at this session.

Many people have strong views on wiretapping and the merits of these conflicting views have been debated for many years. But the fact remains that with all the debate, there has been little action and the result is that the individual rights of privacy in telephone conversations is not being protected at all and the needs of society to protect itself against the misuse of the telephone for criminal purposes are not being met.

So the present situation is entirely unsatisfactory, and on this I believe both the proponents and opponents of H.R. 10185 will agree. It is inconceivable to me that we should permit this situation to continue and it is also inconceivable to me that we cannot find a fair balance between the legitimate needs of law enforcement and the protection of individual rights of privacy.

We believe that H.R. 10185 strikes this balance. It would make wiretapping illegal except when specifically authorized in investigations of certain major crimes—thus giving far greater protection to privacy than exists today while permitting law enforcement officers to use wiretapping to obtain evidence of certain major crimes under the supervision of the courts.

There are those who sincerely feel that the bill would limit law enforcement officers too much. Others, who are equally sincere, feel that the bill would permit too much invasion of individual rights. Different people will draw the line at different places.

But I earnestly hope that differences of emphasis, and disagreements as to detail, will not be allowed to obscure the basic fact that the existing unsatisfactory situation is getting steadily worse and that corrective legislation is needed now.

Why do I say the existing situation is unsatisfactory?

The existing federal law on wiretapping is Section 605 of the Communications Act of 1934, which provides in part:

"... no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ."

This law is unsatisfactory in two respects. It permits anyone to tap wires. Mere interception is not a crime; a crime is not committed until the intercepted information is divulged or published. (Another provision makes it a crime to use such information for one's own benefit.)

Thus even if we find an intercepting device attached to a telephone line, and find out who is doing the intercepting, we still cannot prosecute. We have to find that the information was divulged or published or used improperly. This means that no one's privacy is adequately protected. Anyone can listen in to your telephone conversations, and mine, without violating the federal law.

On the other hand, all divulgence is prohibited. This means that it is against the law for law enforcement officials to disclose in court any of the words they overhear from wiretapping or the substance, purport, or effect of those words—even though what they overhear is clear evidence of a vicious crime.

The Supreme Court so held with respect to federal officers in the *Nardone* case, decided in 1937. And it so held with respect to state officers in the *Benanti* case, decided in 1957. Indeed, the federal courts refuse to receive in evidence, not only the substance of the intercepted conversation, but any evidence obtained as a result of leads which that conversation gave. As a result, wiretapping cannot be used effectively by the federal government or the states to aid in law enforcement, even for the most serious crimes.

The strange paradox is that under this federal law a private individual is free to listen in to telephone conversations for the most improper motives, but law enforcement officials cannot use wiretapping effectively to protect society from major crimes.

State and local prosecutors emphatically agree with me when I say that the law as it exists today does not meet the legitimate needs of law enforcement.

And you will, I think, find complete agreement that it does not adequately protect the privacy of telephone users and the integrity of the interstate telephone network.

I am sure you will agree that legislation is needed and that it is urgently needed. What kind of bill should be enacted?

Again I want to talk today about general principles. We have drafted H.R. 10185 with considerable care. We have furnished a detailed analysis of the provisions of that bill with our letter to the Speaker, and I ask that that letter and the accompanying analysis be included in the record of these hearings.

I don't want to take time in this statement to go into a detailed section-by-section analysis of H.R. 10185 although I will be happy to answer any questions which any member of this Committee may have. I want rather to emphasize certain basic principles which I think must be met in any satisfactory bill, and to show how we have tried to meet them in H.R. 10185.

A satisfactory bill, must in my opinion, do the following:

1. Provide adequate authority to law enforcement officers to enable them effectively to detect and prosecute certain major crimes;
2. Prohibit all wiretapping by private persons and all unauthorized wiretapping by law enforcement officers;
3. Provide procedural safeguards against abuse of the limited wiretapping which it would authorize;
4. Establish uniform standards for the federal government and the states.

Let me take up these criteria in turn and indicate how, in my judgment, H.R. 10185 meets them.

1. The bill must provide adequate authority to law enforcement officers to enable them effectively to detect and prosecute certain major crimes

Wiretapping is an important tool in protecting the national security. In 1940, President Roosevelt authorized Attorney General Jackson to approve wiretapping in national security cases. Attorney General Clark, with President Truman's concurrence, extended this authorization to kidnapping cases.

As Congress has been advised each year by the Director of the Federal Bureau of Investigation, the practice has continued in a limited number of cases upon express permission from the Attorney General. But, as I have pointed out, the evidence received from these wiretaps or developed from leads resulting from these wiretaps cannot be used in court. It is an anomalous situation to receive information of a heinous crime and yet not be able to use that information in court.

And, of course, this applies not only in cases of espionage and treason but in pressing the fight against organized crime. Testimony presented to committees of both Houses of Congress last year highlighted, as did the Kefauver and McClellan Committees' investigations, how the nation is being corrupted financially and morally by organized crime and racketeering.

The problem of organized crime is growing progressively more serious. It is a far graver threat now than in the 1920's and 1930's. The limited wiretapping authority for which we ask in this bill would help greatly in our effort to bring organized crime down to the point where it can be controlled effectively by local law enforcement.

There are over 100 million phones in the United States. The organized criminal syndicates which are engaged in racketeering activities involving millions of illicit dollars, do a major part of their business over this network of communication.

The very fact that the telephone exists has made law enforcement more difficult. It permits criminals to conspire and carry out their activities without ever getting together and, therefore, without giving the police the opportunity to use other techniques of investigation.

The telephone is not only a means of facilitating crime, but it may be an instrumentality of crime. It is used in bribery, extortion, and kidnapping, with the added advantage of protecting the identity of the criminal.

As Attorney General Robert H. Jackson said in 1941: "Criminals today have the run of our communications system, but the law enforcement officers are denied even a carefully restricted power to confront the criminal with his telephonic and telegraphic footprints. Unless we can use modern, scientific means to protect against the organized criminal movements of the underworld, the public cannot look to its law enforcement agencies for the protection it has a right to expect."

I submit that the federal government should be permitted to use wiretaps to investigate and to use the evidence so gained to prosecute for certain specified crimes, with appropriate procedural safeguards and centralized control.

This legislation also is necessary to clarify the authority of state officials to wiretap and use the evidence so obtained. Even though, under applicable state laws, state law enforcement officers may wiretap, recent federal court decisions make it clear that the disclosure in court of evidence obtained by such wiretapping is illegal under Section 605.

Although the federal courts have refused to enjoin the introduction in state courts of such evidence, prosecuting attorneys in New York City have dropped cases dependent on evidence obtained through wiretapping because they feel that to introduce the evidence would be a violation of federal law.

Some state judges no longer will issue orders giving state law-enforcement officers authority to wiretap notwithstanding the fact that the applicable state law authorizes such orders. As a result, a number of important state criminal prosecutions have been abandoned or are in jeopardy.

The particular offenses for which wiretapping should be authorized will, I have no doubt, be the subject of much discussion before your committee. There is room for honest difference of opinion on this point. We have tried to draw a line that seems logical to us. The Congress may feel that we have included too many offenses or excluded some that should be included.

H.R. 10185 would authorize wiretapping and introduction of wiretap evidence in court for the following federal offenses:

Crimes affecting the national security: Espionage, sabotage, treason, sedition, subversive activities and unauthorized disclosure of atomic energy information;

Murder and kidnapping;

Extortion and bribery;

Dealing in narcotics and marihuana;

Interstate transmission of gambling information and interstate travel in aid of racketeering enterprises.

H.R. 10185 would permit state officials to tap wires for the following state offenses if state law permits such action:

Murder and kidnapping;

Extortion and bribery;

Dealing in narcotics and marihuana.

Many state prosecutors feel that the states should be authorized to tap wires for gambling offenses also. They are entirely correct in saying that gambling is central to the problem of organized crime. On the other hand, to permit tapping the wires of every two dollar bettor would be to permit very extensive wiretapping. We have thought it best to limit the authority to tap wires for gambling to those offenses which involve interstate transmission of gambling information, in the thought that this would be sufficient to reach the large organized operators.

Let me clarify one possible misconception. H.R. 10185 would leave it entirely up to the states as to whether they want to authorize wiretapping. Some states may feel that they do not want to authorize any wiretapping. They will be free to make that judgment. All that H.R. 10185 does, as to the states, is to impose limits beyond which they cannot go.

2. The bill must effectively prohibit all wiretapping by private persons and all unauthorized wiretapping by law enforcement officers

H.R. 10185 would remove the impediments to effective prevention of unauthorized wiretapping that now exist. Section 3 of the bill provides explicitly that it is unlawful for any person, except as authorized by the bill, to intercept any wire communication or to disclose the contents of such communication or to use the contents of such communication. "Intercept" and "contents" are broadly defined.

Attempts and procuring others to act are also prohibited. The general conspiracy statute would apply to conspiracy to do any of these things. Violations would be punishable by two years imprisonment or a fine of \$10,000, or both.

These prohibitions will, we believe, enable us effectively to protect telephone users from unauthorized wiretapping. They will enable us to arrest, prosecute and convict for the mere fact of interception. The only evidence we will need for a conviction is evidence that an intercepting device was attached and that the defendant attached it, or procured someone to attach it, or conspired with someone to attach it. This will plug the loophole in the existing law.

These prohibitions would apply not only to private persons but to public officers who tap wires otherwise than in accordance with the bill. Until now the Department of Justice has been reluctant to prosecute state or local officials for actions taken in good faith in conformity with a state law authorizing wiretapping and disclosure in court of wiretap evidence. If this bill is passed, I assure you that we will prosecute anyone, private person or government officer, who is found tapping wires without lawful authority.

In addition to these criminal sanctions the bill attempts to remove a major incentive to illegal wiretapping by providing, in sec. 4, that no evidence obtained by unauthorized wiretapping may be received in any state or federal court, department, agency, regulatory body or legislative committee. This exclusion applies not only to the contents of the intercepted message but also to any information obtained by leads furnished by that message. It enacts in statutory form the rule declared by the Supreme Court in the second *Nardone* case, prohibiting use in evidence of the so-called "fruits of the poisonous tree."

These provisions of the bill, together with the safeguards which I am about to discuss, will mean that if the bill is passed the privacy of telephone users will be much better protected than it is now.

3. The bill must provide effective procedural safeguards against abuse of the limited wiretapping it would authorize

We have made a determined effort to surround the limited wiretapping which the bill would authorize with workable safeguards against abuse. Let me indicate some of the important safeguards.

First. Except for cases involving the national security, which I shall discuss in a moment, wiretapping could be authorized only by order of a judge. Section 8 specifies in detail the information which would have to be submitted under oath and the findings which a judge must make in order to issue such an order. The judge must find that there is probable cause for believing that—

- (1) an offense for which an application may be filed under the bill is being, has been, or is about to be committed;
- (2) facts concerning that offense may be obtained through the interception;
- (3) no other means are readily available for obtaining that information; and
- (4) the facilities to be intercepted are being used in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by, a person involved in such offense.

Law enforcement officers could not just tap any telephone. The judge must find that the telephone is being used in connection with the commission of an offense or is leased to, listed in the name of, or commonly used by the suspected criminal. And his order must specify the particular telephone which may be tapped.

A wiretap could not be in effect for more than 45 days. Any extension would require a new application and new findings by the judge.

This requirement of a court order is considerably more restrictive than the procedure on searches of a man's home or person. Many searches are made without a warrant, either where incident to an arrest or involving a moving vehicle or under a statute—such as the customs laws—permitting administrative searches.

Moreover, a federal search warrant can be issued by a United States Commissioner or any state court of record. Under this bill, authority to issue wiretapping orders will be confined to federal district and circuit judges (in the case of federal offenses) and to state judges of courts of general criminal jurisdiction (in the case of state offenses).

In cases involving national security we have provided alternative procedures. Application may be made to a court under the procedures outlined above, but in addition the bill provides that the Attorney General, in person, may authorize interception of wire communications if he finds that the commission of the offense is a serious threat to the security of the United States and that use of the court order procedure would be prejudicial to the national interest.

In a narrowly limited class of cases, both because of the sensitivity of the information involved and in the interests of speed, the Attorney General needs this executive authority to permit wiretapping.

National security requires that certain investigations be conducted under the strictest security safeguards. All Attorneys General since 1940 have been authorized by the President to approve wiretapping in national security cases. Attorney General Clark, with President Truman's concurrence, extended this authorization to kidnapping cases.

This legislation would authorize the Attorney General to order wiretapping after the determination that there was a reasonable ground for belief that the national security was being threatened. In order to proceed, the Attorney General would have to find and certify that the offense under investigation presented a serious threat to the security of the United States; that facts concerning that offense may be obtained through wiretapping; that obtaining a court order would be prejudicial to the national interest and that no other means are readily available for obtaining such information.

Thus, the bill would limit the authority now held by the Attorney General to authorize wiretapping but it would permit evidence obtained thereby to be presented in court. I believe these are most important points.

Second. Responsibility for applying for wiretap orders would be centralized. At the federal level, any application to a court must be approved by the Attorney General or an Assistant Attorney General designated by him. And, in those grave national security cases where wiretapping would be authorized without a court order, the Attorney General must give the authority. Thus, all federal wiretapping must be authorized by a Presidential appointee who is publicly accountable for his acts.

At the state level, the application must be made by a state attorney general or by the principal prosecuting attorney of a city or county, if such person is authorized by state law to make such an application. Some state officials feel that this is too limited. Perhaps it is. The Congress will have to make the decision. But we feel that the principle of focussing responsibility for all wiretapping applications in a small number of officials who can be held publicly accountable is an important safeguard.

To help maintain this public accountability, we have also provided for annual reports to the Congress of statistics on wiretap orders applied for, issued by and denied by federal and state judges.

Third. The bill would limit the disclosure and use of information obtained by authorized wiretapping. It authorizes use of this information by law enforcement officials only in the proper discharge of their official duties. It authorizes disclosure only to other law enforcement officials to the extent appropriate to the performance of their duties, or while testifying under oath in criminal proceedings in federal or state courts or grand jury proceedings. This limitation reflects our view that the justification for wiretapping is to aid in the enforcement of the criminal law, and, therefore, disclosure of information obtained by wiretapping should be permitted only in connection with criminal proceedings.

Fourth. The bill would establish federal court procedures for testing the legality of a wiretap. The defendant may move to suppress any evidence obtained by wiretapping on the grounds that the communication was unlawfully intercepted, that the order or authorization is insufficient on its face, that there was no probable cause for the court order authorizing the tap, or that the interception was not made in conformity with the order or authorization. The granting of such a motion would render the evidence inadmissible in any proceeding.

We believe that these safeguards are practical and will not unduly impede the legitimate use of the limited wiretapping which the bill would authorize. We believe that they provide a large measure of protection against abuse.

4. The bill must establish uniform standards for the federal government and the states

We are here concerned with an interstate telephone network which is regulated by the Congress in detail. A wiretap cannot differentiate between local and long distance calls from the same telephone. For this reason the Supreme Court, in the *Weiss* case in 1939, held that Section 605 of the Communications Act prohibited interception and disclosure of the contents of a telephone call between two parties in the same city.

A national telephone system requires a national policy. I believe it is the responsibility of Congress to protect the integrity of the interstate telephone network and the privacy of its users. Hence, we believe Congress should define the conditions by which any wiretapping by federal or state officials will be permitted.

Moreover, as the Supreme Court has pointed out on a number of occasions, including the recent case of *Mapp v. Ohio*, differences in federal and state rules as to investigative techniques and the introduction in court of evidence obtained by such techniques have unfortunate results for the administration of criminal justice.

Hence, we feel that uniform rules and standards for the federal and state governments are important in any wiretapping legislation.

I do not want to conclude this statement without reiterating my strong belief, and the strong belief of every responsible official in the Department of Justice, in the importance of individual privacy. We believe, with Justice Brandeis, that the right to be let alone is one of the basic liberties of free men.

We believe that every citizen of the United States has a right not to have strangers listen in on his telephone conversations. Indeed, one of the major reasons we are proposing this legislation is because under existing law the privacy of telephone users is not adequately protected.

But this right of privacy, like most other individual rights in our society, is not absolute or unqualified. Society also has a right to use effective means of law

enforcement to protect itself from espionage and subversion, from murder and kidnapping, and from organized crime and racketeering.

Senator SCOTT. I offer it together with a statement by the former Attorney General Kennedy appearing in an article called "Attorney General's Opinion on Wiretaps."

"He believes they can and should be regulated with due regard for both law enforcement and the right of privacy."

(The material referred to follows:)

ATTORNEY GENERAL'S OPINION ON WIRETAPS

(By Robert F. Kennedy)

In 1959, while inspecting a firealarm station, the Fire Chief of a large Western city made a startling discovery. The recording system had been rigged to record not only firealarm calls but also all calls on the Chief's private line. The Chief looked further. He found a recording tape on which was transcribed a personal telephone conversation between him and a United States Senator.

The Department of Justice discovered the identity of the wiretapper—but was forced to close the file on this case last September without any action against him. He could not be prosecuted under the present Federal wiretapping statute, which should protect against such gross invasion of individual privacy, but does not.

Last fall, District Attorney Frank Hogan of New York City developed a strong case against seven of the top narcotics distributors in the country—men who had operated a multi-million dollar narcotics ring in the New York City area for more than five years. Yet on Nov. 14, Mr. Hogan abandoned his prosecution of the seven men. Much of his evidence came from wiretapping and—although the wiretaps had been authorized by a court, as is permissible in New York—he felt he could not introduce this evidence without committing a Federal crime.

In other words, the men could not be prosecuted because of the present Federal wiretapping statute, which should permit reasonable use of wiretapping by responsible officials in their fight against crime, but does not.

Clearly, there is almost no one who believes this law, which enhances neither personal privacy nor law enforcement, to be satisfactory. Indeed, bills to change it—Section 605 of the Federal Communications Act—have been introduced in virtually every session of Congress since it was passed in 1934. But the present law has remained on the books, the beneficiary of the stalemate resulting from an emotion-hardened debate on the question of wiretapping that has gone on between absolutists for decades.

It is easy to take an absolute position on wiretapping. Some, concerned with encroachments on individual rights by society, say wiretapping of any kind is an unwarranted invasion of privacy. Others, concerned with a rapidly rising crime rate say law-enforcement officers should be free to tap telephone wires to gather evidence.

The heart of the problem—a proper balance between the right of privacy and the needs of modern law enforcement—is easy to see. It is not so easy to devise controls which strike this balance. But it is not impossible, either, and I believe that in the wiretapping bill which the Department of Justice has proposed to Congress we have formed such a balance.

There is no question that the telephone is an important asset to criminals. Here is an instantaneous, cheap, readily available and *secure* means of communication. It greatly simplifies espionage, sabotage, the narcotics traffic and other major crimes.

I do not know of any law-enforcement officer who does not believe that at least some authority to tap telephone wires is absolutely essential for the prevention and punishment of crime. There are over 100 million phones in the United States and the bulk of business is transacted over the telephone. Increasingly, this business includes crime—the organized criminal and racketeering activities, involving millions of dollars, which are among our major domestic problems. Without the telephone, many major crimes would be much more difficult to commit and would be more easily detected.

Last year, Congress enacted five of eight crime bills proposed by the Justice Department. One of these laws recognized that the telephone is a major tool of organized crime and prohibited the use of the telephone for interstate transmission of gambling information. The President signed the bill on Sept. 13. Almost im-

mediately, several operators of major gambling services went out of business or curtailed their activities. The result has been that organized crime has been dealt an effective blow where it hurts—in the pocketbook.

This experience underscores the need for wiretapping legislation. Wiretapping often may be the only way of getting evidence or of getting the necessary leads to break up major criminal activity.

Yet, on the other hand, most people feel strongly about the privacy of their telephone conversations. None of us likes to think that some unknown person might be listening to what we have to say. There is no doubt that the Constitution confers on each individual a right of privacy—what the late Justice Louis Brandeis called “the right to be let alone.”

The Fourth Amendment specifically protects “the rights of the people to be secure in their persons, houses, and papers, and effects against unreasonable searches and seizures.” In the famous Olmstead case of 1928, involving a Seattle bootlegging ring, the Supreme Court held that to intercept telephone calls by wiretapping did not violate the Fourth Amendment because the law-enforcement officers did not enter the house, touch the person or seize the papers and effects of the people whose wires were tapped.

But in another sense, wiretapping involves a greater interference with privacy than does the conventional search and seizure. Every telephone conversation involves at least two persons, one of whom may be wholly innocent. And in many cases the telephone that is used by a suspected criminal may also be used by a large number of other persons.

Indeed, many professional criminals typically transact their criminal business over public telephones. A tap set up to catch the criminal may necessarily overhear hundreds of conversations by persons who are totally unsuspected of crime, but whose privacy is nonetheless violated.

Even though the Fourth Amendment is not literally applicable—and the Olmstead decision is still the law—the principles underlying it are important in considering wiretapping. The framers of the Constitution did not outlaw all searches of a man’s house and seizures of his papers and effects. They only prohibited “unreasonable” searches and seizures.

In particular, they recognized that Government officials could search a man’s house and seize his papers. But first they required these officials to obtain a warrant from a court upon a showing of probable cause to believe that illegal material was on the premises to be searched. In other words, the framers of the Constitution attempted to balance two objectives that criminals be caught and convicted, and that the privacy of innocent persons be protected.

This is precisely our objective today.

Wiretapping is not authorized in most states. Section 605 of the Federal Communications Act provides: “No persons not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.”

To the layman, this certainly sounds like an absolute prohibition of wiretapping except where one of the parties to the conversation consents to it. Yet wiretapping is practiced by Federal law-enforcement officers, at least some state and local governments, and—as in the case of the Fire Chief’s phone—by many private individuals. Indeed, the laws of the six states, such as New York, specifically authorize wiretapping by law-enforcement officials under court order.

How can this be? The legal answer is that the Communications Act does not prohibit interception alone; it prohibits interception and disclosure. For this reason, every President since Franklin D. Roosevelt has authorized the Attorney General to permit wiretapping in cases involving the national security. In 1941, Attorney General Robert H. Jackson indicated that “disclosure” within the Federal Government—among officials—also was not prohibited by the act. Yet, disclosure in court—using the lawfully obtained evidence to convict a criminal—has been regarded itself to be a criminal act.

This is unsatisfactory. There is no guarantee of privacy in the use of the telephone under the existing law because anyone can listen in without violating that statute. To convict someone of illegal wiretapping we have to prove both the tap and an unlawful disclosure. That is a very difficult burden indeed.

At the Federal level, wiretapping is limited to a small number of cases involving the national security and criminal cases in which the life of a victim is at stake. It is done only with the express approval of the Attorney General.

The extent of wiretapping by state and local law enforcement officers is very difficult to determine. In those states which have legislation permitting wiretapping under court order, the records indicate that it is fairly common. A poll conducted

in New York State showed that between 1950 and 1955, 2,392 wiretap orders were obtained—about 400 taps a year. Some investigators contend that several times as many wires were tapped illegally. At that time there were well above 6,500,000 telephones in use in New York State.

In states where there is no law permitting wiretapping, the indications are that a certain amount of police wiretapping goes on, nevertheless. There also are assertions that some corrupt police officers may use information obtained from wiretaps for purposes of blackmail, enforcing payoffs, and for other motives of personal profit.

No figures are available as to the extent of private wiretapping. Most people who have studied the matter believe that private investigators and other individuals tap wires extensively to obtain evidence in divorce cases, stock-market tips, information about competitors, and the like.

This is a shocking situation. When law-enforcement officials themselves violate the law, violations by others go unpunished, and everyone's respect for law is seriously damaged. Further, no one's privacy is protected.

The critics of all wiretapping quote Justice Holmes to the effect that wiretapping is "dirty business" and use this as a slogan against the method of gathering evidence. To give Justice Holmes' words a modern application, it is the present state of law, the present chaos, which is really the "dirty business." And the solution is a coherent law which, with stringent safeguards, permits the gathering of evidence by wiretapping in vital cases but at the same time effectively forbids other wiretapping, public or private.

Only Congress can clear up the present chaotic situation. Certainly we ought to put an end to a law which:

(1) Fails to prevent illegal action—indiscriminate wiretapping—by law-enforcement officials and private individuals; and

(2) Fails to recognize the legitimate needs of law enforcement for limited authority.

I don't think it is possible—or workable—to attempt to deal in absolutes. I cannot agree with those who say that wiretapping should not be permitted in any circumstances and that the right to privacy outweighs any other considerations. If a child were kidnapped and there were any possibility of getting that child back unharmed by the use of wiretaps, I would feel that this strongly outweighed anyone's right to a private conversation. I take the same view with respect to protecting the security of the United States from espionage, sabotage and other possible acts of foreign agents.

At the other extreme, some law-enforcement officials feel there must be an extensive use of wiretapping with little or no supervision by courts or high administrative authority.

With this I also disagree strongly. If we are to authorize wiretapping for law-enforcement and prevention of crime, we must subject it to the most rigorous checks against abuse which we can devise. To put it simply, we should not lightly invade the privacy of individuals.

The details of new wiretapping legislation will have to be worked out by Congress. However, I believe that it should include—as drafted in our proposed law—the following features:

(1) Wiretapping should be prohibited except under clearly defined circumstances and conditions involving certain crimes. Because wiretapping potentially involves greater interference with privacy than ordinary search and seizure, it is proper to limit it narrowly and permit it only where honestly and urgently needed. Wiretapping is absolutely required in cases involving national security, human life, narcotics and interstate racketeering. Under our bill, other, unauthorized interception or disclosure of wire communications would be punishable by a maximum penalty of two years in prison and a \$10,000 fine.

(2) In general, I believe wiretapping should be authorized only by court order and that even then the right to apply to the court should be limited to relatively few responsible officials. We would make one necessary exception. In cases involving serious threats to national security, it is extremely important that the identity of suspects be tightly held within the F.B.I. The fewer who know our suspicions, the more effective our security. For this reason, we would continue the present practice of having the Attorney General, in person, authorize wiretapping in these cases.

(3) Uniform rules for the Federal Government and the states should be established. We are dealing here with an interstate communication network whose integrity is a matter of importance to everyone using it. The maximum extent

to which state officials may be authorized by state law to tap interstate facilities should be regulated by Congress.

(4) Applications for wiretapping orders to a court necessarily should be made in secret since it would be useless to tap if suspected criminals were alerted. This should not mean that orders would be issued as a matter of course by judges. Any wiretapping statute should—as does our proposal—spell out in detail the findings a judge must make on the basis of evidence presented to him and should state the duration of any order which he can issue. When a case is brought to trial, I believe the defendant should be given the opportunity to see the order authorizing the tap and to challenge its validity as, is now done in the case of search warrants.

(5) Even though wiretapping would be authorized by court order, or, in some national security cases, by the Attorney General, the law should limit the disclosure and use of the wiretap information. Limiting the use of wiretap information to proper discharge of official duties would effectively prevent corrupt officers from using it for personal benefit and would confine any disclosure and use to legitimate law enforcement purposes.

(6) Finally, the law should continue, and extend to state courts, the rule at present applied in Federal courts that any evidence derived by means of an unlawful wiretap should be excluded.

To enact legislation along these lines will be a difficult job. Opinions differ as to each of the points I have listed and as to many details relating to them. But these difficulties should not be allowed to stand in the way of enactment of comprehensive legislation by Congress.

The need for such legislation is real. It would help us maintain the national security and stamp out organized crime. And, equally important, it would put an end to the violation of law by law-enforcement officers and, less excusably, by private individuals, including blackmailers.

It would, in fact, protect the privacy of all of us who use the telephone.

The CHAIRMAN. Senator Cook.

Senator Cook. Mr. Rehnquist, for the benefit of the record I would like to give to the reporter at a later date the remarks that were made by you at a panel discussion on "Privacy and the Law in the 1970's," at the American Bar Association meeting in London.

Contrary to some of the remarks that were made yesterday, I do not see here where you become a great advocate for wiretapping other than in the strictest sense under the statute which was passed by the Congress of the United States and which the Justice Department is empowered to enforce.

If I may, I would like to read into the record what I think sums up your opinion.

Whatever may be the ultimate decision by our highest court on the merits of the question, I believe that a refusal of the Justice Department in its role as advocate before the courts or the executive branch of the Government to vigorously argue in favor of its legality would be a wholly unwarranted abdication of the Department's responsibility.

You then go into a discussion of surveillance, not only from the standpoint of wiretapping but also from the standpoint of visual surveillance. In regard to the discussion yesterday relative to probable cause, it is very interesting, I think almost essential, and I think most lawyers in this room would concur, "probable cause for an arrest or specific search is hopefully to be found at the conclusion of an investigation and ought not to be required as a justification for its commencement."

You said those words then. Do you agree with them now?

Mr. REHNQUIST. Yes, I do.

Senator Cook. I certainly agree with them also.

Getting back to another discussion of yesterday, I feel that great emphasis was made of how you completely and absolutely condoned, and were enthusiastic about, or words to that effect, the Government

action in the May Day affair in Washington. Again, Mr. Chairman, I would like to put into the record the speech that Mr. Rehnquist made at Appalachian State University, I might say out of a speech of some 24 pages, the first five and a half pages dealt with a very general discussion of the ability of police departments to function, the ability to formulate a policy in its broadest sense under certain conditions. I find nowhere in here any endorsement of the actions of, or any mention of the police officials in the city of Washington other than the fact that you made reference to the fact that there was a metropolitan police force of approximately 5,000 men and that within the first few hours they had to make no less than 7,000 arrests.

Then you allude to what is referred to as qualified martial law. I might suggest I hope you and I both agree that this qualification is nothing new in the law.

I have before me a book entitled A "Practical Manual of Martial Law" that was written in 1940 by Frederick B. Wiener, Special Assistant to the Attorney General of the United States. It has quite a dissertation in the field of qualified martial law.

Would you tell me what you feel would be a definition of qualified martial law?

Mr. REHNQUIST. Recalling as best I can from Mr. Wiener's book, which I believe is the source of my knowledge on the subject, it is the situation where the force brought to bear against the law enforcement forces is such that the normal procedure of individual arrest and booking and admission to bail and appearance before a community magistrate simply cannot be carried out and in this situation it is my understanding that the courts, including the Supreme Court of the United States in the case of *Moyer v. Peabody*, have said it was lawful for the Government in that situation to resort to a situation of arrest not on the basis of criminal charge of individual wrongdoing but on a very temporary basis of simply restoring order, and that the process was not arrest in the normal sense and that release was required in a very short order as soon as the serious emergency had passed.

That is a short summary of my understanding of it, Senator.

Senator COOK. And, as a matter of fact, rather than be of the opinion as we discussed yesterday that there may have been either martial law or qualified martial law on that occasion, in your speech in North Carolina you took the position that there had been neither. I quote from page 4, "Indeed if one takes a more extreme situation than that which prevailed in Washington during the past couple of days," and then you went into a dissertation on qualified martial law. Is that not correct?

Mr. REHNQUIST. It is correct, Senator.

Senator COOK. Thank you, Mr. Rehnquist.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Mathias.

Senator MATHIAS. Thank you, Mr. Chairman.

I would like to complete the congratulations to Mr. Rehnquist, and add to my congratulations some acknowledgement of his fortitude and strength.

Yesterday as we were adjourning I said I thought the hearing approached a violation of the eighth amendment after he had been on the stand since 10:30 in the morning.

But in a sense, Mr. Rehnquist, you brought it on yourself. One of the old political saws of this country, attributed to Calvin Coolidge and to various other politicians, is that what a man does not say can never hurt him. Some years ago you wrote an article in the Harvard Law Record, published in 1959, in which you said:

Specifically until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee, before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

I think we are perhaps learning from your 1959 admonition. Your history will not be the same as that of Justice Whittaker that you were recounting in which you said, and I further quote:

If any interest in the views of Mr. Justice Whittaker on these cases were manifested by the Members of the Senate, it was done either in the cloakroom or meeting of the Judiciary Committee. Discussion of the new Justice on the Floor of the Senate succeeded in adducing only the following facts, (a) proceeds from skink trapping in rural Kanasa assisted him in obtaining his early education; (b) he was both fair and able in his decisions as a judge of the lower federal court, (c) he was the first Missourian ever appointed to the Supreme Court, and (d) since he had been born in Kansas but now resided in Missouri, his nomination honored two States.

I think we can assure you that your case will be distinguished from that of Mr. Justice Whittaker's.

Now, it seems to me if we deal with the appointments to the Supreme Court as one of the highest responsibilities of the Senate, every Member of the Senate must have some concept in his own mind as to what qualifies a nominee for the Court.

Certainly basic qualifications are integrity and competency. In these areas I think everything that has been said here in the past day and a half indicates that there is no question as to your integrity and competence. Certainly fidelity to the Constitution, which was mentioned very eloquently by the Senator from North Carolina, Senator Ervin, is another basic qualification. And here again, I think there is no problem as far as you are concerned.

In addition, I think every nominee must be in a position to reinforce public confidence in the Court, and certainly in the years immediately ahead the Court is going to be called upon to answer very profound and pervasive social questions. So it must have the respect of citizens in order that their decisions compel public compliance and acceptance. And it is in the area of the decisions of the court in interpreting the unwritten but compelling parts of the Constitution that I think we have to concern ourselves.

I would like to address some questions to you on the philosophy with which you will approach the issues—the kinds of issues that may come before the Court. You do not have to answer the questions with any such particularity that you will feel obliged to disqualify yourself either here or there, but answer them only in a general manner.

Before you came to the Justice Department, you had in an active civic life expressed your position on a very wide range of issues, especially in 1964 and 1967 on the subject of civil rights.

Although we have covered some of this ground, I would like to ask you again whether your views as a private citizen are any different today than they were then.

Mr. REHNQUIST. As I said yesterday in response to another question, Senator Mathias, with respect to the public accommodations ordinance, I think my views have changed.

With respect to the 1967 letter which I wrote in the context of the Phoenix school system as it then existed, I think I still am of the view that busing or transportation over long distances of students for the purpose of achieving a racial balance where you do not have a dual school system is not desirable.

Senator MATHIAS. It has been said here and elsewhere that your political views tend to be conservative. What effect, assuming this is the case, will this have on you as a judge and, consequently, as a man who should be able to decide cases impartially?

Mr. REHNQUIST. I would hope none. I realize that that is the same question I would want to be asking a nominee if I were a member of the Senate Judiciary Committee, and I cast about for some way of perhaps giving some objective evidence of the fact, rather than simply asking you to rely on my assurance.

I was on several occasions in Phoenix chosen to be an arbitrator between lawyers who found themselves in dispute with respect to particular claims, and I think the reason I was chosen was because there was a feeling that I would be fair, that whatever I might feel about personalities involved or about personal doctrine, I would try to apply whatever law there was to the facts and reach a fair conclusion.

I have always felt that, as I think Justice Frankfurter said, you inevitably take yourself and your background with you to the Court. There is no way you can avoid it, but I think it was Frankfurter who also said, if putting on the robe does not change a man, there is something wrong with the man. I subscribe unreservedly to that philosophy, that when you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. You are there to construe as objectively as you possibly can the Constitution of the United States, the statutes of Congress, and whatever relevant legal materials there may be in the case before you.

Senator MATHIAS. In the same Harvard Law Record article you quoted, I thought with some approval but I may have read that into it, an editorial from the New York World which opposed Judge Parker's confirmation as Justice of the Supreme Court in 1930. The New York World said editorially:

The Senate has every right if it so chooses to ask the President to maintain on the Supreme Court bench a balance between liberal and conservative opinion of the Court as a whole.

From what you have just said, I would assume that this would make less difference to you today than when you wrote that article and quoted from the editorial.

Mr. REHNQUIST. It is so difficult to pin down the terms "liberal" and "conservative," and I suspect they may mean something different when one is talking about a political alignment as opposed to a judicial philosophy on the Supreme Court.

I think it would be presumptuous of me to suggest to the Senators on this committee, or to the Senate as a whole, what standards they ought to look for, but I cannot think of a better one than fidelity to the Constitution and let the chips fall where they may, so to speak, whether the particular decision pleases one group or pleases another.

I think to an extent in discussion about the Court there has been a tendency to equate conservatism of judicial philosophy not with a conservative political bias, but with a tendency to want to assure one's self that the Constitution does indeed require a particular result before saying so, and to equate liberalism with a feeling that at least on the part of the person making the observation that the person tends to read his own views into the Constitution.

I think the difference is well illustrated by Justice Frankfurter's career, who came on the Court at a time when I think it was clear to most observers that the old Court of the nine old men of the twenties and thirties was indeed, on any objective analysis, reading its own views into the Constitution, and Justice Frankfurter, of course, prior to his ascent to the bench, had been critical of this, and as a Justice he helped demolish the notion that there was some sort of freedom of contract written into the Constitution which protected businessmen from economic regulation.

And yet, when other doctrines were tested later in the Court, it proved that he was not simply an exponent of the current politically liberal ideology and reading that into the Constitution.

He was careful to try to read neither the doctrine of the preceding Court nor perhaps his own personal views at a later time to the Constitution, but to simply read it as he saw it.

Senator MATHIAS. In an effort to get at this question of judicial philosophy, maybe we ought to look at some specific areas of the Constitution which would necessarily, I think, be embraced in a judicial philosophy, but which due to their very nature are not susceptible of strict construction: Words such as "unreasonable" in the fourth amendment, "excessive" in the eighth, "due process" in the fifth and fourteenth amendments. I think these are areas which refer to rights which are not clear and absolute so that they have to be qualified and interpreted in protecting the freedoms and privileges, assessing the liabilities that the Constitution addresses itself to.

What would you consider, for example, to be reasonable searches and seizures as contemplated by the fourth amendment?

Mr. REHNQUIST. Senator, I honestly think that is too specific a question for me to answer. I know there are several cases pending up there now and I would anticipate that there would be a number in the future.

Senator MATHIAS. Would you feel that you could give the committee your ideas on what you think excessive bail would be? Some broad definition which you could apply the word "excessive" to.

Mr. REHNQUIST. I do not believe I ought to, Senator.

Senator MATHIAS. Well, I am not trying to put you in a position where you would prejudice your usefulness to your colleagues in the future, but I think this question may be important in the future as to which defendants or classes of defendants would be suited for bail. This is an area which would be of concern to the Senate, to the courts, and to the country.

What about due process?

Mr. REHNQUIST. I just think it would be inappropriate for me to try to now advance some sort of definition of a term which may well, if I were confirmed, come before me and on which I would hear argument and read briefs and have the benefit of discussion in the conference room.

Senator MATHIAS. In August you were in Alabama, and you said then, and I am now quoting from your speech:

The purpose of the guarantee of freedom of expression in our Constitution is not to assure everyone the same opportunity to influence public opinion, but to assure that any conceivable view on a subject may be advocated by someone.

I must confess that particular expression of philosophy gives me some concern for one practical consideration. I am wondering who would appoint who to express a particular viewpoint.

Mr. REHNQUIST. I think what was meant, Senator, was—

Senator MATHIAS. This may, in taking it out of context, distort it, but—

Mr. REHNQUIST. No. I do not think it really does distort it. I think what was meant was that the guarantees of the first amendment do not mean that everybody is going to be provided with a printing press in order that they can have their own newspapers, but instead that anyone who has a newspaper is going to be permitted to say whatever he thinks.

Senator MATHIAS. Well, I agree with you; however, I had not read that from that quotation.

I think we want to do the best job we can in eliciting for the other Members of the Senate, who are not members of this committee, and the public, a profile of your judicial philosophy. You yourself suggested it is our duty. I may want to come back to some of these questions, but for the moment, Mr. Chairman, reserving the right to further questions, I will pass.

The CHAIRMAN. Senator Gurney?

Senator GURNEY. Thank you, Mr. Chairman.

I want to echo my colleagues in congratulations to you, Mr. Rehnquist, on this great honor, your nomination to the Supreme Court.

I do not think, Mr. Chairman, that I could add anything by way of questioning of the witness. I think his judicial philosophy has been thoroughly explored.

I think President Nixon is to be highly commended and congratulated for having sent the name of Mr. Rehnquist here for confirmation.

I think his qualifications speak for him in a very clear and resounding tone. He is exceptionally well-qualified for appointment to the, High Court, and I think he will add luster to his proper role, that is, an administration being one of law and not of men. In my view, the time is long overdue for the Supreme Court to exit from the role of lawmaking and return to its proper role of law-interpreting.

Thomas Jefferson, perhaps the greatest of the Founding Fathers, certainly had as much to do with the shaping of our Republic as any one man. He had great reservations about the judicial branch of Government. Here are some of the things he said about it. One quote:

The Constitution is a mere thing of wax in the hands of the judiciary.

Another quote:

A great object of my fear is the Federal judiciary.

Another one:

It has been long my opinion and I have never shrunk from its expression that the germ of dissolution of our Federal Government is in the Constitution of the Federal judiciary.

I think if Jefferson were a member of the Committee on the Judiciary today, and had listened to the answers of Mr. Rehnquist concerning his understanding of the proper role of the Supreme Court, I think that Mr. Jefferson would be reassured and I firmly believe that a majority of the Nation's people also share that feeling.

I think Mr. Rehnquist's appointment will help restore confidence to the people in the Court, a state of mind that is badly needed and long overdue.

I have no questions.

The CHAIRMAN. Senator Kennedy?

Senator KENNEDY. Mr. Rehnquist, I also share this feeling, which I think you have become very much aware of during the last day, about the difficulty of trying to get some better kind of handle on your personal philosophy and concerns and commitments. Senator Hart pointed out yesterday that the Constitution of the United States as it was written and drafted never anticipated many of the challenges which are presented to our society. I think you have gathered from the questioning that for us, attempting at least to resolve in our own minds how you approach these problems, not how you are going to decide them but how you are going to approach these problems, is terribly important for preserving the institution of the Court.

My colleagues and I have asked you many questions in the areas of separation of powers, due process, equal protection, free speech, and so forth. As you pointed out so well in your article in the Harvard Law Record these are legitimate areas of inquiry for us. I think you have been extremely cautious and guarded in your responses in these areas for those who are interested in how you are going to approach these questions.

You have indicated that you are going to attempt to put your political philosophy behind you and that you are going to assume a new kind of a responsibility when you take on the robe.

I think what I am interested in is, what are the various kinds of factors in your own philosophy that are going to help you make objective decisions? Of course, as was brought out yesterday by Senator Ervin and others, you are part of all that you have met, and this has been something which I know has troubled me in trying to bring out a greater degree of responsiveness from you.

You mentioned the role that Justice Frankfurter played in going on the Court with those remaining from the "nine old men" and the fact that he was perhaps a judicial conservative and that maybe the "nine old men" had been superimposing their own political philosophy on the Constitution.

Well, you know, what were those factors which so distressed you in the exercising of their political philosophy? How do you distinguish between Frankfurter's temperament as compared to those who had been making the decisions at that time?

Mr. REHNQUIST. Well, I would say that the series of freedom of contract cases, *Lochner v. New York*, *Adkins v. Children's Hospital*, by the objective judgment of historians, represented an intrusion of personal political philosophy into constitutional doctrine which the framers had never intended, and that Frankfurter had criticized that from the outside of the Court. It was not entirely clear until he had

been on the Bench whether the basis for his criticism was that he did not want laws like that held unconstitutional or whether it was that he felt there was no constitutional warrant for invalidating them, and I suppose you never know about an advocate until he does get on the Bench because it is only then that he is put to the test.

But the test came for him, I suspect, not so much in those cases but in other cases which later came before the Court, where he had great personal reservations, I suspect, about what was being done but, nevertheless, felt that the Constitution did not prevent it.

Senator KENNEDY. Well, as you believe that imposing personal views was the problem when Justice Frankfurter came to the Court, and as historians have made the same judgment, would you make the same criticism of the Warren court?

Mr. REHNQUIST. Could you spell out the question a little more?

Senator KENNEDY. The "Warren court," as a phrase, is generally associated with protection of liberties and rights and, as you are prepared to comment on your interpretation and other historians' interpretation of the Court which Frankfurter found as superimposing its views, would you be as quick to feel that the Warren court was following the Constitution or interpreting or were its Justices superimposing their views?

Mr. REHNQUIST. Well, trying to keep it in the terms of historical analysis rather than my own estimate of how I would decide something, I think Justice Frankfurter's behavior while he was a member of the Warren court is some indication at least of his agreement with them in some areas and disagreement in others.

He joined the unanimous decision in the school desegregation cases. He dissented from some of the cases involving the rights of criminal defendants.

Senator KENNEDY. Well, of course, that was not my question.

You felt and you have stated here and you have referred to legal historians feeling that the Court in the 1930's was superimposing the Justice's personal philosophies rather than objectively applying the Constitution—you made that judgment or recognized the legitimacy of that judgment—I am wondering whether you would make that same judgment about the Warren Court.

Mr. REHNQUIST. Well, it is much easier to make a historical judgment with at least a degree of confidence about decisions that were handed down over a period of years from 1905 to 1935 than it is with respect to a Court whose decisions are handed down from a period of 1953 until 2 years ago, if that is what you mean by the Warren Court, and therefore I think there is a great deal of difference in the confidence with which one can say history, in the sense of legal historians objectively evaluating it, has said that the so-called nine old men were wrong, at least a majority of them were wrong, in reading in freedom of contract.

I do not claim to be a keen student of legal historians analyzing the Warren Court. I would think that in the area of the Warren Court's criminal law decisions there probably is not the same consensus as to legal historians at the present time.

Senator KENNEDY. Well, maybe it is more difficult to make a judgment now than looking back over the earlier part of the century. But that is what I am asking of you as a student, not with reference to any

specific kind of case evaluation, but since you are prepared to make of the nine old men the judgment that they were superimposing personal judgments rather than following the strict letter of the law, I am interested in your judgment whether you would feel that the Warren Court had done the same.

Mr. REHNQUIST. Well, what I am giving you is my understanding of a historical consensus, and——

Senator KENNEDY. Would you agree with that historical consensus?

Mr. REHNQUIST. Yes, on the freedom of contract doctrine I think I would agree.

I think the historical consensus, because of the recency of the Warren Court's decision, is less firm, partly for that reason. I think there is substantial historical consensus in accord with the *Brown* versus *Board of Education* decision. I think that in the criminal law area, it is my understanding that there simply is not that sort of consensus. Whether it is from lack of time to develop or from disagreement——

Senator KENNEDY. I am not asking you to tell me what the historians are going to say. I am interested in what your feeling is. I am not saying can you predict what historians are going to say about this period or what others are going to say about it. I was interested in how you regard it.

Mr. REHNQUIST. Well, I certainly would not set myself up to make some sort of sweeping generalization about the Warren Court which sat from 1953 to 1969.

Senator KENNEDY. Well, you were prepared to do it about the nine old men.

Mr. REHNQUIST. I was prepared to do it in the sense of a very specific doctrine that was enunciated over a period of years from about 1905 to 1935.

Senator KENNEDY. There would be those who would say that the Warren Court is also recognized for particular doctrines in terms of individual rights and liberties as well.

Would you not agree with me on that, that there are some very relevant cases, lines of cases, flow of logic, flow of decisions as well on very particular areas, especially the rights of the accused and civil rights?

Mr. REHNQUIST. Certainly the Warren Court was known for those types of cases; yes.

Senator KENNEDY. Could you give me your evaluation in those areas?

You are prepared to do it in other——

Mr. REHNQUIST. I have given you my evaluation in terms of my understanding of a historical consensus. I wrote publicly on two cases decided by the Warren Court in 1957 or 1958. That was on the basis of making a reasonably careful study of the cases and the precedents and coming to a conclusion.

I certainly would not attempt to categorize all streams of cases without having had some opportunity to research the precedents, even from a historical point of view.

Senator KENNEDY. And you are not prepared to say that the Warren Court was making decisions based upon personal philosophy rather than the Constitution?

Mr. REHNQUIST. No. I am not prepared to say that.

Senator KENNEDY. Again in terms of the responses in the areas that we have covered, albeit briefly, will respect to wiretapping, the May Day demonstrations, preventive detention, the investigation of dissidents, you have indicated time and again when asked questions in these areas that you were—and correct me if I misstate your view on this—that you were presenting a view as an advocate and therefore, were presenting the view of the Department, but if you found any of these views to be personally obnoxious, you would not have stated them or would not have testified on those or made those comments, speeches. Is that—

Mr. REHNQUIST. That is substantially correct, yes.

Senator KENNEDY. You see, I think we then have to take those statements or comments pretty much as the basis for your views, since I think you have been generally reluctant to develop them to a great extent in the course of this hearing. And we have to place that against the background of the experience, for example, that there were a number of men during the course of this administration—Leon Panetta, Secretary Hickel, Terry Lenzner, perhaps even Cliff Alexander, a number of others within the administration, who for one reason or another separated themselves from the administration on the basis of strongly held views covering a wide variety of different issues. But you never felt constrained to do so, I would gather, at least on the basis of what you have commented on here so far.

Mr. REHNQUIST. No I am still here.

Senator KENNEDY. And to that extent, I guess, we have to value the representations that you have made in these areas in the past really to be your views.

Mr. REHNQUIST. I do not think that is an entirely fair statement.

Senator KENNEDY. Well, could you give us some idea which statements represent your views and which don't? That is all we are asking, Mr. Rehnquist, if we can. We have all of us been fencing around on this. I know we would be interested in what help you can give us.

Mr. REHNQUIST. I know we have. I think it would be inappropriate in an area where I have acted as an advocate to express a personal view.

I realize that leaves you in an unsatisfied position, but I do not feel I can do otherwise.

Senator KENNEDY. Well, then, help us—what kind of questions do you think we ought to be asking you to fulfill our duty according to your Harvard article, if we are to perform our roles as you think we should, and we are running up against this kind of situation? You help me.

Mr. REHNQUIST. I am simply not able to.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. Birch?

Senator BAYH. I think I expressed yesterday similar frustration, realizing that the responsibility that you must meet as a prospective nominee, as a part of this administration, as an adviser of the Attorney General, as a participant in many ways, an advocate, comes head-on with the responsibilities we have and it is not an easy problem to resolve.

I tried your patience for well over an hour yesterday and will not do so today.

Let me just touch on two or three areas, two or three points that might clarify a bit the questions asked yesterday.

I notice in looking at the various rights that were discussed yesterday, and I have not had a chance to look at all the transcript, but a summary of them, one area of rights that is very much in discussion today that was not touched upon yesterday is the rights of women citizens in this country.

You have been asked to testify and have testified relative to EEOC cease and desist orders and this type of thing, so I will not ask your opinion on that.

The administration, so far as I know, has not taken a position, despite my efforts as chairman of the Constitutional Amendments Subcommittee, has not taken a position before the subcommittee relative to the importance of the equal rights for women amendment. But my staff tells me you have testified in favor of it. Is that right?

Mr. REHNQUIST. I testified before the House Judiciary Committee.

Senator BAYH. In favor of the amendment?

Mr. REHNQUIST. Yes.

Senator BAYH. I have been unable to get—

Senator COOK. Senator, we now have another man on our side, another advocate.

Senator BAYH. I am almost afraid to ask him whether this is the administration's view or his personal view.

Is that a fair question that I dare?

Mr. REHNQUIST. I think I must refrain from answering.

Senator BAYH. Let me phrase the question a little differently. Senator Cook and I have been trying to help, to lead the charge in this area, so we perhaps do not come as totally unbiased Members of this body. To date the Court has not yet looked upon women as full citizens under the 14th amendment.

Would you care to offer a personal opinion about how women should be treated under the 14th amendment?

Mr. REHNQUIST. Well, I think that, if I may speak with extreme generality as I feel is required, that—

Senator BAYH. May I interrupt just enough to say you know there are now two specific cases before the Supreme Court, and I will not ask you at all to deal with either one of those. So perhaps I should wave that red flag.

Mr. REHNQUIST. Certainly the equal protection of the laws clause in the 14th amendment protects women just as it protects other discrete minorities, if one could call women a minority.

Senator BAYH. One should not.

Senator COOK. Not even discreetly.

Senator BAYH. Can you cite us a case, Mr. Rehnquist, where the Court has ruled that discrimination against women is a violation of the constitutional rights?

Mr. REHNQUIST. No. I think the Court has been quite unwilling—in that Michigan bartender case decided about 1940 or 1949, they held that a limitation on a right of women to tend bar, as I recall, which was a fairly stringent limitation, nonetheless was not a violation of the equal protection clause, and it seems to me that there is one other case which I do not recall in which they also held something claimed to be a violation of equal protection clause was not one.

Senator BAYH. I do not know of a case where women have been described as persons under the 14th amendment. Does it strike you as rather inequitable to say that it is constitutional to prohibit women from serving liquor behind the bar, but all right to have them serving it in front of the bar to patrons?

Mr. REHNQUIST. I think that is one of the issues in one of the cases that is up there now.

Senator BAYH. All right. I do not think it is, but that is neither here nor there. I can see why you might not want to answer that.

Let me just try once again to be a bit more definitive, or get you to be a bit more definitive, in a couple of the areas we discussed yesterday because I think this is critical to us in trying to determine in our own minds whether you meet the test that you indeed set for yourself.

Do you believe this is a constitutional right?

Mr. REHNQUIST. Yes.

Senator BAYH. You stated that yesterday.

Do you concur in the general concept related in *Griswold v. Connecticut* back in 1965 as the way they describe this right, the broad basis of it?

Mr. REHNQUIST. I think it is not appropriate for me to get any more specific. To say whether I agree with the doctrine of a particular case or not I think would be entirely inappropriate for a nominee.

Senator BAYH. Well, if I read specific passages or sentences without relating them to a case, could I then ask if you concur in that general philosophy or—

Mr. REHNQUIST. You mean as a matter—do I think it philosophically sound in accordance with my own personal notions?

Senator BAYH. Yes.

Mr. REHNQUIST. Well, I will certainly try to answer that, with the understanding that this is not the same thing as saying that the Constitution so provides.

Senator BAYH. We have had a great deal of discussion here both from you and from some of us relative to where the Constitution enters and where one's personal views enter.

It seems to me that it is impossible for any human being not to let his personal views interfere or intervene in some way as he brings the Constitution into focus on a given problem.

You think personally, do you, that the right to privacy is important?

Mr. REHNQUIST. Yes.

Senator BAYH. It is an important right?

You see, where I have concern is that the way I understand what you said yesterday, and let me just try to paraphrase it and you tell me whether I am right or wrong, that you feel personally that there are a number of instances in which—many of them discussed yesterday—bad government policy involving an invasion of individual right to privacy is nevertheless not in violation of an individual's constitutional rights.

Is that an accurate paraphrasing of your feeling?

Mr. REHNQUIST. That was the view I took in the testimony I presented to Senator Ervin's committee on behalf of the Justice Department.

Senator BAYH. Well, but is that your personal view? You as an individual?

Mr. REHNQUIST. My personal view as to whether something that may be bad government policy is nonetheless not unconstitutional?

Senator BAYH. Well, let me use specific questions, either identical to or similar to ones I thought we dealt with yesterday.

For example, let's take a peace rally on the War Memorial steps in Indianapolis, Ind., totally peaceful. A speech is being given, a speech is being read. Policemen are taking pictures of everyone there. There are no threats or signs of violence at all.

Now, do you believe that that is a violation of the constitutional rights of those present to have this type of thing continuing to happen?

Mr. REHNQUIST. I think that calls for a judgment on the very specific factual situation.

Senator BAYH. Well, do I need to be more specific than the specifics I just related—totally peaceful, no threat of violence, no unruly mob, and yet the crowd was adequately dispersed by law enforcement officials taking pictures with the supposition that dossiers are being compiled on those there, or that the material gathered, pictures gathered, were being put into dossiers already compiled?

Mr. REHNQUIST. I think that calls for a constitutional judgment on the very specific sets of facts and I do not think I ought to give it.

The CHAIRMAN. We will recess now until 2 o'clock.

(Whereupon, at 12:25 p.m., the committee recessed, to reconvene at 2 p.m., the same day.)

AFTERNOON SESSION

The CHAIRMAN. Let us have order.

TESTIMONY OF WILLIAM H. REHNQUIST—Resumed

Senator BAYH. Mr. Chairman, inasmuch as Senator Hart is senior to me, and he has some conflicting hearings involving a problem in his own local community today, his State, which makes it impossible for him to be here right now, may I have permission to read three questions for Mr. Rehnquist and ask him to respond to these as if they were asked by Senator Hart?

The CHAIRMAN. Of course.

Senator BAYH. Is there any objection to that, Mr. Rehnquist?

Mr. REHNQUIST. None at all, Senator Bayh.

Senator BAYH. I don't know that I can read these as concisely as Senator Hart:

Mr. Rehnquist, yesterday you testified at great length, with great patience, on a variety of matters. I do have a few questions I would like to ask, not to belabor any of the discussions yesterday, but to try to refocus a bit on some of the fundamental concerns I have.

Senator Bayh and Senator Tunney have already asked about your opposition to the Phoenix civil rights order of 1964 and I appreciate you indicated your views on the merits and on that one you had changed. Here is still what is on my mind: Yesterday when we talked about the role of a Justice in constitutional litigation, I think you agreed with me that those clauses promising due process and equal protection of the law in Learned Hand's phrase of "majestic generalities" which require interpretation with the aid of history and

precedents. President Nixon has recognized the importance of judicial interpretation in the field of civil rights. When he accepted his party's nomination in Miami in 1968 he said, "Let those who have the responsibility for enforcing our laws and our judges who have the responsibility to interpret them be dedicated to the great principles of civil rights." I agree. The President's promise is particularly critical in the case of our highest tribunal. One thing that has troubled me is whether your record can fairly be said to reflect the dedication "to the great principle of civil rights" of which President Nixon spoke. What have you ever done or said that could help me on that concern?

That is the first question. I will repeat the question: What have you ever done or said that could help me on that concern?

Mr. REHNQUIST. I think that there are some paragraphs in my Houston law day speech which recognize the great importance of recognition of minority rights, that the progress is not as fast as we would like and that more remains to be done. I am trying to think of some other public statement that may contain similar—well, you know, I am just going back through isolated passages in public statements.

Senator BAYH. If I might just interpolate a bit, and perhaps this is an interpolation that Senator Hart wouldn't want me to make, but have there been things that you have done—it doesn't necessarily mean you have to have said them—relevant to the committee inquiry? You mentioned one in response to the question I asked yesterday relative to your change in opposition to the equal accommodation ordinance. I think Senator Hart's question could reasonably be interpreted as an expansive question, not limited to particular things you may have said in speeches.

Mr. REHNQUIST. Well, I am trying to think through, perhaps going backward from the public remarks I have made in the Justice Department. I think in my so-called New Barbarians speech I made the statement that the people who lie on railroad tracks to prevent the carrying out of the laws stand on exactly the same footing as a Southern Governor who stands in the schoolhouse door.

Now, this may not indicate anything more than a statement on my part but it certainly indicated that I have, long before my nomination to the Supreme Court was made, felt strongly that the law of the land should be carried out in every part of the country and that resistance to it, whether in the name of interposition or something else in the South, or whether in the name of conscientious objection somewhere else, couldn't be tolerated.

Senator BAYH. May I suggest in the capacity which you hope soon to hold that it is a bit more than carrying out the law that Senator Hart asked your opinion on, but how you view the purpose of the law, the interpretation of the law in a general term, not just carrying it out.

Once the Supreme Court has decided, it is one thing to say you shouldn't stand in a schoolhouse door. That is a ministerial function; but the point, it seems to me, that Senator Hart's question is directed to, is as to whether that decision should have been made in the first place because of its effect on human rights. If that is not a fair interpretation, let's just go to the question.

Mr. REHNQUIST. Justice Miller, I think, made the statement in the slaughterhouse cases that in his opinion the principal import of the post-Civil War amendments was to benefit the Negro race.

I have always felt that was contemporaneous construction and a sound one of those amendments.

Senator BAYH. I am willing to let that stand if you are.

Mr. REHNQUIST. I am.

Senator BAYH. The second question from Senator Hart is:

Coming back one more time to your view of the Court's role, I have a further question relating to our discussion yesterday about the need for judicial interpretation. My impression is, and please correct me if I am wrong, that you responded to Senator McClellan yesterday that you agreed that the Court should not reinterpret the Constitution to bring it up to date, so to speak? I would like to explore that.

I understand you support the decision in *Brown* versus *Board of Education*. By your view of the Justices' role, how would you justify the Court's departure from *Plessy* versus *Ferguson* and subsequent decisions, when they were overruled in *Brown*?

Mr. REHNQUIST. I think I would justify it in this manner: that presumably the nine Justices sitting on the Court at the time that *Brown* versus *Board of Education* came before them canvassed, indeed they canvassed to such an extent that they set the case down for reargument on specific issues, deeply canvassed the historical intent of the 14th amendment's framers, the debates on the floors of Congress, and concluded that the Court in *Plessy* against *Ferguson* had not correctly interpreted that.

Now, that seems to me a very proper role of the Court. Precedent is not sacrosanct in that sense. Due weight has to be given to the Justices of an earlier day who gave their conscientious interpretation, but if a recanvass of the historical intent of the framers indicates that that earlier Court was wrong, then the subsequent Court has no choice but to overrule the earlier decisions.

Senator BAYH. Are you aware that probably few cases in history have provoked louder cries of anguish from some members of this committee than *Brown* versus *Board of Education* and that there is probably not a better example that they would use to support the contention that you should not support "lawmaking" as a Supreme Court judge as symbolized in their minds in *Brown* versus *Board of Education*?

Mr. REHNQUIST. Of course, I do not support lawmaking as a Supreme Court judge; but as I stated yesterday, if nine Justices, presumably of the same varying temperaments that one customarily gets on the Supreme Court at the same time, all address themselves to the issue and all unanimously decide that the Constitution requires a particular result, that, to me, is very strong evidence that the Constitution does, in fact, require that result. But that is not lawmaking. It is interpretation of the Constitution just as was contemplated by John Marshall in *Marbury* versus *Madison*.

Senator BAYH. I suppose Senator Hart asked the question to ask you to examine that historically, now looking back on *Brown* versus *Board of Education*. Does an individual judge in making a determination as to whether there should be a dramatic change—is it his responsibility to count the number of votes or to determine whether that change should be made?

I am sure you would say it is the latter?

Mr. REHNQUIST. Count the number of votes where?

Senator BAYH. In other words, you suggested in response that such a dramatic change would not be just bringing the Court up to date, in spite of strong precedents, when nine judges get together and feel this way. It seems to me at the time that is not relevant. At the time they don't have that decision before them. They have to determine whether precedents before are to be sustained or whether a significant change in Court interpretation should be made. And thus you have to use broader philosophical reasons, it seems to me, than the one you just gave, if I may say so.

Mr. REHNQUIST. Is the thrust of your question the idea that I was suggesting that unless all nine of them agree, none of them should have voted to overrule *Plessy versus Ferguson*?

Senator BAYH. No. I was trying to get a better idea of what situations would have to exist at the moment you might be called upon to make a dramatic reversal such as *Brown versus Board of Education* to compel you to make that.

The fact that you fall back on, the strong precedent of a nine Court decision that has been sustained over a period of years, is irrelevant at the moment that a decision must be made in the first place to chart a new course or reinterpret old law.

Mr. REHNQUIST. Well, I don't think you would ever say that a unanimous decision of the Supreme Court is irrelevant in determining a case before you as a Justice of the Supreme Court. I think one would approach a unanimous decision, particularly one that has been reexamined and reaffirmed, with the greatest deference. That doesn't say you never decide otherwise.

Senator BAYH. Let me try to phrase the question again because apparently I have done it very poorly.

At the time *Brown versus Board of Education* came before the Court, there was no nine to zero vote in support of *Brown versus Board of Education*. I am asking you, and I think what Senator Hart is trying to do is to ask you, to put yourself in a similar situation, not on that particular case necessarily but to discuss with us what circumstances you feel generally need to exist before you as a Justice would feel that you could overturn such a strong precedent as that which had existed under *Plessy versus Ferguson*.

Mr. REHNQUIST. Well, an examination into the intent of the framers of the 14th amendment. If you became convinced that the *Plessy* Court had not properly interpreted that intent, that it had simply adopted a view that was too narrow to be consistent with what the framers of the 14th amendment intended, then I think you would be entitled to disregard *Plessy*.

Again, an 8-to-1 decision is not one lightly to be disregarded, but nonetheless, if upon reexamination giving the weight that you ought to give to a precedent it appears wrong, then it is wrong.

Senator BAYH. Is it possible that in addition to making the determination that the previous Court had been wrong, one could come to the conclusion that certain circumstances had arisen in the interim which made the previous decision unable to accomplish the purpose that the Court sought to accomplish?

Mr. REHNQUIST. Well, I suppose one is entitled to take into account the fact that public education in 1954 is a much more significant institution in our society than it was in 1896. That is not to say that

that means that the framers of the 14th amendment may have meant one thing but now we change that, but just that the rather broad language they used now has a somewhat different application because of new development in our society.

Senator BAYH. One of those new developments is the very thorny thicket of busing, and you have mentioned twice now that you are opposed to busing children over long distances for any purpose. "Long distances" is a significant qualifier that perhaps you could get most of us to agree with you on, but unfortunately that is not the case before us on most occasions.

Let me ask you this: Do you feel that busing is a reasonable tool or a worthy tool or that it is a useful instrument in accomplishing equal educational opportunities, quality education for all citizens?

Mr. REHNQUIST. I have felt obligated to respond with my personal views on busing because of the letter which I wrote and I have done so with a good deal of reluctance because of the fact that obviously busing has been and is still a question of constitutional dimension in view of some of the Supreme Court decisions, and I am loath to expand on what I have previously said.

My personal opinion is that I remain of the same view as to busing over long distances. The idea of transporting people by bus in the interest of quality education is certainly something I would feel I would want to consider all the factors involved in. I think that is a legislative, or at least a local school board type of decision.

Senator BAYH. Fortunately or unfortunately, that probably will reach the highest court and that is why it is a matter of concern to you and a matter of concern to us.

Mr. REHNQUIST. Well, there is no doubt of that.

Senator BAYH. In the Phoenix educational climate that existed at the time you wrote the letter to the editor, did you have some schools that were inferior to others in the Phoenix school corporation?

Mr. REHNQUIST. I am not sure that I know that much about the various schools in Phoenix at the time to answer that.

Senator BAYH. Well, you apparently knew enough about them to be opposed to the program that was suggested by the superintendent of schools.

The reason I ask that question is that it is conceivable to me that the reason for busing was to make more equal the educational opportunities in schools that were unequal at the time.

Mr. REHNQUIST. Well, I will stand on my earlier statement that the busing over long distances to achieve racial balance which many might think also contributed to quality education was a burden that the schools in Phoenix as they existed at that time should not have to bear.

Senator BAYH. Do you feel a school board has the responsibility to provide equal quality education in all segments of the community? Is that a reasonable goal?

Mr. REHNQUIST. Oh, certainly.

Senator BAYH. What does a school board do about the inconsistencies that exist in many of our communities, some of which I represent, in which there is strong opposition to busing, and yet equal opposition to a tax plan or a financial plan which would upgrade inferior schools that exist within the school corporation?

Mr. REHNQUIST. Senator, I think that goes beyond the bounds of simply my present view as to the comments I made in 1957 and since it is so obviously something that could come before the Supreme Court, I don't think I ought to answer it.

Senator BAYH. It seems to me that would be the purpose of the whole program espoused in Phoenix at the time, not just to say that you had α percentage of Chicanos and Blacks sitting in your classroom, to provide quality education. That is why I think the question is meaningful in terms of your original opposition. It is too easy simply to oppose busing over long distances, which is a very inefficient way to provide educational opportunities. I would concur with that. But to suggest that that is the only reason for busing, the only way it can be utilized, I think is not consistent with the facts.

Mr. REHNQUIST. I think I will stand on my earlier statement.

Senator BAYH. The third question from Senator Hart:

Returning to the May Day demonstrations, Senator Hart wants to follow up on one point Senator Kennedy raised yesterday, leaving aside the question of whether sweeping arrests were made without probable cause, the second point is that because a decision had been made to dispense with even the field arrest procedures, it soon became clear to most observers that the overwhelming bulk of the arrestees couldn't possibly be prosecuted. There was no proper means of indicating who had arrested them or for what offense or in what location. In fact, random assignment of officers as the arresting or complaining policemen was made at the District of Columbia stadium for a number of the arrestees.

Didn't it concern you sufficiently to speak up about it and even after it had become clear they couldn't be lawfully prosecuted, many youngsters were still detained in deplorable conditions and after release their cases were not dropped until the prosecution was in effect kicked out of court by the U.S. court?

Didn't that bother you at all?

Mr. REHNQUIST. I have to assume it is a hypothetical question, although some elements have certainly been demonstrated to the satisfaction of the local courts here. I think some of them are assumptions. But speaking to it as a combined factual and hypothetical question, I did not make any effort to intervene in the matter after the turmoil for two reasons, I suspect:

One is that the Office of Legal Counsel is basically an advisory branch of the Justice Department. The operational divisions—the criminal division, civil rights division, internal security division—are the people who handle things in the courts and in this case, as a matter of fact, I think it was the District of Columbia Corporation Counsel and the U.S. attorneys who were handling it.

The second thing is that, as I recall, my last day in the office before I was down with this back trouble was sometime around May 8 or 9, and I was simply incapacitated from that time until early June.

Senator BAYH. Senator Hart wanted me to make one final comment for him in which he apologizes to you, Mr. Rehnquist, and to the committee, for not being able to be here personally this afternoon to hear the answers to these questions. He said: I thought they were important and I will study the record for the replies.

Now, let me, if I may, go back to where we were before we all had a much needed break for lunch.

It has been my opinion, and I am sure that I am not alone, that you have done a very honest and articulate job of fielding the questions that have been posed.

I have felt that you have handled them sincerely and I hope that you feel that we have asked them with equal sincerity.

It seems to me we are on the horns of a real dilemma, one that I am sure you recognize. You in your writings in the Harvard Law Record suggested that you felt that the nominee's philosophy is ground that should be considered, a subject that thsould be considered by the Senate, on a Supreme Court nominee.

The President, as few presidents have done before, stressed strongly at the time your name was submitted publicly that it was because of your philosophy and the philosophy of Mr. Powell that you were chosen. That was a compelling reason, that you are a judicial conservative. Before we were told the goal was for a strict constructionist. It has been difficult and perhaps meaningless to try to find any definition of those terms, but what the man himself believes. Because of the responsibility you have had, and it has been a significant one, at Justice Department, you felt compelled not to answer questions covering your own personal views on issues, respecting judicial philosophy, for several different reasons.

I would like to try to define these reasons to see if perhaps there isn't a way that we can deal with the responsibility I feel you have and I sense that you feel that you have, and the committee has, to try to explore in more detail what you really feel about some of these important fundamental issues.

You indicated that you felt it improper to give us your personal views with regard to certain matters where you have been involved in the Justice Department's activities, including in a number of cases refusing to answer questions on the grounds that you have been the Justice Department's official spokesman regarding these subjects either before congressional committees or in making public speeches at universities and other forums.

Could you tell us once again why do you feel, now that you are a Supreme Court nominee, hopefully soon to leave the executive branch, you still feel it is improper to give us your personal views, your personal views on these matters of concern?

Mr. REHNQUIST. I think that it is a generally applicable principle in the lawyer-client relationship that the lawyer does not express his personal view as to the merits of the client's case. I think that that has added applicability here because the effect, assuming that there were some areas in which I disagreed with the position I have publicly taken for my clients would be disadvantageous to them. For that reason I certainly don't feel I can simply answer in areas where I may be in agreement and say "No comment" where I am in disagreement, since the obvious implication would be that where I say "No comment" I am in disagreement; and I think this is less than fateful advocacy on the part of a lawyer toward his client.

Now, I realize that this puts the committee in something of a dilemma. I don't know that it is much different than that posed by the position of other nominees who have come here, but at any rate I am simply unwilling now, even though I may be a Supreme Court nominee, to foresake what I conceive to be my obligation to my clients.

Senator BAYH. You see, I appreciate and respect that. I was asked by some of the members of the press if I felt that anyone who espoused radical views that you have articulated should be kept off the Supreme Court and I said that frankly I didn't know whether you held radical views. I felt that radicals, left and right, would not benefit the Court, and I thought some of the views that you had espoused could be interpreted by me as radical but that you are interpreting them as part of the Justice Department philosophy. This depending on the Government's selfrestraint, this whole business, I feel is very bad. And thus—let me see if there isn't a way to break this log jam.

You feel very strongly about the attorney-client relationship, not only that this would be adverse to the client if you took a contrary position to your client's, but I suppose more basically the common law tradition of not disclosing matters of privilege that are shared by you and your client. Is that accurate?

Mr. REHNQUIST. Both are certainly involved in many of the cases.

Senator BAYH. Well, who is your client?

Mr. REHNQUIST. My clients are the Attorney General and the President.

Senator BAYH. As agent for the entire United States, I suppose, right?

Mr. REHNQUIST. Well—

Senator BAYH. In essence your client is the United States and—

Mr. REHNQUIST. No. That, Senator, I regard as a great oversimplification. Certainly as to the President, if one conceives him to be a client and have a lawyer which I don't think is the happiest expression of that relationship, he is, for all practical purposes, a popularly elected executive who is responsible to the Nation as a whole every 4 years for an electoral mandate.

The Attorney General is the President's appointee. He is responsible to the President. I am the President's appointee to a position where I am responsible both to the Attorney General and to the President.

The CHAIRMAN. I think if you took the position that the whole American people were your clients that you would be fired and you should be fired.

Senator BAYH. I would just as soon not comment on that profound statement.

Senator HRUSKA. Would the Senator allow a comment from the Senator from Nebraska?

Senator BAYH. I will be happy to.

Senator HRUSKA. Thank you.

Perhaps there isn't such a thing as anyone who represents all the people in America, either as a client or as a public official or in any other way; but isn't it true, Mr. Rehnquist, that anyone who represents the President as counsel is representing the man chosen to represent all of the people? As such it is important that he receive the best and most complete legal advice possible. And of necessity much of it must be confidential and bound by the attorney-client privilege.

Mr. REHNQUIST. Certainly the President is the closest thing in a Republican form of government that may be typified as representing the people.

Senator BAYH. Well, let me leave the question, then, that you really have as your clients the entire United States, but confine it to

your having as your client the Attorney General and, one step removed the President.

Am I wrong in suggesting that both at common law and statutorily, from the canon of ethics' standpoint, that the lawyer-client privilege is designed to help the client and not the lawyer? Is that privilege not one to the client and not from the client to the lawyer?

Mr. REHNQUIST. Certainly, the client is entitled to waive the privilege. The lawyer is not.

Senator BAYH. All right. Then we have two types of concern. One, your advocacy in those areas where you now might say that your personal opinion is different from the administration's and you don't want to disclose that because you might undercut your own client.

The second deals with revealing lawyer-client secrets. What relevance does that type of obligation have when the position of the client is already known publicly? In other words, if the administration and the Attorney General have said what they feel about certain elements of the basic tenets of the Bill of Rights, then why do you as a lawyer have any right to protect them from your involvement in that?

Mr. REHNQUIST. Well, I think to the extent that the Department, the administration, takes a public position, I feel free to discuss and have discussed my own personal contribution to that position—the New York Times case being an example; the preparation of the national security wiretapping brief being another example. But insofar as I may have been asked for advice in the process of making administration policy decisions upon which the administration has not taken a public position, there, I think, the lawyer-client privilege very definitely obtains.

Where the administration has taken a public position and the lawyer is asked not what advice did you give in connection with that position but basically do you personally agree with the position or not, there, I think, it is inappropriate to answer even though a public position has been taken.

Senator BAYH. You see, what concerns me is that not only in testimony before subcommittees of this committee, but also on several college campuses, you have made statements, and when some of us have tried to ask you about the statements you made specifically, each time you said you were speaking as a Justice Department spokesman—also that the audience expected a hard liner, I think, was another response you made to one of our colleagues. In these areas, we haven't been able to get Bill Rehnquist's philosophy for our consideration, and it is those areas that concern me.

You feel those are still protected by the attorney-client relationship?

Mr. REHNQUIST. Yes; I do.

Senator BAYH. That is the type of relationship that I suppose could be waived by the client, could it not?

Mr. REHNQUIST. I would think that it could be; yes.

Senator BAYH. And if some members of this committee would send to the Attorney General a letter asking him to let you have the opportunity to freely express your own personal philosophy, and we got his assent to that, or he gave his assent to you, then you would be free to give us the answers to some of the questions which heretofore you have not answered because of the lawyer-client relationship?

Mr. REHNQUIST. I would certainly think the privilege could be waived by the clients. Now, just who the client is, whether it is the President or the Attorney General, is something that would depend on the particular circumstances.

Senator BAYH. But at least it is not all the people of the United States? We have agreed on that?

Mr. REHNQUIST. I agree on that.

Senator BAYH. Well, would you have any strong objections if I were to send such a letter to both the Attorney General and the President? Is there anyone else who should be asked to participate?

Mr. REHNQUIST. Without suggesting at all my own impressions as to what a response would be, I would certainly have no objection to your sending—

Senator BAYH. I am not making this suggestion lightly. I think you are absolutely sincere and feel you have a responsibility to adhere to the lawyer relationship, but I must say I feel I have an equal responsibility to find a way to penetrate it. You have admitted that by your own writings. The President has admitted it, and yet because of the nuances of the lawyer-client relationship, we aren't really able to get what you feel.

Since you have no feeling that this would embarrass you, I will send such a letter to the President and to the Attorney General and await their reply. And I appreciate your patience in going through all of this with me.

Mr. Chairman, I will send this letter today before the sun goes down, because I don't want this to be "drug" out. I would like for it to be consummated quickly.

The CHAIRMAN. Don't worry; it is not going to be "drug" out. [Laughter.]

About this business, I think that is something this committee ought to pass on.

Senator BAYH. Pardon me?

The CHAIRMAN. I think that is something this committee ought to pass on. I am opposed to it.

Senator BAYH. Do you feel that as one Senator, one member of the committee, I don't have a right as an individual, Mr. Chairman?

The CHAIRMAN. Go ahead.

Senator HRUSKA. Will the Senator yield?

Senator BAYH. I will be glad to discuss this with any of you here, either privately or publicly. It seems to me this gives us an opportunity to let this gentleman express his own opinion.

The CHAIRMAN. This gentleman has been on the witness stand for the last 2 days and has acquitted himself very, very well.

Senator BAYH. I agree. I have said that to the press. I will continue to say it, but one of the problems he has been faced with, Mr. Chairman—

The CHAIRMAN. I am ready to vote.

Senator BAYH. Pardon me?

The CHAIRMAN. And I am ready to vote.

Senator HRUSKA. Would the Senator yield?

Senator BAYH. Yes; I will be glad to get the thoughts of the Senator from Nebraska.

Senator HRUSKA. Mr. Rehnquist, the President in his comments on your nomination designated you, I believe, as a judicial conservative. Is my recollection correct?

Mr. REHNQUIST. I believe it is, Senator.

Senator HRUSKA. Have you ever discussed with the President personally whether you are a judicial conservative or not, in the context of the nomination for the Supreme Court?

Mr. REHNQUIST. It is not that I have any hesitancy in answering the question, except as to the propriety of repeating any discussion with the President. Since there was none here, I suppose I need have no hesitancy; no, he did not.

Senator HRUSKA. Then, obviously the President, in referring to you and describing you as a judicial conservative, resorted to the same type of information that is presently available to the committee, to wit: Your testimony before committees, your statements, your articles, opinions that you have written, and the observations and the contacts and recommendations of different people who know you. Wouldn't that follow?

Mr. REHNQUIST. Certainly those sources were available to him.

Senator HRUSKA. Yes. Presumably he did consult all or some of these sources. We know, at least as much as he knew when he determined your philosophy. I submit we can do the same.

Now, as to the interest, the very intense interest, of some members of this committee in some expression from you as to your personal philosophy, I would venture the suggestion that this is a rather new-found interest. I recall very well in the committee room when another nominee for the Supreme Court was occupying the nominee's chair which you now occupy. I think for the better part of 2 days the Senator from North Carolina repeated question after question almost without limit, requesting insight into his personal philosophy on various subjects. The answer was always the same. And at one juncture, the nominee said:

Mr. Senator, I have talked to no one, no place, no how at no time about anything since I received this nomination.

Now, that was Thurgood Marshall.

I heard no expression of interest on the part of some other members of this committee in following up that line of questions with that nominee. Always before when a nominee has declined to answer a question when, in his own mind, for whatever reason, it has appeared inappropriate, this committee has honored that decision. This nominee should be treated no differently.

To require answers, aside from the attorney-client privilege, would not be fair to his future colleagues on the Court, assuming confirmation; it would not be fair to the litigants in the Court or to their respective counsel.

And so even if we have a letter here from all of the people of the United States saying it is all right for you to talk, Mr. Rehnquist, those considerations would not be solved, would they?

Mr. REHNQUIST. No; I don't believe they would.

Senator HRUSKA. And that has been my experience, reaching back to the time of Justice Brennan's confirmation. That has been the standard answer, and it has been accepted by this committee. I do

not believe that there is much hope of getting away from the immutable fact that there is a limit beyond which no nominee can in good conscience go in expressing opinions either personal or legal in character at this particular juncture.

As to the waiver, I don't see how you can get a waiver. There is no particular way it can be received nor issued.

Mr. REHNQUIST. Certainly past nominations have generally taken that position, and I think their refusals to answer that sort of question were probably justified.

Senator HRUSKA. They certainly have, and I think upon the reading of any of the prior hearings, that same decision, that same answer, will be found. It has always been accepted by the committee and also by the Senate.

I think you have been more liberal than some of the nominees before us in the extent that you have answered many questions. I would have asserted the answer, the historical answer, much sooner than you have done.

Thank you, Senator Bayh, for yielding to me.

Senator BAYH. Well, I appreciate getting the comments of my colleague from Nebraska. I am sure he is aware as a distinguished attorney that there is ample precedent. One has to look no farther than the American Bar Association Code of Professional Responsibilities, Code of Ethics, under canon 4, to find that the lawyer-client relationship can be waived by the client.

Now, perhaps the client in this circumstance would have no reason to waive it. I feel that this nominee has been struggling as we have been struggling to reconcile the differences which exist in our responsibility. They are not the same and I don't suggest that they are. I sat way down there when we had that particular nominee here and I think the Senator from Nebraska is absolutely right; that is exactly what happened. And I think all of us have to recognize that many times it all depends on whose ox is getting gored and we don't always face each problem with consistency as much as we would like to; we are bound up in our own ideas.

But I do not recall in my public life—that has not been nearly as long as my distinguished friend from Nebraska's—a President of the United States who has ever come on television and has made as the second prerequisite for his nominee, the second consideration, his judicial philosophy, and then to be confronted with that same nominee, a very distinguished legal scholar, who says himself:

Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

Now, there are the horns of the dilemma on which we are impaled.

Senator HRUSKA. If the Senator will yield for comment on that point, I don't think there are any horns at all nor any dilemma.

The CHAIRMAN. And no one's ox is being gored.

Senator HRUSKA. The fact is, and the Senator has as good a knowledge of that history as I, that Franklin Delano Roosevelt after he failed legislatively to pack the Court, turned to a deliberate course of appointing liberal judges and he chose them for that and he called them that. Let's not kid ourselves; that is why they were chosen.

And I sat here since 1954, sometimes in semiagony, sometimes in frustration, also sometimes in despair, wondering when that line of judges of liberal philosophy would ever run out and we would come to another kind of philosophy which would lend balance to the utterances and the statements of the Court. And I believe it is about time now that this committee and the Senate and the country take advantage of the happy circumstance that another type of nominee with another philosophy is being considered. It is not true that it is for the first time that that second consideration is being asserted for the appointment of members of the Supreme Court. That is not so. History disproves it; and it is a little late to try to rewrite that history.

The CHAIRMAN. Well, let's proceed.

Senator BAYH. If I might just make one other observation, Mr. Chairman, I think that there probably are some distinguished judges on that Court that have been appointed in the interim described by the Senator from Nebraska who would shudder a bit to be described as part of the liberal bent. I will not name them but I think the record will show who they are.

I want to make clear the distinction between what I am concerned about and what—maybe there isn't a distinction, but it seems to me there is one—a prospective nominee should refuse, has, and undoubtedly will refuse to comment on certain areas because this might abridge his sitting as a judge in cases that come before him. This is one area.

Together we can go through the transcript and enumerate those areas that have confronted Mr. Rehnquist with a problem. I am not at all concerned about those but we can also go through that transcript and we can find a number of areas, a number of questions which I will not repeat at this time, where that was not the basis, where I had the feeling that here was a man who was willing and wanted to give us his thoughts, but he could not do so because he felt he was violating the trust he had with the Attorney General or speaking as a Justice Department spokesman. I see no reason why that should not be lifted. I don't see how it is going to hurt the President or the Attorney General and it is surely going to help the Senate in its consideration.

I am not going to hold my breath until we get that waiver.

Senator HRUSKA. Or until it is asked, either.

Senator BAYH. Oh, perhaps I should hold it until it is asked. But that will be probably an easier time frame than receiving a reply.

Senator HRUSKA. The Senator does not recall a time when any nominee has been before this committee or any of its predecessor committees and when the nominee said "I feel it is improper; it is an improper question which is directed to me and therefore I respectfully regret that I cannot answer it," that that assertion on his part has not been respected by the committee? The validity of that statement is open for examination of previous transcripts by any of the members of this committee or anyone else. The refusal is for the nominee to assert and when it has been asserted, whoever the nominee has been, it has always been respectfully abided by.

Senator BAYH. Then may I ask my colleague from Nebraska if he would help resolve the problem in my mind where the nominee is on record as having said, in support of the administration, speaking

as a Justice Department spokesman, that he favors certain positions that I feel are not in the best interests of the country?

Now, I am unable to separate the nominee from the philosophy that he espoused wearing that hat. Am I obligated then to vote against him?

Senator HRUSKA. Well, in the first place, we have always recognized that a man's status changes when he becomes a nominee. Prior writings will speak for themselves but if he speaks on that same subject in terms of either expressing an opinion on a legal or constitutional proposition, or his present convictions on a proposition of that kind, then he runs into trouble and possible unfairness to his future colleagues if he would have to withdraw from a case. You cannot separate that.

We have always had that and we can examine the writings. We have Mr. Rehnquist's prior record and we will have the opinions of witnesses that will come here; they will give us many interpretations of his philosophy. I can hardly wait until next Tuesday when those explanations start. A witness has a right to be wrong, too.

And so the position that a man assumes when he becomes a nominee is different; it immediately changes and it should be governed by the new circumstances.

Senator BAYH. Well, I want to compliment the nominee again as I have in the past.

You say he has a right to be wrong.

Senator HRUSKA. Any witness has a right to be wrong; any witness.

Senator BAYH. On occasion even a U.S. Senator might be.

Senator HRUSKA. I have known of some times when that has happened also. [Laughter.]

Senator BAYH. The admission has been less frequent, but I think the fact that the nominee has said in the area of equal accommodations that he felt now in retrospect that he would not have that same position, I salute him for that. I just might—

Senator MATHIAS. Would the Senator yield just for one brief observation?

Senator BAYH. If you will let me just read one paragraph from the Congressional Record, I will yield and not force further patience on my colleague or the witness who has been very patient.

I just want to remind my friend from Nebraska that there are some rather distinguished authorities for the line of questioning we were following here which go as follows:

"When we are passing on a judge, we not only ought to know whether he is a good lawyer, not only whether he is honest, and I admit that this nominee possesses both of these qualifications"—as I do about our present nominee—"but we ought to know how he approaches the great questions of human liberty." A gentleman by the name of George Norris, distinguished Senator from Nebraska, made that observation in a similar situation.

Senator HRUSKA. It is still true; still true.

Senator BAYH. All right. I yield.

Senator MATHIAS. Just a very brief observation: I join with my colleague from Nebraska, the Senator from Nebraska, in his feeling. I think that Mr. Rehnquist deserves a considerable degree of understanding and admiration because he has observed the important rules which govern the profession of law.

Perhaps what the Senator from Indiana seeks to do and which I seek to do and other members of the committee think can be done, is limited by our ingenuity and not by the subject matter. We can get at what we need to get at without applying to the President for any waiver. I agree with the Senator from Nebraska.

The CHAIRMAN. Judge Craig.

Identify yourself for the record.

STATEMENT OF HON. WALTER EARLY CRAIG, A U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

Judge CRAIG. Mr. Chairman, I am Walter Early Craig. I am currently U.S. district judge for the District of Arizona. I am a former president of the American Bar Association.

I am here, gentlemen of the committee, in support of the nomination of Mr. William H. Rehnquist to be an Associate Justice of the Supreme Court. In passing I might say that I would be less than honest if I did not also say that I endorse wholeheartedly the nomination of Mr. Lewis Powell. I have known him for 25 years. Mr. Powell has a number of witnesses, I understand, to come before this committee, and I endorse everything they say that is good about him. I know nothing but complimentary things about him.

I can say the same for Mr. Rehnquist. I have known Mr. Rehnquist since his admission to practice law in Arizona, both in a professional capacity and since I have been on the bench, which I ascended in 1964.

Mr. Rehnquist's academic achievements are already a matter of record. They are remarkable. The only reason I mention those high achievements is because it relates to his qualifications as a lawyer. In my experience, Mr. Rehnquist's professional skills and ability are outstanding.

I have prepared and submitted to you a written statement with respect to my observations and concern with Mr. Rehnquist's appointment. I am certain that in my experience, throughout the United States, and my acquaintanceship and knowledge of members of the profession, that I could find no one that I would recommend more highly than Mr. Rehnquist to occupy the office of Associate Justice of the Supreme Court of the United States.

He has demonstrated, I think, his patience and judicial temperament in appearing before this body. I have observed it for 19 years, so it does not come as a surprise to me that he has handled himself so magnificently here. I have seen only a relatively few minutes of his testimony, but I have kept in some touch with the progress of the hearings.

In his appearances before my court, Mr. Rehnquist conducted himself not only with outstanding professional skills but with dignity, intelligence, and integrity. I think he has conducted his life that way so long as I have known him.

I do not know, Mr. Chairman, if you care for anything further, but I might comment in one additional respect. I read someplace or heard something about Mr. Rehnquist probably not being the leader of the Phoenix bar or of the Arizona bar. If there is a "leader" of the Phoenix bar or the Arizona bar, I do not know who it is, with the possible exception that it may be my 97-year-old father who is still going to his office.

Obviously, today Mr. Rehnquist could not be the leader of the Phoenix bar or the Arizona bar because he is not in Phoenix. He has been in Washington serving in the Department of Justice since early 1969.

What I do want to say, however, is that if Mr. Rehnquist were currently practicing in Phoenix and in Arizona, I would say, if asked, that he is a leader of the Arizona bar. There may be others who qualify for that title, but certainly Mr. Rehnquist would be at the top.

The CHAIRMAN. Thank you, sir.

Senator Bayh, any questions?

Senator BAYH. Some of the press may have seen me shaking hands with Mr. Craig up here just before the hearings started, and if he has no reason for me not to disclose what I told him, I will disclose it, that I was faced with trying to find someone whom I had great respect for in the legal community that might be familiar with the thought processes and philosophy of the nominee, and this morning I had said to my staff I would really like to talk to Walter Craig, but I didn't think it was ethical for me to approach him because he now sits as a distinguished member of the Federal judiciary in Arizona.

I had the opportunity to come to know and respect the judge—perhaps I should be more official—Judge Craig, while he was the president of the American Bar Association, and he really is the kind of person whose opinion carries a great deal of weight. I think he would be the first one to suggest that no one Senator, even a friend, should automatically agree with his judgment, but the fact that he has taken the time from his busy court schedule to be here and endorse emphatically this nominee carries a great deal of weight with the Senator from Indiana. It really does.

Judge Craig, you are familiar with the concern that many of us have here, that at least the President has thought that the whole purpose for these nominations is to turn around the Court and thus turn around the series of interpretations that have been put on the laws over the past 20 years, are you not?

Judge CRAIG. Well, generally, yes, Senator.

Senator BAYH. And the concern that I have had, just as one Senator, and I don't think I am alone, is the fact that when we put on the Court a Justice who in one capacity or another prior to his nomination has taken positions that concern us in the area of right of free speech—the chilling effect or the lack of chilling effect, how should wiretaps be controlled, self-discipline is all that is necessary to keep Big Brother government in line, and this type of thing—in varying capacities these statements have been made, and that is what we have been trying to find out; and whether we will be able to reconcile that or not, I don't know, but as I said earlier, the fact that you have the kind of judgment about the nominee that you have means a great deal to me.

Judge CRAIG. Senator Bayh, I must confess in my own judgment that I do not know what the term "judicial conservative" means. I must confess that I am confused in this day and age as to what a liberal is. I am confused as to what a conservative is.

In 1928 when I belonged to the Al Smith for President Club on the Stanford University campus, I think some people thought I was a

radical because that was about as crazy a thing as you could possibly do with Mr. Hoover living on the campus. I didn't consider myself as being a radical. I didn't know what I was. I know I had a lot of fun with it. But I think the way the system of justice operates in the United States, no one man is so important as to singly change the law of the land.

I have not sat on the Supreme Court of the United States. I have sat on appellate courts with other judges, something I will do tomorrow morning if the plane gets me there. I know the way the appellate function works, and I know a little about the decisionmaking processes on those courts and on three-judge courts at the district court level.

I think the discussions around the conference table with each judge contributing his views to the ultimate result is really how the law is made. No one man makes it, as you well know. We worked together on the 25th amendment, that one didn't come out exactly the way you or I would have chosen to do it. The final result was a product of discussions, hard work, rewriting and compromise, and I think generally that is the way the law grows from the judicial side as distinguished from the legislative side.

Senator BAYH. May I, Mr. Chairman, ask Judge Craig, since he is in a unique position to answer some of the allegations that may be made next week, if he would permit me to ask him if he has personal knowledge of some of these things.

I have a resolution of the Southwest Area Conference of the NAACP, a resolution sent to the President of the United States, dated October 23. In it it makes certain allegations relevant to the nominee's insensitivity in the area of human rights.

Let me read from this resolution, and perhaps so it cannot be taken out of context and not thus give the wrong impression I ought to ask unanimous consent that it be put in the record in its entirety.

The CHAIRMAN. Right.

Senator BAYH (reading). "Whereas, Mr. Rehnquist in 1964, while serving in a high official capacity in the Arizona State government openly harassed and intimidated the immediate past president of the NAACP, Rev. George Brooks and members of the NAACP on the steps of the Arizona State Capitol during a peaceful attempt to reach the legislative bodies to present grievances from the minority community."

Judge Craig, do you have any personal information relative to that charge or allegation?

Judge CRAIG. No, I don't. I would say from my knowledge of Mr. Rehnquist that the descriptive adjectives used are unwarranted and probably, Senator, the man who can best answer that one sits to my right, Senator Fannin, who, as I recall, had some official function at that time in the State of Arizona.

Senator BAYH. You have no personal knowledge?

Judge CRAIG. No. I know there was a demonstration. I know that Mr. Rehnquist had some connection with the State government as an adviser to the attorney general or something of that nature.

Senator BAYH. May I go on to another whereas here.

"Whereas Mr. Rehnquist does not fully accept the rights of all citizens to exercise the franchise of voters rights, and our fears are based upon his harassment and intimidation of voters in 1968 during the presidential election in precincts heavily populated by the poor."

I cannot attest to the validity of this. This is one of the whereases. As I mentioned, we are going to be asked about this the first of the week.

Do you have any judgment about that or personal knowledge?

Judge CRAIG. I never heard a bit of it. I don't know upon what that charge is based.

Senator BAYH. May I allude to newspaper clippings from various Arizona newspapers in 1960, 1962, and 1964. Interestingly enough, this whereas relates to 1968. But apparently Mr. Rehnquist was cochairman of the group within his party called the Avowed Security Group Program.

Later, as I think it was mentioned earlier, he was head of a committee of lawyers formed and the assessment has been made, at least some places in the clippings, this was a pattern in which the purpose was to intimidate minority voters from voting.

Do you have any personal information about that type of practice being followed by the nominee?

Judge CRAIG. Well, I know that it was not that purpose. To my knowledge, Senator, and I was pretty active for a long time, I don't know anyplace in Arizona where there was concerted effort to intimidate any voter at any time at any polling place.

Senator BAYH. It seems to imply, Judge, in these newspaper clippings, that at least some of the Republican officials admitted, and this is not taking it out of the King James version to read from these clippings, that letters were sent to selective areas, not countywide, in Maricopa County, and then in the traditional fashion that is used in some of the inner city areas, some in my own State, I am painfully aware of this, that the names on the letters which were returned were axiomatically challenged and a slow-down of the voting took place.

You are not familiar with anything like that happening?

Judge CRAIG. No sir.

The CHAIRMAN. The testimony was that it didn't happen, wasn't it?

Senator BAYH. Sir?

The CHAIRMAN. The testimony was that nothing like that happened.

Judge CRAIG. No, I don't know if somebody wrote some letters, Mr. Chairman. I couldn't say categorically whether anyone did or did not. What I said was, to my knowledge, and I am pretty well versed on what happens in Arizona, to my knowledge there was never any concerted effort on the part of anyone to intimidate anybody in a polling place.

Senator BAYH. Do you know anything about the nominee that would lead you to have cause for concern about his insensitivity in the area of human rights if he were sitting on the Supreme Court of the United States?

Judge CRAIG. Senator Bayh, I want to say this in response to that inquiry: I believe this man has a humanity about him and a human warmth that would make him, if anything, more sensitive to the needs of people with respect to the necessity to improve their lives and their society. I don't think that he would be in any way insensitive to the philosophy of civil rights or the Bill of Rights, or any other rights.

Senator BAYH. You think he is the type of individual that, once he is on the Court, separates himself from the rather strong views that he has expressed while a Government employee?

Judge CRAIG. I think he is a gentleman of outstanding intellectual capacity.

I think every judge worth his salt attempts to do just that. How much creeps in from the back of your head nobody has been able to measure. But I am certain that this man would make every effort, if he did have any personal views, to disassociate those from the judicial decisionmaking process. I am confident of that.

Senator BAYH. Thank you very much.

Judge CRAIG. Yes, sir.

Senator HRUSKA. Judge Craig, in regard to the first "Whereas" of the resolution of the Southwest Area Conference of the NAACP, I should like to read to you an excerpt from yesterday's Washington Post:

When Rehnquist was nominated for the Supreme Court, a former Arizona President for the NAACP, the Reverend George Brooks, charged in 1965, Rehnquist confronted him outside the State Capitol and argued in abusive terms that a civil rights act, later passed by the State legislature, should be opposed.

The Arizona NAACP promptly passed a resolution and the text of the resolution and that "Whereas" was read by the Senator from Indiana a little bit ago.

Now, getting back to the story from the Washington Post:

By the end of last week, Brooks was telling a different story. He now says that the discussion with Rehnquist was calm, "the tone was professional, constitutional, and philosophical," he said. He was neither harassed nor intimidated, Brooks added. But he said that in his opinion, Rehnquist is a philosophical racist.

It is the hope of this Senator that inasmuch as Mr. Brooks retracted one part of his accusation, maybe in due time he will get to that second part.

Do you recall anything of that nature in regard to this incident?

Judge CRAIG. No, not at all. I have never known Bill Rehnquist to be racist, and I know him pretty well, sir.

Senator HRUSKA. And you wouldn't have any personal knowledge as to what Mr. Brooks might have said or what he might have repudiated at a later time?

Judge CRAIG. I wouldn't. The only thing I would say is that according to Mr. Brooks' first statement, with respect to the abusive language, it would shock me to believe that my friend, Mr. Rehnquist, would use such language under those circumstances anyway, and, therefore, I would say it was undoubtedly inaccurate.

Mr. Brooks apparently understood that himself and tried to correct the record. I think he is just as wrong on the other point.

Senator HRUSKA. Thank you.

The CHAIRMAN. Any further questions?

(No response.)

The CHAIRMAN. The witness is excused.

Judge CRAIG. Thank you very much.

(The NAACP document referred to follows:)

**RESOLUTION OF THE SOUTHWEST AREA CONFERENCE OF THE NAACP BRANCHES
TO THE PRESIDENT OF THE UNITED STATES AND THE U.S. SENATE**

Whereas, Richard Milhaus Nixon, the President of the United States has nominated his personal legal advisor, William H. Rehnquist in a sudden manner without consulting members of the Congress, or the American Bar Association; and

Whereas, Mr. Rehnquist has consistently fought the NAACP and others in the State of Arizona who champion the causes of civil rights and the poor; and

Whereas, Mr. Rehnquist in 1964, while serving in a high official capacity in the Arizona State Government openly harassed and intimidated the immediate past president of the NAACP, the Rev. George Brooks and members of the NAACP on the steps of the Arizona State Capitol during a peaceful attempt to reach the legislative bodies to present grievances from the minority community; and

Whereas, Mr. Rehnquist does not fully accept the rights of all citizens to exercise the franchise of voters rights, and our fears are based upon his harassment and intimidation of voters in 1968 during the Presidential election in precincts heavily populated by the poor; and

Whereas, the Maricopa County Branch of the NAACP opposed the naming of Mr. Rehnquist to the position of personal legal advisor to the President; and

Whereas, in 1957 Mr. Rehnquist espoused a strong belief with the John Birch Society's position and publicly castigated the U.S. Supreme court and individual members of the court; and

Whereas, Mr. Rehnquist has labelled the youth of Arizona and the nation who peacefully protest the status quo as "barbarians", and

Whereas, as President Nixon's personal legal advisor, Mr. Rehnquist acted as a primary moving force in the nominations of G. Harrold Carswell and Clement Haynsworth; and

Whereas, by his public statements and actions Mr. Rehnquist has shown himself to be a right wing extremist, a rational reactionary, and a sophisticated racist; Now therefore, be it

Resolved, That the Southwest Area Conference of the NAACP calls upon the President of the United States to withdraw the name of William Rehnquist forthwith; Further, be it

Resolved, That the U.S. Senate refuse to give its advice and consent to the nomination; and further, That the President of the United States by his nomination of Mr. Rehnquist will have nominated one who has proven himself to be inimical to the causes of Blacks, Poor, Civil Rights and Civil Liberties.

Senator TUNNEY. Thank you very much.

Mr. Chairman, I realize that the witness has been in the chair a long time, and I don't want to delay the proceedings of this committee.

Mr. REHNQUIST. Senator, could I get up and walk around the table once?

Senator TUNNEY. I will join hands and walk with you.

Senator MATHIAS. I can't help but observe that the nominee has just exercised or followed the prescription of Dr. Paul Dudley White who I saw urging that everybody who has been sitting for a long period of time to get up and at least jog in place. It is very good for the mind as well as for the heart. Maybe everyone in the room might want to do that.

The CHAIRMAN. Let us proceed.

Senator TUNNEY. Thank you very much, Mr. Chairman.

As I indicated yesterday, and as we have heard so much today from other Senators, I feel very definitely that philosophy is a factor that should be considered. You have indicated in some of your earlier writings that you feel the same way, and I understand the reasons that you have felt that you could not get into this subject of philosophy, perhaps, as much as you would have desired.

You have indicated that you have an attorney-client relationship and you have indicated you are a nominee to the Supreme Court and you do not want to circumscribe your activity on the Court, judgment values on the Court.

You have also indicated that as a member of the administration, you have a certain privilege as a member of the administration not to divulge those communications that you had with administration personnel in such a way which could harm or violate the responsibilities that you have in relationship to the President.

Now, I understand all of those three areas of privilege, and I think you are entitled to the three areas of privilege.

On the other hand, I agree with other Senators, I think, that we are entitled to have some better idea of your attitude about fundamental liberties in our Constitution. I would like to read some quotations or statements you have made and get an expression of opinion from you as to whether you still subscribe to the point of view or not.

With regard to privacy and surveillance, you made a speech on March 19, 1971, "Privacy, Surveillance and the Law," in which you said:

I do not believe, therefore, that there should be any judicial enforcement limitation on the gathering on this type of public information by the Executive Branch of Government. Must we then leave the Government to police itself? My answer would be that first such a result is not as bad as it may sound, and, secondly, that matters of oversight other than those afforded by judicial supervision are available. I have previously stated my belief that the first amendment does not prohibit even foolish or unauthorized information gathering by the Government. It is, of course, possible to extrapolate from the decided Supreme Court cases and conclude that the Court would further broaden the interpretation of the first amendment to include a prohibition for circumvention of this type of activity. My own opinion is that such an expansion of existing doctrine is unlikely.

Do you still subscribe to that viewpoint, that you do not believe that there are any judicially enforceable limitations on the evidence gathered by the Government, that the Government can survey a person on its own initiative?

Mr. REHNQUIST. Put in context, Senator, I do.

The last sentence that you quoted was, as I am sure is apparent to you, a prediction on my part of what I thought the Court would do.

That does not represent my own personal opinion.

But put in the context of surveillance, not in the sense of wire-tapping or invasion of premises or in terms of trying to use Government sanctions to extract information from people, but simply the observation of someone in a public place and qualified by the possibility that the result would be different where actual harassment were shown, as I commented yesterday, my answer to your question is yes.

Senator TUNNEY. When you testified before Senator Ervin's committee earlier this year, I happened to be present at the time you testified, and Senator Ervin asked you a question: "Do you feel there are any serious constitutional problems with respect to collecting data or keeping it under surveillance for persons who are merely exercising their right of peaceful assembly or petition to redress a grievance," and you answered, "I do not believe that it raises a constitutional question."

Mr. REHNQUIST. That was my testimony at that time. I think that I am entitled to have borne in mind the fact that I was then a Justice Department spokesman, and that the Justice Department as a possible litigant in such action, is certainly required to take a reasonable position, but it is not required to take the one which would be most restrictive on its activities.

Senator TUNNEY. You also testified that if you didn't believe in what you said, you probably wouldn't be in the position that you are in now.

Mr. REHNQUIST. I didn't mean to say precisely that, Senator. I said that if I felt what I was saying was reprehensible or obnoxious to me, I would not be in the position I am in now. I would take that to leave open disagreements within what I consider to be reasonable bounds.

Senator TUNNEY. Senator Ervin then went on to question you, "Don't you agree with me any surveillance which would have the effect of stifling such activities, namely, the first amendment, those activities which are privileged under the first amendment, would violate those constitutional rights?" Your answer was, "No, I do not."

I assume that the answer—

Mr. REHNQUIST. Would you read that back again?

Senator TUNNEY. Yes. Senator Ervin's question:

Don't you agree with me that any surveillance which would have the effect of stifling such activities would violate those constitutional rights?

And your answer:

No, I do not.

Mr. REHNQUIST. I am not sure I do agree with that now. I am inclined to think that it is a fact question and I was perhaps resolving the fact question in my own mind on the basis of the line of inquiry that Senator Hart made yesterday, where thousands of people came, knowing there was going to be such surveillance, on the basis of Judge Austin's decision in Chicago, where he found as a fact that there was no stifling effect.

I do not think I would want to categorically say that such surveillance could not have a stifling effect. I think I would treat it as a question of fact.

Senator TUNNEY. I appreciate your answer.

Senator Ervin then went on to say, Question:

Don't you think a serious constitutional question arises where any government agency undertakes to place people under surveillance for exercising their first amendment rights?

Your answer: "When you go further and say, 'Isn't a serious constitutional question involved,' I am inclined to think not, as I said last week."

Mr. REHNQUIST. The question being whether surveillance—

Senator TUNNEY. Surveillance, yes.

"Don't you think a serious constitutional question arises where any government agency undertakes to place people under surveillance for exercising their first amendment rights?" and your answer was, "when you go further and say, 'Isn't a serious constitutional question involved,' I am inclined to think now, as I said last week."

Mr. REHNQUIST. Again, assuming that in fact the surveillance efforts have no chilling effect, I would stand by that answer, I think, again as a spokesman for the Department.

Senator TUNNEY. You don't think a serious constitutional question would arise putting people under surveillance for exercising their constitutional right of free speech?

Mr. REHNQUIST. In the absence of a causative connection between some sort of chilling effect and the surveillance itself, that was the position I took for the Department, and I believe it would be a reasonable one.

Senator TUNNEY. When you say in the absence of a chilling effect, I think you have eliminated the problem.

The question is wouldn't the surveillance have a chilling effect, and wouldn't that in effect raise the constitutional problems, and your answer was "I believe I am inclined to think not."

Mr. REHNQUIST. Well, I don't think the question was phrased that way.

Senator TUNNEY. Well——

Mr. REHNQUIST. Given the factual assumption of a chilling effect, then I would want to reserve judgment.

Senator TUNNEY. In other words, you think there could be a chilling effect?

Mr. REHNQUIST. Yes, sir; as in a Chicago type of case, I do.

Senator HRUSKA. Would the Senator yield?

Senator TUNNEY. Yes.

Senator HRUSKA. Yesterday you told us about a judge who thought that the force following those who were being under surveillance would have presumably a chilling effect if they were immediately behind those that were subject to the surveillance, but if there was an intervening force, that no longer would be true. Would that be a more specific fact upon which you could predicate your answer?

Mr. REHNQUIST. That is the type of fact situation I would want to know before attempting to answer yes or no on the existence of a chilling effect.

Senator TUNNEY. Senator Ervin went on to question you and said, "Is it your position the Government could take somebody and put somebody—I believe it is called a tail on me—and this man could walk around and follow me everywhere I went, and because he didn't compel me to go to those places and just observe me, that I would have no legal remedy?" And your answer, "As I have said yes before, I think it is a waste of the taxpayers' money, it is an inappropriate function of the executive branch, I don't think it raises a first amendment violation."

Mr. REHNQUIST. Subject to the qualification I gave to my previous answer to your question, I would stand by that statement.

Senator TUNNEY. You gave a speech, and I quote from it, of May 1, 1969, to the Newark Kiwanis Club, you stated, and I quote: "The deliberate lawbreaker does not fully atone for his disobedience when he serves his sentence for he has, by example, undermined respect for the legal system itself." The flavor of that is that in your mind that there can be no redemption ever for a lawbreaker?

Mr. REHNQUIST. No; I am not talking about the sense of redemption of the individual lawbreaker, although certainly I realize the word "atonement" can be used in that sense. I am thinking more of the idea which I also expressed in the same speech, that he who strikes at a law, strikes at the law, and that every time a law is violated there is a risk of a snowballing effect. Thus, individual sentences under the law, while all that are appropriate for the individual violator, may not be able to redress the necessary respect for law on the part of society as a whole.

Senator TUNNEY. So, in other words, as I understand your explanation, you didn't really mean that a deliberate lawbreaker cannot fully atone for his disobedience when he serves his sentence?

Mr. REHNQUIST. No; not in the sense that he shouldn't be restored to whatever civil rights and freedom the law authorizes in that situa-

tion. All I meant was that a deliberate lawbreaker strikes a blow at the system, as well as committing a personal violation of the law.

Senator TUNNEY. And you go on to say in the same speech, "I do offer the suggestion in the area of public law that disobedience cannot be tolerated, whether it be violent or nonviolent disobedience." What did you mean by that, cannot be tolerated? Do we have to march them out into the ocean and drown them?

Mr. REHNQUIST. What I meant was that what has been occasionally characterized as nonviolent disobedience, lying down on railroad tracks in front of troop trains, and that sort of thing, to prevent the ordinary functions of government to be carried out, simply because it is not itself violent, is not therefore justifiable.

Senator TUNNEY. Then, to quote an article you wrote in the Civil Service Journal of January 1, 1971, "If Justice Holmes mistakenly failed to recognize that dismissal of a Government employee, because a public statement was a form of restraint on his free speech, it is equally a mistake to fail to recognize that potential dismissal from Government employment is by no means a complete negation of one's free speech." Would you care to elaborate on what you meant by Justice Holmes' mistaken beliefs regarding dismissal of employees?

Mr. REHNQUIST. Justice Holmes made the remark in a case he decided when he was a judge of the supreme judicial court of Massachusetts, that a man may have a right to free speech, but he has no right to be a policeman. He in effect held that whatever locality it was in Massachusetts had a perfect right to dismiss a policeman for exercising free speech because it wasn't violating the freedom of speech provisions.

I think the courts have since taken a broader view of the free speech provision and felt, quite properly, that the sanction of dismissal was itself an infringement on free speech, could be tolerated in some situations and not others, and I think the great view of history today is that Justice Holmes was mistaken in making that assertion.

Senator TUNNEY. And you feel that he was mistaken?

Mr. REHNQUIST. Yes, sir; I do.

Senator TUNNEY. Then a speech you made to the Air War College at Maxwell Field, Ala., on August 23, 1971. You said, and I quote, "The purpose of the guaranty of freedom of expression in our Constitution is not to assure everyone the same opportunity to influence public opinion. This would require not merely a prohibition of government interference with freedom of expression, but complete redistribution of wealth and of the means of communication but to assure that any conceivable view was advocated by someone."

I must say that statement concerns me because I don't see how you can say that giving freedom of speech to all would require a complete redistribution of wealth and of the means of communication. Could you explain what you meant by that?

Mr. REHNQUIST. Yes, sir. Senator Mathias asked me a somewhat similar question this morning, and I think I said in reply to him that the first amendment did not require that the Government equip everybody with a printing press or give them each a television station. It meant simply that those who had printing presses and those who had television stations should be able to say whatever they wanted to.

Senator TUNNEY. In other words, you weren't suggesting that the freedom of speech for some ought to be curtailed in society as opposed to the freedom of speech of others, that all have an equal right to express their viewpoint, some may enjoy different modes of communication, and as a result of having a television program available to them, communicate their ideas to more people, but you weren't suggesting, were you, that you would curtail the right of any one individual in society to express his opinion?

Mr. REHNQUIST. Not at all, and your statement is perhaps a better statement than I made on what the fact is, that the man with the television station has a better chance to express his views than the man who doesn't have it, but each has free speech within his own compass.

Senator TUNNEY. Would you care to express yourself on your attitude toward free legal services for the poor, as an example, giving the poor an opportunity to utilize the court system which in the past has been limited to the wealthy and the semiwealthy, middle class in society.

Mr. REHNQUIST. Well, putting aside any conceivable constitutional implications or statutory interpretations, I think it is a highly desirable result.

I was on the Board of Maricopa County Legal Aid Society at a time when funds were difficult to come by, and the services provided to the poor simply weren't adequate because of lack of funding. I think that the increased funding is now making legal services available to the poor as well as to the rich, and I heartily favor that.

Senator TUNNEY. I am very happy to hear you say that.

In answer to Senator Mathias' question regarding due process, which you discussed in general terms, you said it would be inappropriate to advance a definition of due process at this particular time, and yet in your Harvard Law Record article, that famous article that you wrote—it has become famous—you stated, "Given the state of things in March 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process?" Have you changed your mind that the Senate ought to be interested in a nominee's attitude toward due process?

Mr. REHNQUIST. I haven't changed my mind that the Senate ought to be interested in a nominee's views. I have come to have an increasing sympathy for the problem of the nominee to respond to very legitimate questions from the Senators without in some way giving the appearance of prejudging issues that might come before him.

Certainly in the sense of formulating a definition of due process, when one thinks of all of the cases that have been decided under that clause, it strikes me as virtually impossible. One can advert to settled doctrines of due process, that a confession obtained by coercion is a violation of the due process of law. That doctrine strikes me as being so well settled a nominee need have no reservation about saying that that is a classical example of it.

The idea that a man is entitled to a hearing before he is deprived of substantial rights is another doctrine that strikes me as so well settled one need have no hesitancy in saying that.

There are much closer questions of due process, I am sure, pending now in the courts that I ought not to express a view on.

Senator TUNNEY. I agree with you on that. I frankly think that it would be wrong for you to express a view on a case that is before the court now which, if affirmed, would require a circumscription of your future judgment. I would be the last person who would want to see that happen.

However, let me ask another question in this area. We can all think of examples in which the Supreme Court is required to pass judgment in situations which are entirely unprecedented and which were clearly never envisioned by the framers of the Constitution.

One of the examples I am thinking of is the Billie Sol Estes case in which the question was whether or not television would be allowed in the courtroom, and there was a due process issue before the Supreme Court.

Now, how would you apply due process standards in a case like that?

What would be relevant to you besides judicial precedent, if there is any judicial precedent? Would you go back to your reading of history; would you rely on your personal philosophy; how would you decide such a totally unprecedented case—what standard would you utilize in deciding a totally unprecedented due process case?

Mr. REHNQUIST. Well, I would first, as is obvious, read the amendment, and you suggest that there are no precedents, yet certainly there would be cases that would be not too far off and I would be inclined to go back to the debates, the Bingham explanation of what he meant by the 14th amendment, other explanations on the floor, and I am sure you would come up with something that obviously would not have included a particular discussion of whether a trial could be televised or not.

All I can think of doing is by the very best and most faithful type of analysis to see if this sort of thing was within the broad prescription that the framers and ratifiers of that amendment had in mind.

Senator TUNNEY. And also wouldn't you apply a standard of what you think is fair under the existing circumstances?

Mr. REHNQUIST. No; I don't believe I would unless I found that to be one of the components of the due process clause.

I don't think it would be right for me to simply say, this doesn't seem fair to me, therefore, I am going to find it is a violation of due process.

Senator TUNNEY. I am talking about an unprecedented case, like the Billie Sol Estes case. I am not talking about a case in which there would be a question of stare decisis, because I think the Billie Sol Estes case was the first case in which the Supreme Court had to make a determination of the rights of the media to have television in a courtroom, and the right of the accused to keep television out of the courtroom.

Mr. REHNQUIST. To the extent that fairness is a component of due process, as a part of the debates and intent of the framers, certainly that would be taken into consideration.

I think it would be wrong for me to simply read in my own subjective notions of fairness.

Senator TUNNEY. The fairness standard that you would apply would be one, I would assume, based on some of your other statements,

a standard derived in context with what is going on in the modern world, and not necessarily what went on in 1789?

Mr. REHNQUIST. No; certainly the fact that the framers of the due process clause did not contemplate specifically that trials might be televised does not foreclose the issue under the due process clauses.

Senator TUNNEY. And so the fairness standard would be a standard applicable to the contents what is going on today rather than 1789?

Mr. REHNQUIST. Fairness in the context of the due process clause.

Senator TUNNEY. One last series of questions, which shouldn't take longer than 4 or 5 minutes, Mr. Chairman.

I realize I have gone over my time. Thank you. I didn't anticipate Mr. Rehnquist's walk around the table. [Laughter.]

Mr. Rehnquist, in a speech last May dealing with criminal procedure, you are quoted as having made a distinction between what you termed a "technical violation of the law" and a violation which was "not only illegal but also brutal or offensive."

Your statement is reported in this way, and I am quoting:

If someone engaged in espionage against the United States, for the benefit of a foreign government, were to go free because of a technical violation of the law relating to unreasonable search and seizures, many would feel that the balance has swung too far in favor of the criminal defendant. If, on the other hand, evidence is not only illegal, brutally, offensively concealed from the defendant for the purpose of prosecuting the defendant for a minor offense, an individual indication of the violation of the constitutional right may serve society better than the conviction of the defendant, if that choice must be made.

How do you go about deciding whether a violation of a constitutional right is brutal or offensive?

Mr. REHNQUIST. I can tell you the general thought that was in my mind at that time, Senator. I am relying on recollection, and my recollection may be incorrect, as to cases or situations, but I think perhaps the thought will come across.

As I recall, in the case of *Mapp v. Ohio*, there was a breaking into a house under the most objectionable sort of circumstances, without any warrant, and a simple ransacking search of the whole place. That would strike me as the kind of violation I was referring to in the second context.

The technical violation I would put in terms of this case from Wyoming that came up to the Supreme Court last spring, where the sheriff in one of the Wyoming counties, on a tip from an informer, went before a magistrate to get a search warrant, rather than an arrest warrant, for two robbery defendants who were later apprehended in another part of Wyoming as a result of a statewide radio broadcast, and after the Supreme Court of Wyoming had ruled against the claim, and the district court in Wyoming and in the tenth circuit ruled against the habeas corpus claim, the Supreme Court of the United States ultimately held that the search warrant was improperly issued because the information presented to the magistrate didn't meet the tests that it ought to meet for a search warrant.

I think that was the type of thing that I had in mind when I said a technical violation.

Senator TUNNEY. Discussing the civil disobedience, you said: "In the area of public law disobedience cannot be tolerated." Isn't there a fundamental conflict there? On the other hand, you say if the Government violates a constitutional right, we must decide whether it is

merely a technical violation, whereas in the case of an individual, it is the absolute test.

Mr. REHNQUIST. As far as the action of the Government agent is concerned, it is the absolute test there too. What I was referring to was not that the Government agents who may have committed a violation of law, however technical, be treated differently than some private citizen, but whether it was desirable, as a matter of policy, to apply the exclusionary rule which in effect excludes the evidence not as against the technical violator of the law, but against the person who was concededly guilty other than for the absence of the evidence to be excluded.

Senator TUNNEY. Finally, Mr. Rehnquist, if you care to answer it, which Supreme Court Justice in history do you admire the most?

Mr. REHNQUIST. I think John Marshall.

Senator TUNNEY. Do you care to elaborate?

Mr. REHNQUIST. He made the Supreme Court what it is today more than any other person.

I think it was Senator Fong who was commenting this morning that there are lots of countries with constitutions that have very fine charters of individual liberties and restraints on Government power, but somehow people get arrested all the time, and things just don't work out the way the constitution said they would.

I think it is largely the responsibility of John Marshall and his establishment of the doctrine of judicial review which has made our Constitution a living document.

Senator TUNNEY. I want to thank you very much, Mr. Rehnquist, for being to my mind more forthcoming today in answering the questions that I had for you.

I think that yesterday, for what reason I don't know, you felt inhibited in answering the questions that I personally put to you, and I think that today you have been very forthcoming in answering the questions that I personally put to you, and I want to thank you for that.

I would like, Mr. Chairman, to ask you if it would be possible, maybe, after we have a chance to read the transcript of the record, to put some questions to Mr. Rehnquist in writing, if possible.

The CHAIRMAN. What did you say?

Senator TUNNEY. I would like to, if possible, be able to put some questions to Mr. Rehnquist after reading the transcript of this hearing.

The CHAIRMAN. We will decide that when we come to it.

I will be fair about it.

Senator TUNNEY. But I don't want to add to Mr. Rehnquist's burden or the burden of this committee.

The CHAIRMAN. That is something that the committee itself will decide.

Senator TUNNEY. Thank you.

Senator MATHIAS. I would like to go back to the wiretapping question. Let me ask Mr. Rehnquist if he can tell us whether one of the arguments that was put forth in the Justice Department brief on the wiretapping question was that of inherent executive power and ask him to say whether the right to wiretap was an extension by the Justice Department of that doctrine?

Mr. REHNQUIST. I believe that position was taken, Senator Mathias, in the district court. I am not sure whether it was taken in the court of appeals or not.

In the brief in the Supreme Court, the Government does not take the position that there is some sort of inherent power in the Executive which makes it superior to the fourth amendment. The position the Government has taken is that the executive, like every other branch of the Government, is bound by the unreasonable search and seizure restrictions of the fourth amendment, and that the question is whether this particular overhearing was or was not an unreasonable search and seizure.

Senator MATHIAS. Can you describe for the committee your own personal role in the Justice Department's position?

Mr. REHNQUIST. Since I have described my participation in the brief, I feel I can say what my own contribution was and not any other opposing views. I felt it was a mistake for the Government to take the position that there was inherent power, and that the case could best be put forward both from the point of view of the Government in its more limited interests as an adversary and in the interests of the Government in the larger point of view by framing the case in terms of whether it was an unreasonable search and seizure under the fourth amendment, rather than some over-riding inherent power.

Senator MATHIAS. When Senator Fong went into this area this morning, he very carefully qualified himself as being one of four Members of the Senate who had voted against the Omnibus Crime bill passed in 1967. I ought to make the same qualification, although I was not in the Senate at the time, I was a Member of the House and I too was recorded against the bill.

I am concerned in this area, as Senator Fong is, and other Members of the Senate. I am wondering if you could tell us what, in your mind, you think the competing factors would be in this area of wiretapping and how persuasive you would feel that this element of inherent Executive power would be in this scale of interest?

Mr. REHNQUIST. You are referring now, Senator, to the national security wiretapping, or the wiretapping under the Omnibus Crime—

Senator MATHIAS. Under the Omnibus Crime.

Mr. REHNQUIST. Under the Omnibus Crime Act, without attempting to prejudge or express an opinion on any particular case, I would think that the competing factors to be weighed are the closeness of the analogy between the traditional warrant procedure for searching premises for tangible physical evidence and the court order authorized under the Omnibus Crime Act for intercepting a conversation for a limited period of time. And basically the competing interest between the right of the individual to privacy in his conversations, privacy in his home, as opposed to the necessity or the authority of the Government in circumscribing circumstances where prior court authorization has been obtained and reasonable cause is shown to believe that incriminating evidence will be obtained for the Government to obtain that evidence.

Senator MATHIAS. Would you feel substantially different about wiretapping in a national security case?

Mr. REHNQUIST. Well, there, of course, since the procedure is undertaken without a court authorization in advance, the question is

whether the exercise of the authority by the Attorney General and the President's designate offers a reasonably close approximation of the type of control that you get from presenting the matter to a neutral magistrate, or whether in view of the exigencies of that particular type of case, some lesser degree of neutral control can be accepted in the interest of preventing possible damage to the national security.

Senator MATHIAS. Moving on to another area, the area of speedy justice, I recall to you The Speedy Trial Act of 1971; the bill of which the principal sponsor is the Senator from North Carolina, Senator Ervin, and of which a number of us, including myself, are cosponsors. There are 51 cosponsors to this bill, I recall.

This is a bill which, you recall, provided that if one accused of a crime is not brought to trial within a specified period of time, it would result in a technical acquittal.

What was the position of the Department insofar as that legislation was concerned?

Mr. REHNQUIST. The position that the Department ultimately took was that it would not oppose mandatory dismissals as such if the bill were coupled with some reform in the practice of Federal habeas corpus, and were also designed to allow the system to reasonably adjust to these new time limitations in order that there wouldn't be a sudden wave of dismissals because of the inability of the system to shift to the new time schedule.

Senator MATHIAS. That wasn't the Department's position?

Mr. REHNQUIST. No, it wasn't, Senator, and since one of our leading newspapers in the Nation's Capital has presented an account from somewhere of what happened, I feel at liberty of speaking about it without the circumspection I might otherwise feel.

Several of us in the Department have been working on the program. Although I was not immediately responsible for it, I was one of those who discussed it, and I think all of us unanimously felt that the mandatory dismissals imposed on the prosecution by the bill, without any concomitant sanctions imposed on the defense, was an unfair way, so far as the prosecution was concerned, of implementing the speedy trial requirement.

I had occasion to be out on the road, so to speak, and be giving a speech down at Maxwell Field, and in the discussion there it became apparent to me that a number of people who were by no means softies, if one may use that oversimplified term in the area of law enforcement, were nonetheless concerned about the situation, where people simply languished in jail because they were unable to raise bond and weren't brought to trial within a short period of time.

Senator MATHIAS. I believe a high percentage of the people who are in jails all over the country today are in that position.

Mr. REHNQUIST. I suspect there is a good deal of truth to that.

At any rate, I became convinced, after hearing this discussion, that the Department ought to shift its position and not just the criminal defendant's situation would be improved, but that the whole system of criminal justice would be improved if we somehow got a guarantee of reasonably speedy administration of criminal justice primarily at the trial level but other places elsewhere, and that the values to be gained from such improvement clearly outweighed the probability

that there would be some mandatory dismissals of people who were guilty and simply weren't able to be tried in that time.

Senator MATHIAS. So it is a matter of philosophy, if we could use that term, that that approach has some personal relevance for you?

Mr. REHNQUIST. Yes sir.

Senator MATHIAS. At the risk of repetition, going back to the questions that I asked this morning on excessive bail, reasonable search and seizure, due process, and so on, perhaps I can now rephrase those question with the hope of probing a little further your views in this area.

Looking at the eighth amendment, at the question of excessive bail, without asking you to define with any kind of particularity that would either retrospectively or prospectively be embarrassing, could you tell the committee what you think are the competing interests—the various factors—that you would consider in determining in a particular case what is excessive bail within the context of the Constitution?

Mr. REHNQUIST. If you will forgive me for being general, I will certainly try.

Senator MATHIAS. Maybe by being general you could still tell us what you think is the more important and the less important factors in this kind of judgment.

Mr. REHNQUIST. Well, certainly one factor is the strong public policy in favor of assuring the presence of a defendant at his trial. Once he has been indicted and arraigned.

Congress has, in the Bail Reform Act of 1966, provided for a number of other less severe sanctions than the actual requirement of bail, but under the Constitution bail is nonetheless permissible.

Whether or not it is excessive, I would take it, would depend on whether the amount fixed with an eye to actually assuring the defendant's presence at the trial.

I would suppose that bail would quite arguably be excessive if it were fixed with an eye to simply keeping the man in jail rather than an amount sufficient to reasonably assure his presence at the trial.

Senator MATHIAS. Would you mind developing a classification of categories of defendants in dealing with this?

Mr. REHNQUIST. Well, of course, in many States my recollection is that capital offenses simply aren't bailable, and I take it the philosophy behind that is that a man who may be convicted of a capital crime has absolutely no incentive to show up for his trial, and that, therefore, there you do not even run the risk of any sort of bail; but I think going down the scale of graduation of offenses, certainly the lighter the offense, the smaller the bail would be, is the customary way one would balance that.

Senator MATHIAS. In your colloquy with Senator Tunney, I think you covered the question of due process under the 14th amendment.

Could you comment very briefly on due process under the fifth amendment? Again, in this context of competing factors.

Mr. REHNQUIST. Unless you can prod me with some statement of fact, I am not sure anything comes to mind as due process under the fifth amendment.

Senator MATHIAS. The whole philosophy of the Bill of Rights, it seems to me, is to provide certain restraints on Government. I am

wondering how you would view the fifth amendment due process requirement as a restraint on Government?

The apparent balance is the interest of the Government against the guarantees of the individual.

Mr. REHNQUIST. Yes, no person shall be deprived of life, liberty, or property without due process of law. I suppose that means at the very least a person to be deprived of his liberty is entitled to a hearing before a fairly constituted tribunal, to be apprised of the charges against him, to have an opportunity to present witnesses on his behalf, to have an opportunity to cross-examine witnesses—again assuming this is a full-fledged criminal trial.

I think if I got more particular than that I would be roaming into areas where I probably ought not to.

Senator MATHIAS. Once again, thinking not of a final definition but only the weighting factors. What do you think is reasonable in the area of search and seizure?

Mr. REHNQUIST. Well, I think the Court has held that the general rule is that a search without a warrant is unreasonable and that ordinarily in order to search, there must be a warrant issued by a neutral magistrate upon a showing of probable cause.

On the other hand, there are recognized exceptions to that doctrine, as the doctrine of exigent circumstances set forth in Kerr against California.

I think the classic example is that of the automobile which is very likely to be moved by the time that the police could go and apply to a magistrate for a search warrant. There I believe the courts have said that because of that necessity, a warrant is not required, and I think that is the sort of balance the courts have tried to strike; that where a warrant is obtainable, the general rule is that a warrant is required, that it is up to the Government to justify those exceptional situations in which a warrant is not required.

Senator MATHIAS. And that is what you would believe?

Mr. REHNQUIST. As general propositions, I have no quarrel with those at all.

Senator MATHIAS. Finally, what about the power of the Government to put into abeyance due process under emergency or extraordinary circumstances?

Mr. REHNQUIST. Well, I commented in response to some question—I don't recall whether it was yours or whether you were present, the doctrine of qualified martial law which has been recognized in many courts, in fact by the Supreme Court of the United States, where the force mounted against the peace authorities in a particular place at a particular time is such that they simply can't cope with it in the normal process of individual arrests, bookings, and that sort of thing, and there it is my understanding that the Government has the authority, for a limited period during the duration of this type of emergency, to arrest people without the usual formalities so long as the period of arrest is kept to the very minimum time required by the emergency.

Senator MATHIAS. Thank you. Thank you again, Mr. Rehnquist. The CHAIRMAN. You are excused.

Senator BAYH. May I make one observation?

I appreciate the fact that as I sat here the last several minutes, Mr. Rehnquist has answered in greater detail, in my judgment, some of the difficult questions that he had appeared to be more reluctant to answer earlier.

I am anxious to have a chance to study them because I think most of this information is the type of information we are looking for, and I personally appreciate that.

The CHAIRMAN. John Bingham Hurlbut, law professor; Martin F. Richman, former law clerk to Chief Justice Warren, former Deputy Assistant Attorney General; Howard Karman, president of the Arizona Bar Association. Will you gentlemen stand.

You are here to testify in behalf of Mr. Rehnquist. We will give you the opportunity to put your statements in the record, please.

(The material referred to follows:)

STATEMENT OF JOHN BINGHAM HURLBUT

By way of identifying myself, which I understand is appropriate, I am John Bingham Hurlbut, Jackson Eli Reynolds Professor of Law, Emeritus as of 31 August 1972, Stanford University.

My remarks in support of the nomination of William Rehnquist will be brief, adding perhaps only a small addendum of footnote to the testimony already before the committee. I speak as one of his law school instructors of two decades ago and more, of my observation of him at that time, of my estimate of him at that time and of my estimate of him at the present time.

Mr. Rehnquist is the product of the Stanford Law School, a member of one of those remarkable and very competent post-war classes, composed largely of veterans, eager to exploit what the law school had to offer in the pursuit of a solid foundation for a professional career in private practice and in public service, and for satisfying those heavy obligations of a lawyer citizen. And on the other side of the platform a strong, demanding, dedicated faculty including such names as Phil Neal (now law dean at Chicago), Sam Thurman (now law dean at Utah), Harold Shepherd (former dean at Duke), and Paul Freund (visiting professor from Harvard for a term). In this setting he was graduated first in his class—and as one of my former colleagues at Stanford has put it, "He was the outstanding student of his law school generation."

I can, I think, speak with some authority on William Rehnquist the student. He was a member of my classes in criminal law in his first year and evidence in his third year. For a while he was my research assistant. We had a common interest in intercollegiate athletics as well as the law. So I saw a great deal of him in the classroom, in my office, and in my home.

As a student he was nothing short of brilliant, determined to achieve excellence, and persistent in his expectation of excellence on the other side of the podium. In the give and take of the classroom he was sharp, forthright, courageous, and objective—precise and deep in his analysis of difficult problems—insistent that a problem be turned over and over to expose all of its facets before its solution—and always a gentleman.

Since 1952 we have kept in touch with each other. While our association has been more casual and less frequent than I would have liked, I have followed his career enough to be quite sure that the hallmark of excellence which characterized him as a student has characterized his professional life.

In my opinion he is highly qualified to be a Justice of the Supreme Court. He combines great intellectual power with complete intellectual and personal integrity and with wisdom and common sense. And he has that all important capacity for steady continual growth which he demonstrated as a student and has demonstrated in his professional life. In my opinion he has those ingredients which guarantee that he will have a distinguished career as he goes about fulfilling the responsibilities of a Justice of the United States Supreme Court. Thank you for this opportunity to appear before you.

STATEMENT OF MARTIN F. RICHMAN

As a former colleague of Mr. Rehnquist in Government service, I am pleased to testify in support of his confirmation. He is well qualified to be an Associate Justice of the Supreme Court, in my view, on the basis of his strong legal and intellectual abilities, character and judicial outlook.

To put my opinion of him in perspective, it is necessary to digress a moment to tell the Committee a few things about myself. First, near the beginning of my career I served as law clerk to Chief Justice Warren, and thus gained some insight into the processes of the Court and the qualities that are important to the work of the Justices. More recently, I served three years as Deputy Assistant Attorney General in the Office of Legal Counsel, most of that time during Ramsey Clark's tenure as leader of the Justice Department. I am a supporter of the main thrust of the work of the Warren Court, and an admirer of Attorney General Clark's approach to law enforcement and the exercise of governmental power.

When Mr. Rehnquist arrived at Justice a few days prior to the Inauguration, I had already set in motion plans for returning to my firm in New York after completing the transition in the Office of Legal Counsel. As it turned out, the period of transition, during which I served as Mr. Rehnquist's Deputy, continued for about four months.

We had a close, informal relationship, with frequent and often extended discussions of the numerous legal issues, large and small, that made up the business of OLC during those early months of the new Administration. We also talked, more casually, of other matters of political and general interest. We made no bones about our divergent political views, but we shared a common professional approach to the work at hand. In this way, through the daily give-and-take of a candid relationship, my opinions of Mr. Rehnquist's mind and character were formed.

I need not dwell on Mr. Rehnquist's legal abilities. He has an incisive grasp for the key issues in a complex problem, the ability to learn a new subject quickly and an exceptional gift for expressing legal matters clearly and forcefully in writing. Though long out of the academic atmosphere, he has a fine scholarly bent, with an inquiring mind on subjects ranging beyond legal matters.

In terms of character, he is strong, honorable, straightforward in his actions and positions. I thought he showed exceptional sensitivity and decency in his decisions on administrative and personnel matters within the Office. While these traits do not necessarily bear on legal ability, they speak deeply of the character of a man.

Finally, there is judicial outlook, perhaps the most important criterion in your scrutiny of a nominee for the Court. The Committee is well aware that Mr. Rehnquist has a deeply held body of views on the political and social issues of our time. They are, in general, very conservative views. The key question for inquiry here, in my opinion, is whether as a Justice Mr. Rehnquist will bring to the decision of the cases not only his own views, however long held and well thought out, but an open mind. Will he approach each case on the basis of the facts in the record, the briefings by counsel, the arguments of his Brethren in conference, and his best judgment of all the available legal materials? In short, will he act like a Judge?

Based on my experience with him, my own answer is in the affirmative. Mr. Rehnquist approaches legal problems thoughtfully, with careful personal study. He is responsive to persuasive argument, and contributes to it by the articulate presentation of his own views. He brings his considerable legal ability to bear when the issues are broad questions of constitutional law, as well as on more technical matters.

I fully expect that I shall disagree with many of his decisions on closely-contested constitutional issues. But I am confident that his votes will be cast on the merits of the cases, that his opinions will illuminate the issues, and that he will make a constructive contribution to the ongoing work of the Court in the development of our law.

STATEMENT OF HOWARD KARMAN, PRESIDENT, ARIZONA STATE BAR ASSOCIATION

Mr. Chairman, my name is Howard H. Karman, President of the Arizona State Bar. I am here at the behest of the Board of Governors of my state bar to support the nomination of a fellow Arizona lawyer, William H. Rehnquist, as an Associate Justice of the Supreme Court of the United States.

Mr. Rehnquist has been a member of that State Bar of Arizona since early in 1954, when he was admitted to practice before the Arizona Supreme Court.

Our Bar is integrated—which is another way of saying that all persons admitted to the practice of law in Arizona courts by our Supreme Court are required by law to be members of the State Bar of Arizona.

As you already know, Mr. Rehnquist engaged in the general practice of law in Phoenix, Arizona from 1954 until 1969 when he came here as one of Mr. Mitchell's top people in the Justice Department.

During his practice in Phoenix, he found time to devote himself to the betterment of the profession in numerous ways.

Phoenix, in addition to being the capital of Arizona, is also the county seat of Maricopa County. The lawyers of Maricopa County have for many years been organized into a voluntary county bar association. Mr. Rehnquist became active in the administrative affairs of the Maricopa County Bar Association when in 1959, he was elected to its Board of Directors, and during the year 1959-60, served as Chairman of both the Program Committee and the Committee on Continuing Legal Education.

During 1961 and 1961 he served as Secretary of the Board of Directors, and in 1961 he was elected vice-president of the Association.

The following year he was accorded the honor of being elected President of the Maricopa County Bar Association, which post he filled with honor. At that time, the county bar association had a membership of approximately 1200.

After completing his year as president, he continued to serve the county bar both as a member of the Board of Directors and as immediate past president.

Since 1959 Mr. Rehnquist has been very active in various activities with the State Bar of Arizona:

He was a member of a committee formed to study proposed amendments to the Constitution of the United States during 1959, 1960 and 1961.

From 1959 to 1964 he served on the Committee for Continuing Legal Education to the Bar, and was chairman of that committee for two years during that time.

One of the functions of the State Bar of Arizona is to provide continuing legal education, which is accomplished through the committee I have mentioned, and through the Arizona Law Institute, an arm of the organized bar, directed by Charles Marshall Smith, a professor of law at the University of Arizona at Tucson. Mr. Rehnquist was always in great demand as a lecturer at courses and programs presented by the Arizona Law Institute, and, according to many, had an unusual facility for understanding even the most obscure and involved legal problem, and the ability to translate such problems into language clearly understandable by those of us not possessed of similar capacities.

Mr. Eldon Husted, the Executive Director of our bar, has reported to me that attendance at seminars and programs presented by the Institute always increased when Mr. Rehnquist was lecturing, and that Mr. Rehnquist, even though he has not been a resident of our state for the last two years, still leads Arizona lawyers in number of lectures given for, and hours devoted to, continuing legal education to the bar, excepting only the director of the Institute.

Mr. Rehnquist was a member of the Committee on Economics of Law Practice during 1963 and 1964; the Memorial Resolutions Committee for the 1962 Annual Convention of the State Bar of Arizona; a council member of the Trial Practice Section from 1960 to 1964; and a member of the Committee on Uniform Laws from 1964 to 1968. During a portion of that time, and until he resigned to join the Justice Department in 1969, he served ably as one of Arizona's three Uniform Laws Commissioners.

Basic discipline of the State Bar of Arizona is under the direction of our Supreme Court, and the factfinding agencies in connection with grievances against lawyers in our state are called Local Administrative Committees. Mr. Rehnquist was appointed by the Arizona Supreme Court to membership on one of the three committees operating in this area in Maricopa County, and served in such capacity for five years, and until his resignation to accept his present position.

I have known Bill Rehnquist professionally for a number of years. After his nomination by President Nixon, I talked to a great many people in Arizona, Republicans and Democrats, liberals and conservatives. To a man they had nothing but praise for Bill Rehnquist. I was surprised that no lawyer I spoke with had an unfavorable comment to make, even those who find themselves at the opposite end of the political spectrum.

I talked to the former counsel of the Arizona NAACP, who also happened to be Chairman of the Arizona Democratic State Central Committee. He spoke favorably of Bill's intellect and experience. I also spoke to Robert W. Allen, former Chairman of the Arizona Democratic State Central Committee, who has

known Bill both professionally and personally since he came to Arizona in 1953. He said that Bill has no personal animosity for anyone, no matter of what race or religion, nationality or sex. He commented that Bill is a lawyer through and through and that foremost in Bill's mind is an adherence to the doctrine of *stare decisis*.

Willard H. Pedrick, Dean of the Arizona State University Law School, supports Bill Rehnquist and said that all of the other members of his faculty likewise support him. In fact, Dean Pedrick informs me that he tried to get Bill Rehnquist to join his faculty several years ago.

In conclusion, Mr. Chairman, I believe that Mr. Rehnquist is admirably qualified by virtue of intellect, temperament, education, training and experience to be confirmed as an Associate Justice of the United States Supreme Court, and I urge your committee to favorably report to the United States Senate in connection therewith. Should you or any of the other distinguished members of your committee have any questions, I will be pleased to try to answer them.

The CHAIRMAN. We are going to recess now until 10:30 Monday morning, at which time Mr. Powell will be the witness.

Senator MATHIAS. Before you recess, can I say 30 seconds' worth?

The CHAIRMAN. Yes.

Senator MATHIAS. I welcome our colleague, Senator Tydings, back to the committee, and also a distinguished Marylander who has deserted us and gone to Virginia, Mr. Carlisle Humelsine. I give great weight to their statements and testimony.

(Whereupon at 3:20 p.m. the hearing recessed and will reconvene on Monday, November 8, at 10:30 a.m.)