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# NOMINATION OF WARREN E. BURGER

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1951-5

## HEARING BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE NINETY-FIRST CONGRESS

FIRST SESSION

ON

NOMINATION OF WARREN E. BURGER, OF VIRGINIA, TO BE  
CHIEF JUSTICE OF THE UNITED STATES

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TUESDAY, JUNE 3, 1969



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE  
WASHINGTON : 1969

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## NOMINATION OF WARREN E. BURGER

TUESDAY, JUNE 3, 1969

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

The committee met, pursuant to call, at 10:35 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Dodd, Kennedy, Bayh, Tydings, Byrd of West Virginia, Dirkson, Hruska, Thurmond, Cook, and Mathias.

Also present: John H. Holloman, chief counsel; Francis C. Rosenberger, Peter M. Stockett, and Margaret Corcoran of the committee staff.

The CHAIRMAN. The hearing this morning has been scheduled for the purpose of considering the nomination of Warren E. Burger to be Chief Justice of the United States. Notice of the hearing was published in the Congressional Record on May 26, 1969. The Standing Committee on Federal Judiciary of the American Bar Association states that the committee is of the view that Judge Burger is highly acceptable from the viewpoint of professional qualifications.

(The letter is as follows:)

AMERICAN BAR ASSOCIATION,  
*New York, N.Y., June 2, 1969.*

Re Hon. Warren E. Burger, St. Paul, Minn.

Hon. JAMES O. EASTLAND,  
Chairman, U.S. Senate Judiciary Committee,  
New Senate Office Building,  
*Washington, D.C.*

DEAR SENATOR EASTLAND: Thank you for your telegram affording this Committee an opportunity to express an opinion or recommendation pertaining to the nomination of the Honorable Warren E. Burger of St. Paul, Minnesota, for appointment as Chief Justice of the United States.

The members of our Committee are unanimously of the opinion that Judge Burger is highly acceptable from the viewpoint of professional qualifications for this appointment.

With best wishes,  
Sincerely yours,

CLOYD LAPORTE, *Acting Chairman.*

Now, these gentlemen are here to testify, we cannot take all of them, but I am going to read their names into the record:

Hon. Cody Fowler, of Florida, past president, American Bar Association; Rosser L. Malone, of New Mexico, past president of the American Bar Association; David F. Maxwell, of Pennsylvania, past president of the American Bar Association; Lewis F. Powell, Jr., of Virginia, past president of the American Bar Association; Whitney North

Seymour, of New York, past president of the American Bar Association; and Charles Rhyne, of Washington, D.C., past president of the American Bar Association.

The following are past presidents of the Federal Bar Association: Hon. Robert N. Anderson; Laurence H. Axman; Frank J. Delaney; William L. Ellis; Marshall C. Gardner; Whitney Gilliland; John H. Grosvenor, Jr.; James McL. Henderson; Carl A. Kendall; John A. McIntire; Thomas G. Meeker; Miss Bonnie Mills, president of the District of Columbia Chapter, Federal Bar Association; William N. Morell, past president; James E. Palmer, Jr., past president; Conrad D. Philos, past president; J. Thomas Rouland, executive director; Robert A. Shields, past president; Bettin Stalling, past president; Paul E. Teusch, president-elect; Frederick A. Ballard, past president, Bar Association, District of Columbia; Henry A. Berliner, Jr., chairman, Junior Bar Association, District of Columbia; James J. Bierbower, past president, Junior Bar, District of Columbia; Edmund D. Campbell, past president, Bar Association of the District of Columbia; James W. Cobb, president, Washington Bar Association; F. Joseph Donohue, former D.C. Commissioner; Newell W. Ellison, partner, Covington & Burling; Richard W. Galilher, past president, Bar Association of the District of Columbia; Nelson T. Hartson, partner, Hogan & Hartson; Francis W. Hill, past president, Bar Association of the District of Columbia; Thomas Searing Jackson, past president, Bar Association of the District of Columbia; Milton W. King, past president, Bar Association of the District of Columbia; Preston C. King, Jr., past president, Bar Association of the District of Columbia; John L. Laskey, past president, Bar Association of the District of Columbia.

Belford V. Lawson, chairman, judicial selection committee, Bar Association of the District of Columbia; Paul F. McArdle, past president, Bar Association of the District of Columbia; George E. Monk, president-elect, Bar Association of the District of Columbia; John Nolan, past chairman, junior bar section, Bar Association, District of Columbia; Ashley Seller, partner, Sellers, Conner & Cuneo; Jacob A. Stein, president, Bar Association of the District of Columbia; James R. Stoner, past chairman, junior bar section, Bar Association of the District of Columbia; William S. Thompson, Member of District of Columbia City Council, and R. Paul Sharood, president of Minnesota State Bar Association.

In addition I have telegrams from Earl F. Maurich, immediate past president, American Bar Association; Edward Koon, past president of the American Bar Association, and others. These telegrams will be admitted into the record.

(The telegrams appear in the appendix.)

The CHAIRMAN. Now, here is a resolution adopted by the judges of the second circuit:

This Court meets en banc today pursuant to a designation made weeks ago on a date that by happenstance falls within the week following the President's nomination of Judge Warren E. Burger as Chief Justice of the United States. It is fitting and proper we think to spread on the minutes of our Court in open session the pride and honor that has been bestowed on a distinguished colleague, an excellent judge and fine craftsman of the law, an honor that extends in some measure to the Court itself.

As his colleagues on the bench, we are uniquely aware of his vigorous interest in the improvement of judicial administration, a quality that can now be usefully applied to his new responsibilities as head of the Federal Judicial System. We

congratulate him individually, and we take this occasion to congratulate him en banc and to wish him many years of fruitful service in his new high office. In due course an appropriate formal resolution will be adopted. The action we take today in open session is more informal, but nonetheless wholehearted.

That was by unanimous vote by Judge Burger's colleagues.  
Here is a letter from the nominee:

My Dear Mr. Chairman: It has come to my attention that some communications to the Senate describe me as a resident of Minnesota. Of course, Minnesota is my native state and all my family reside there, but I have been a legal resident of the Commonwealth of Virginia for fourteen years. I am not aware of what significance, if any, this duality of residence background would have, but I thought it desirable that I call the matter to your attention.

Senator Byrd.

#### **STATEMENT OF HON. HARRY F. BYRD, JR., A U.S. SENATOR FROM THE STATE OF VIRGINIA**

Senator BYRD. Mr. Chairman and gentlemen of the committee, I am pleased to present to the committee today a fellow Virginian. Since 1955, Judge Warren Burger has been a property owner in Virginia, a taxpayer in Virginia, and a voter in Virginia. Judge Burger, I know, will always be proud of the great State of his birth, Minnesota, but we in Virginia are proud of Judge Burger. We consider him a Virginian. His home and the 6 acres surrounding it are located in Arlington County.

In reading some of Judge Burger's opinions as a judge of the U.S. Court of Appeals for the District of Columbia and some of his public statements, it seems to me that he not only is an able jurist but one who believes in the separation of powers between the legislative and judicial branches of government. President Nixon has asserted he believes it important to appoint to the Court at this time in the Nation's history judges who believe in a strict interpretation of the Supreme Court's role. Judge Burger's record suggests that he adheres to this belief.

I am grateful to the committee and to its splendid chairman, Senator Eastland, for permitting me to say a few words today in behalf of a fellow Virginian. If this committee acts favorably on the pending nomination, and if the Senate subsequently consents to the nomination of Judge Burger, he will become Virginia's first Chief Justice since John Marshall. John Marshall served 34 years from 1801 to 1835. I doubt that Judge Burger will want to serve quite that long but I, for one, am delighted at his selection to be Chief Justice of the United States. I congratulate Judge Burger, and I commend President Nixon on the appointment.

And again, Mr. Chairman, I am grateful to you and to the committee for permitting me to say these few words.

The CHAIRMAN. Senator Spong.

#### **STATEMENT OF HON. WILLIAM B. SPONG, JR., A U.S. SENATOR FROM THE STATE OF VIRGINIA**

Senator SPONG. Mr. Chairman, members of the committee, I am pleased to be here this morning to join in presenting to you Judge Warren Burger, who is before you for consideration for Chief Justice of the United States.

Judge Burger, as you know, has served for a number of years with distinction at the bar and on the bench. I shall not comment this morning upon any of his judicial decisions, but I would observe that he showed, in my opinion, great wisdom and good judgment when he decided to move to the Commonwealth of Virginia 15 years ago. And I am very pleased to be here today to present him to you as a fellow Virginian. I know that this nomination will receive your most serious consideration today. It is a pleasure for me to join with the number of lawyers you have already recorded in hoping that this committee will give favorable consideration to this nomination and passing it on to the Senate. I congratulate Judge Burger, and I thank you again for allowing me to be here with you this morning to help present him.

Thank you.

The CHAIRMAN. Judge Burger, you have a biography before you. If it is correct, I will place it in the record.

#### **STATEMENT OF HON. WARREN E. BURGER, TO BE CHIEF JUSTICE OF THE UNITED STATES**

Judge BURGER. Yes, I do, Senator. I would have only one very slight correction, and that is in the description of the law firm I was a member of beginning in 1931 upon graduation from law school. That name should be Boyeson, Otis & Faricy, and the name which is on the biography is the correct name of the firm at the time I withdrew from it at the end of 1952. Otherwise it is a correct statement.

The CHAIRMAN. With those corrections, it will be admitted into the record.

(The biography follows:)

##### **WARREN E. BURGER**

Born : September 17, 1907, St. Paul, Minnesota.

Education : 1925-26, 1932-33, University of Minnesota, Minneapolis, Minn.; 1927-31, St. Paul College of Law, St. Paul, Minn. LL. B. degree, magna cum laude.

Bar : 1931, Minnesota.

Employment : 1931-53, Faricy, Burger, Moore & Costello, St. Paul, Minnesota, Attorney; 1953-56, Department of Justice, Assistant Attorney General, Civil Division; March 29, 1956—present, District of Columbia Circuit Judge.

Marital Status : Married, 2 children.

Office : U.S. Courthouse, Washington, D.C. 20001.

Home : 3111 N. Rochester Street, Arlington, Virginia 22213.

To be Chief Justice of the United States.

The CHAIRMAN. Judge, what was the nature of your practice when you were in it?

Judge BURGER. My practice covered a wide range of work, Senator, excluding the field of criminal law. I tried some criminal cases by appointment of the court or as a volunteer in the legal aid system. In Minnesota, we have had, for longer than I can remember, a public defender system, an organized public defender system in all cities of the first class, that is to say, cities over 100,000. So in St. Paul most of the work was done by that staff. But I tried a half a dozen criminal cases in those years. Otherwise, my practice was very general.

The CHAIRMAN. What do you conceive to be your duties as Chief Justice and a member of the Supreme Court?

Judge BURGER. Well, Mr. Chairman, if I were to be confirmed by the Senate, I would conceive my judicial duties to be essentially the same, basically the same as they have been as a member of the U.S. court of appeals—deciding cases.

Above and beyond that, of course, the Chief Justice of the United States is assigned many other duties, administrative in nature. I would think he has a very large responsibility to try to see that the judicial system functions more efficiently. He should certainly be alert to trying to find these improvements. He cannot do it alone, of course, but through the new Judicial Center, for example, the Federal Judicial Center, and another very encouraging sign, the activity of the Subcommittee on the Courts under the chairmanship of Senator Tydings. I would think it was the duty of the Chief Justice to use every one of these tools to make our system work better. And I would expect to devote every energy and every moment of the rest of my life to that end should I be confirmed.

The CHAIRMAN. Do you think the Supreme Court has the power to amend the Constitution of the United States by judicial interpretation?

Judge BURGER. No; clearly no. It has no power to amend the Constitution.

The CHAIRMAN. Does the Supreme Court have the power to legislate judicial interpretations?

Judge BURGER. I think as you put the question, clearly it has no such power. No court has that power.

The CHAIRMAN. Now, will you as Chief Justice of the United States take special care to preserve to the State and local governments all of the rights, responsibilities, and powers reserved to them by the Constitution of the United States?

Judge BURGER. Mr. Chairman, I would answer that question and more broadly. I took an oath something more than 13 years ago to support and defend the Constitution. If the Senate confirms me, I would take the same oath again. I would expect to follow that to the best that my ability and my comprehension would permit me to do it.

The CHAIRMAN. That will be all for right now.

Senator McClellan.

Senator McCLELLAN. Thank you, Mr. Chairman. I want to make a brief comment, and ask only one or two questions.

First, I sincerely commend the President for making this nomination, and I congratulate Judge Burger on the honor that has been conferred upon him by the President and which I am confident the Senate will acquiesce in. I think it was an excellent selection..

In the past when we have had judicial confirmations before us, I have frequently undertaken to ascertain something about the philosophy of the individual nominee. I have listened with interest to the questions asked by the distinguished chairman and the answers given by Judge Burger. In many instances the nominees for the Court positions have no judicial record. They have had a professional record, of course, but our nominee today has a judicial record of the past 18 years. I was first attracted to the work of the nominee in 1962 by his famous dissenting opinion, as I recall, in the *Killough* case, and I have followed his record since then and observed with gratification many of

the decisions which he has rendered and in which he has participated. Even as late as March of this year, I was impressed with a dissenting opinion rendered by Judge Burger in the *Frazier* case. At that time I had no intimation and never even suspected that 3 or 4 months later I would have the pleasure of this occasion and the opportunity to vote favorably on the confirmation of your nomination, which I intend to do. I inserted that opinion in the Congressional Record and made some comments about it. Again, it was without ever contemplating or imagining that this occasion would develop within the following 2 or 3 months.

So I am familiar with your fine work on the bench and I do not need to interrogate you at any great length about your philosophy. I simply would ask one or two questions only.

As I have interpreted your philosophy, I think it could be said that it has been aimed at achieving a proper balance between the rights of the accused and society. I think your opinions in that regard have reflected appropriate judicial restraint. And I ask you simply; is that your philosophy today and is that the philosophy that you would expect to guide you in the performance of your duties as Chief Justice of the Supreme Court?

Judge BURGER. Senator McClellan and Mr. Chairman, I suppose the round answer to that is that when you have been sitting on a court for 13 years, or sitting in the Senate for 13 years and voting and acting, it would be much like it. A certain pattern will emerge which other people see. I have never thought of it in terms of a pattern, very frankly. I have decided cases as they have come before the court. I have tried to articulate what I thought were the reasons for those holdings. When I dissented, I sometimes dissented very vigorously. I tried to use as my pattern never to dissent more vigorously than members of the Supreme Court dissent against the majority of opinions of their colleagues. I feel no change. I am aware of no change in my basic approach. But I hope I have not stopped learning. I have undertaken to study the judicial systems, the mechanisms of judicial administration of other countries. I have continued my studying of the law, I hope, constantly, but I think I am probably to be judged on what I have said and written for something over 13 years.

Senator McCLELLAN. That is exactly what I had in mind, and I would like to quote from one of your dissenting opinions briefly. "Our task as judges," you said, "properly exercised is a narrow one: To interpret the laws faithfully as Congress wrote them, not as we think Congress ought to have provided." I certainly agree with that philosophy and with that concept of a court's duty and responsibility. I assume you still have that philosophy.

Judge BURGER. I know of no reason to think it is any different, Senator.

Senator McCLELLAN. You further said in that same opinion: "Under the guise of protecting legitimate individual rights, the majority abandons the balance we are charged with maintaining between individual rights in the protection of society." That is why I asked you the other question. I gathered from that statement that you feel there is a proper balance that must be maintained.

Judge BURGER. It must be.

Senator McCLELLAN. Yes, sir. I thank you very kindly.

Judge BURGER. Thank you, Senator.

The CHAIRMAN. One more question.

Is it your philosophy that the Constitution of the United States has a fixed, definite meaning, that it does not change but stays there until it is amended as the Constitution provides that it be amended?

Judge BURGER. Well, within the confines of a limited hearing, Senator, Mr. Chairman, it might call for a lecture, which I am sure the committee does not want, to try to meet all points of that, but surely it is the duty of the judges, all judges, to read the Constitution and try to discern its meaning and apply it.

I recall Justice, Mr. Justice Black's unique interview on TV some months ago in which he carried the dog-eared copy of that Constitution as he does in his pocket and in being interviewed said in substance: "Here is what the words say, and they are very plain words, and I take them for what they are."

I think I would subscribe to the views of Mr. Justice Black on that occasion with respect to your question, Mr. Chairman.

The CHAIRMAN. Senator Ervin.

Senator ERVIN. I do not care to ask the nominee any questions, Mr. Chairman. I believe we are very fortunate in having one who has manifested his devotion to the Constitution and devotion to the law. Judge Burger has written a number of very fine opinions. I think he is a very sound judge and also a very fine legal craftsman. As the judge intimated himself a moment ago, I think we can judge a man's judicial past on the basis of the opinions he has written. And in order that there might be something in the hearing on this point, I would like to insert in the record at this point a statement I have prepared myself giving my appraisal of the nominee's work on the U.S. Court of Appeals for the District of Columbia.

Also, I would like to put in the record a speech by Judge Burger given to the Ohio Judicial Conference in Columbus, Ohio, September 4, 1968, entitled "Rule-Making by Judicial Decision—a Critical Review." Additionally, a speech by Judge Burger given at Ripon, Wis., on May 21, 1968, and excerpts from recent opinions of Judge Burger which appeared in the May 30, 1969, issue of Congressional Quarterly, and majority opinion in the case of *Powell versus McCormack*, 395 F. 2d, 577, 1968, which was written by Judge Burger, and the case of *Frazier versus United States* decided in the U.S. Court of Appeals for the District of Columbia on March 14, 1969. The dissenting opinion in this case was written by Judge Burger.

Mr. Chairman, I would like to have these items inserted in the record and state further, as I stated, that Judge Burger is a fine legal craftsman, and I have no difficulty of knowing what he has decided or dissented from in his cases. He is a very lucid writer, and a very gifted writer. His opinions manifest a recognition and appreciation of the importance of the separation of powers of government as delineated by the Constitution. The opinions Judge Burger has written in criminal cases indicate to my mind that he believes that society and the victims of crime are just as much entitled to justice as the accused. And so I expect to support the nominee.

I may have to leave before the vote is taken, but I would like to be recorded as in favor of the nominee.

The CHAIRMAN. Senator Dodd.

**Senator Donn.** Thank you, Mr. Chairman.

**Judge Burger.** I know your reputation as a fine lawyer and as a highly able judge. I think that your nomination is an excellent one. I do not have any questions.

**Judge Burger.** Thank you.

**The CHAIRMAN.** Senator Kennedy.

**Senator KENNEDY.** No questions, Mr. Chairman.

**The CHAIRMAN.** Senator Tydings.

**Senator TYDINGS.** Judge Burger, I am delighted to take part in this confirmation hearing. I wonder if you could provide for the committee--this is a question that I should have asked of the last nominee for Chief Justice--a list of all professional corporations, business firms or enterprises in which you have been an officer, director, proprietor or partner during the time that you have been on the bench. Can you provide such a list?

**Judge Burger.** Well, it is so brief I could answer it right now, Senator Tydings, if you want.

**Senator TYDINGS.** Fine.

**Judge Burger.** I have been a member of the Advisory Committee of the Institute of Criminal Law and Procedure of Georgetown Law Center. I have been a member of the faculty of the Appellate Judges Seminar at New York University which meets 2 weeks every summer with a full time intensive refresher course for appellate judges. I have been a member of the Federal Bar Foundation which is a foundation underlying the Federal Bar Association. I have been a trustee of the Mayo Foundation for approximately 11 years. I have been a member of the board of the Georgetown University and Frankfurt University Institute of Foreign Trade Law which works out exchange student arrangements between Frankfurt University in Frankfurt, Germany and Georgetown University, the duties of which have been extremely light.

I have been chairman of the American Bar Association Committee on Minimum Standards for Criminal Justice, and during its 4½ years of operation I was also chairman of one of its underlying advisory committees, of which there are seven, to draft standards for the prosecution and defense function, for the performance of those functions, which is a report which is something of nearly 400 pages. This has represented 4½ years work of 11 representative lawyers and judges from around the United States, Federal and State judges, law professors, practicing lawyers, prosecutors, defense lawyers.

At the moment, I cannot think of any others, Senator Tydings, but if they occur to me I certainly would supplement the record. There are committees here and there which every person comes to but committees which are not too active. I am a member of a half a dozen committees of our own court. Within the structure of nine judges, we have subcommittees dealing with various problems.

I might say that in the short time that I have had to consider this problem, not yet 2 weeks, I have found out only a little about the new duties that would devolve upon me if the Senate confirms me. It would seem very clear to me that I must reexamine my whole mode of life and determine where the priorities lie.

As I said in response to a question from the chairman, I believe, the priorities would have to favor legal matters, judicial matters. I would not think, for example, of withdrawing from the American Bar Asso-

ciation or the Federal Bar Association or the Institute of Judicial Administration, but I would think that probably I would have to curtail my participation in those activities if I were to do justice to the burdens of the office you are considering here today. And I would think that, as I said, all matters not relating to judicial work and the improvement of the administration of justice would have to be eliminated.

As you know, the Chief Justice by statute—and these are duties that the Congress imposed upon him—is in one way or another the chairman of six or seven different bodies, some of which have nothing to do with the law or the administration of justice, but they are duties which he has. So that the occupant of that office is bound to be an extremely busy man if he does nothing except fulfill those duties.

**Senator TYDINGS.** Judge Burger, those of us who are interested in judicial reform are delighted in your record and interest in this field. One of the principal responsibilities of the Chief Justice, as you so well pointed out, is as the Chief Administrator of the Federal judicial system, and I think that you are well aware of the problems which have mounted in recent years, particularly rising caseloads and backlogs in the Federal judicial system. Just a few questions for the record.

Do you see a need for court administrators trained in management techniques rather than just the law to assist the judges or to work under the judges in the courts of appeals and in metropolitan districts with six or more permanent judges? Do you understand the question?

**Judge BURGER.** Yes, I do, Senator. I think there is a very great need for management people. Now, whether they are lawyers or not lawyers, I think, becomes then a relatively subsidiary point. But the judicial system in the United States and the federal system is largely running too much the way it was run 30 or 40 years ago. There are some improvements. I would not disparage the great improvements that have been made. But there has been an underlying attitude on the part of judges that if each judge just does his own job of deciding cases every day that the system will work. And that is an oversimplification. Somebody has got to be the traffic manager, somebody has got to see that the machinery is working. Let me illustrate it very briefly, if I can.

Time after time I have known of situations in Washington where 12 of the 14 available judges are assigned to criminal cases and nothing else, and at 3 o'clock in the afternoon a case ends and the machinery does not provide another case so he can start working right away. The judge is held up, as it were. He can go back to do some things, but when he is all geared up to try cases, he wants to try cases. We have got to have some reexamination in terms of whatever name you want to give them, by people who are skilled and experienced and expert at systems functioning. And I think there is a new attitude on the part of judges, to a very substantial extent engendered by reports of your subcommittee, that this is necessary, and I think it is going to come and it must come or else the whole system is going to break down.

**Senator TYDINGS.** Let me ask you another question: One of the most serious failures in the administration of the federal system is the failure of the U.S. courts of appeals to be able to promptly dispose of civil appeals and criminal appeals. In one bad example, the ninth circuit, the median time from the filing of the record to final disposition in criminal cases is 14.8 months; in civil cases it is 13.9 months. Another area of great concern is the fact that since 1959, the number of cases being held by U.S. courts of appeals for more than 3 months

after the argument has been completed has been increased by more than 500 percent. On June 30, 1959, there were only 40 cases in the U.S. courts of appeals that were held for more than 3 months after the appellate argument. On June 30, 1968, there were 256 such cases. My question to you is, Do you feel that we need the serious type of examination of our present system or procedures in appellate courts such as proposed by Judge Lombard of the second circuit or Judge Bryan of the fourth circuit, that is, a reexamination of our utilization of printed briefs and records, and indeed full-dress opinions with an idea to really tightening up appellate operations and to innovate in order to reduce the appalling backlog?

**Judge Burger.** I agree with your analysis, Senator Tydings. Every circuit in this country has got to make a careful reexamination of its techniques and mechanisms. It must look at some areas where extensive opinions are really not necessary.

That is one area. Sometimes we judges have a tendency to want to write a lot of views which may not really be essential to the case. This is true of all judges, myself included.

The American Bar Foundation under a committee which studied this problem for some time has come up with some very, very significant analyses. They were not new to a great many people, but they were new to some. I think studies of that kind have got to be encouraged, that judges must reach out for them and be willing to accept them even if the studies do not come from judges. I think in the last 2 years particularly there is a much more hospitable attitude on the part of judges of the courts of appeals and of the district courts to accept ideas, because they have come to the point where they are simply overwhelmed with work and they know that something else has got to be done, and the answer is just not creating more judges all the time.

**Senator Tydings.** No, unfortunately the facts show that the creation of new judgeships, has hardly done more than keep the courts abreast of the caseload which the preceding number of judges were handling.

I gathered from your remarks, Judge Burger, that you feel that the Federal Judicial Center will be an extremely helpful tool to the Judicial Conference and to you as the Chief Administrator of the federal system.

**Judge Burger.** I think it will be a extremely valuable asset and I hope it will engage the support of the Members of the House and the Senate. I frankly was somewhat skeptical of it when it was created. It had a very small budget, as you know, and a very small staff. Mr. Justice Clark taking it over after his retirement from active duty on the Supreme Court has done a perfectly amazing job in a short time in stimulating judges all over the country to do things for themselves. And I really would like to pay tribute to his leadership today.

**Senator Tydings.** Both Senator McClellan and Senator Hruska were very instrumental in getting the Federal Judicial Center authorized by the Congress and getting it funded, and I am delighted to hear it is working as well as you say.

**Judge Burger.** I think it is one of the most important single steps that has been taken to improve the administration of justice in the federal system in my time on the bench.

**Senator Tydings.** Judge Burger, for the past three and a half years the Subcommittee on Improvements in Judicial Machinery has been

studying the problem raised by the very few and far between cases of a physically disabled Federal judge staying on the bench when he should retire or the very rare occasion of the unfit judge. In 1968 as a result of these hearings our subcommittee put together a judicial reform proposal on which we are now holding hearings and on which we held hearings last year. Perhaps the essential part of the judicial reform proposal would be a mechanism called a Judicial Commission on Tenure and Disability which would be composed of five Federal judges, three district judges, and two circuit judges assigned to the Commission by the Chief Justice of the Supreme Court. The Commission would, in effect, act as a special muster or special committee for the Judicial Conference to investigate any and all claims of judicial disability or unfitness, just as the California State system works, and to make recommendations, if necessary, for involuntary retirement or removal to the Judicial Conference which would then have to determine what action to take. And finally there would be a right of appeal to the Supreme Court of the United States.

Judge BURGER. Are you familiar with this proposal?

Judge BURGER. I am familiar with it in a general way, Senator Tydings; not with all the details of it.

Senator TYDINGS. Do you think that such a mechanism within the judicial system itself, within the judiciary, as I described it, would interfere with the independence of the judiciary?

Judge BURGER. I do not. I do not.

Senator TYDINGS. As I described my judicial reform proposal, do you feel it would be consistent with the separation of powers doctrine of the Constitution?

Judge BURGER. It has never occurred to me that there is any conflict there, Senator. You may recall an exchange of correspondence we had a good many years ago when I wrote an article which appeared in several journals on this very point. At that time my proposal was that the judicial councils of each circuit were not living up to their obligation to deal with this problem, and discussing, among other things, the natural indisposition of judges to want to pass on these delicate matters. Nevertheless, the Congress in, I think, section 331 of title 18 put that duty on the judicial councils years ago. If they performed it, we would not even need the machinery we are talking about. But if they do not perform it under that machinery, then some other machinery is essential.

Senator TYDINGS. There are several other proposals in the Judicial Reform Act which I think it would be helpful to receive your views.

One proposal is mandatory retirement at the age of 70, or, that is, mandatory senior judge status at the age of 70. What is your reaction to that as a judicial reform?

Judge BURGER. There again I could refer you to the article which we exchanged correspondence about where I suggested that an age limit of 70 for trial judges would be a reasonable one, possibly a higher age for appellate judges. I hope that was not because I was an appellate judge. I hope it was only because I think the strain, the emotional and physical strain of day-to-day presiding over a trial court requires a great deal more than sitting on an appellate court. And I would never exclude, however, the availability of these judges for service as senior judges, because there are many of them, I recall particularly Judge

Soper of the fourth circuit who performed magnificently into his nineties, and as well as he did at 80 and 70. So there are exceptions, and those exceptional men should be used.

**Senator TYDINGS.** That is the greatness of our senior judge system.

**Judge BURGER.** Yes.

**Senator TYDINGS.** Of course, if we did not have the availability of the senior judges' talent, we would indeed be in sorry straits.

**Judge BURGER.** Yes, we would.

**Senator TYDINGS.** Judge Burger, do you feel that a judge should assume the role of chief judge of a circuit court or chief judge of a district court after he passes the age of 65?

One of the proposals in the judicial reform bill would prohibit the assumption of that role as chief judge after the age of 66.

**Judge BURGER.** Well, I do not think I am qualified really to pick a fixed age. I think there certainly is much to be said for limitations as the Congress created the limitation about 10 years ago at age 70. At that time I think some of the proposals were to make it 65, and the compromise was made on 70. I do not have a firm view on it. I really cannot go beyond that, Senator Tydings.

**Senator TYDINGS.** Do you have any position you would like to take with regard to the proposals now pending before the Judiciary Committee with regard to financial disclosure of Federal judges?

Let me be a little bit more specific. Do you feel that Federal judges should disclose publicly as, say, the Members of the Senate do, all honorariums of \$300 or more received by them each year from a single source?

**Judge BURGER.** I see no objection to that at all, Senator.

**Senator TYDINGS.** Do you feel that a Federal judge should disclose as the Senate does, the name and address of each business or professional corporation, firm or enterprise in which he was an officer, director, proprietor, or partner during the preceding year?

**Judge BURGER.** Well, as you know, the Judicial Conference of the United States has adopted a resolution which certainly indicates that the Federal judges should not be directors of profitmaking corporations, and I think that is generally observed in the Federal judiciary. As far as I know it is. I have never heard of any exceptions in recent years.

**Senator TYDINGS.** Unfortunately, there is no mechanism to enforce it at the moment.

**Judge BURGER.** The disclosure, the disclosure would accomplish this, as you suggest.

**Senator TYDINGS.** Do you have any thoughts on the filing of a complete financial statement such as the individual Senators file with the General Accounting Office, say, by members of the Federal bench to the Judicial Conference of the United States?

**Judge BURGER.** I have not thought that through. But over the years I have considered it. I see no problem with it. I see no problem with it.

**Senator TYDINGS.** Thank you very much, Judge Burger.

**Judge BURGER.** Thank you, Senator.

**The CHAIRMAN.** Senator Byrd.

**Senator BYRD.** Thank you, Mr. Chairman.

Judge Burger, I want to congratulate you on your nomination and on your confirmation by this committee, which I think will follow

shortly and on your confirmation by the Senate, which I have every good reason to believe will follow within a few days.

I am going to make some comments and observations about opinions you have rendered and statements you have made as a judge of the U.S. Court of Appeals for the District of Columbia Circuit. And if you desire, you may respond to any of the remarks or comments which I shall make.

I have been pleased that in many of the opinions you have rendered and statements you have made as a judge of the U.S. Court of Appeals for the District of Columbia Circuit you have expressed a strong belief that our law enforcement officers must be given a chance to fairly and impartially enforce the laws without being hampered or hindered by hypertechnical guidelines laid down by the Federal courts.

In a statement which you submitted to the Subcommittee on Appropriations for the District of Columbia when I was the then chairman, on July 19, 1967, you made certain remarks which I shall excerpt from the statement, and then I shall ask that the entire statement be included in the record. I quote you as follows:

No one has yet demonstrated a fallacy in the ancient concept that sure and swift justice is the most effective deterrent to crime, probably exceeding the deterrent effect of imprisonment itself. But American criminal justice at present can lay very little claim to being swift or sure or efficient. As a citizen and as a judge, I find this frustrating and discouraging and I fear that it is seriously undermining the functioning of the system and impairing the deterrent impact of convictions and the possibilities for rehabilitating the offenders. A system which encourages and even rewards long drawn out conflict with society is not useful. From my own study and observation of criminal justice in other societies, I know that many of them are experiencing new and difficult problems, but I know of none which has reacted to problems as we have in the sense of casting virtually all of the choices in favor of one side of the conflict—the accused. Certainly no other society using the Common Law System of Justice has found it necessary to go to the lengths we have gone in the past thirty years but more markedly in the past few years. In England and other Common Law countries, the people are just as free as we are and individual rights are as zealously protested, without making the criminal process so complex and difficult as ours that a great many guilty people slip through the net. And when we look at the fact that Washington, D.C. with fewer than one million people has many more criminal killings each year than all of England with over forty million, we are bound to wonder if there is some connection between the rules and the results. A system of justice which does not protect the law-abiding has failed in the basic reason for being and we are very close to failing.

The overwhelming majority of people are decent and lawabiding and we must ask—and judges among others must ultimately answer—of what value is a system of criminal justice which assures us the most absolute protection from the excesses and errors of the police but renders us more vulnerable to the attacks of those whom the police are charged with restraining. I suspect that most people would rather have more protection from the criminal element and a little less protection from police errors. We in the judiciary have the burden, I must admit, of demonstrating that each new rule of law has a valid purpose, that it has social utility for that is what law in a civilized society is all about. If it does not serve the basic purpose of all government—the protection of the society—we must carry the burden of showing some extraordinary and overriding—and legitimate—benefit to the individual which cannot be achieved any other way. In short, we need to make a searching examination of the basic purpose of a system of criminal justice, and I hope the Congress will take steps to help bring this about. Surely judges will not resist a sober and responsible look at what we are doing and where it is taking us.

Mr. Chairman, I ask unanimous consent that the entire memorandum which was submitted by Judge Burger to me as chairman of the subcommittee at that time be inserted in the record.

**The CHAIRMAN.** It will be admitted.  
(The memorandum is as follows:)

**APPENDUM BY JUDGE BURGER AT THE REQUEST OF THE COMMITTEE AS A SUMMARY**

I would like to sum up what I was trying to say in answer to the Chairman's large questions about a relationship between the actions and the attitudes and conduct of people. I hope I have made clear my view that no one case or even several cases has created the difficulties which undoubtedly exist in the administration of criminal justice. The problem is not that simple. Nevertheless I am satisfied that the actions of courts, as distinguished from the formal judicial opinions, which few people read, become widely known to the public in the unusual cases which are in the news. The Stewart case and others like his such as Coleman, Dallas Williams, and Naples are known and talked about in the best clubs and the worst ghettos. The people doing the talking may not know what they are talking about but they talk and we must not be surprised if they get the impression that the machinery of justice is not working very well. But I must concede that ultimately the general thrust of important judicial holdings, such as those I referred to which were in the courts year after year, do indeed become widely known and discussed. These cases give an image of justice being frustrated and often defeated. Even the most temperate and thoughtful laymen cannot understand the occasion for 3, 4, or 5 trials and numerous appeals to dispose of one relatively simple case.

**SURE AND SWIFT JUSTICE GREATEST DETERRENT**

No one has yet demonstrated a fallacy in the ancient concept that sure and swift justice is the most effective deterrent to crime, probably exceeding the deterrent effect of imprisonment itself. But American criminal justice at present can lay very little claim to being swift or sure or efficient. As a citizen and as a judge, I find this frustrating and discouraging and I fear that it is seriously undermining the functioning of the system and impairing the deterrent impact of convictions and the possibilities for rehabilitating the offenders. A system which encourages and even rewards long drawn out conflict with society is not useful. From my own study and observation of criminal justice in other societies, I know that many of them are experiencing new and difficult problems, but I know of none which has reacted to problems as we have in the sense of casting virtually all the choices in favor of one side of the conflict—the accused. Certainly no other society using the Common Law system of justice has found it necessary to go to the lengths we have gone in the past 30 years but more markedly in the past few years. In England and other Common Law countries, the people are just as free as we are and individual rights are as zealously protected, without making the criminal process so complex and difficult as ours that a great many guilty people slip through the net. And when we look at the fact that Washington, D.C. with fewer than one million people has many more criminal killings each year than all of England with over 40 million, we are bound to wonder if there is some connection between the rules and the results. A system of justice which does not protect the law abiding has failed in the basic reason for being and we are very close to failing.

**PROTECTION FOR MAJORITY OF CITIZENS**

The overwhelming majority of people are decent and law abiding and we must ask—and judges among others must ultimately answer—of what value is a system of criminal justice which assures us the most absolute protection from the excesses and errors of the police but renders us more vulnerable to the attacks of those whom the police are charged with restraining. I suspect that most people would rather have more protection from the criminal element and a little less protection from police errors. We in the judiciary have the burden, I must admit, of demonstrating that each new rule of law has a valid purpose, that it has social utility for that is what law in a civilized society is all about. If it does not serve the basic purpose of all government—the protection of the society—we must carry the burden of showing some extraordinary and overriding—and legitimate—benefit to the individual which cannot be achieved any other way. In short we need to make a searching examination of the basic

purpose of a system of criminal justice, and I hope the Congress will take steps to help bring this about. Surely judges will not resist a sober and responsible look at what we are doing and where it is taking us.

**Senator BYRD.** Judge Burger, you issued a dissenting opinion in the case of *Frazier v. United States*, decided March 14, 1969. At issue in that case was the proper interpretation and application of the decision of the Supreme Court in the *Miranda* case, which dealt with the admissibility of confessions in criminal trials. In your dissenting opinion in the *Frazier* case you expressed the view that police authorities had complied with the requirements of the *Miranda* decision and that the confession of the accused should have been admitted in evidence. You made the following statement in your dissenting opinion, with which I heartily concur:

The seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances is giving rise to myriad rules, sub-rules, variations and exceptions which even the most alert and sophisticated lawyers and judges are taxed to follow. Each time judges add nuances to these "rules" we make it less likely that any police officer will be able to follow the guidelines we lay down. We are approaching the predicament of the centipede on the flypaper—each time one leg is placed to give support for relief of a leg already "stuck," another becomes captive and soon all are securely immobilized. Like the hapless centipede on the flypaper, our efforts to extricate ourselves from this self-imposed dilemma will, if we keep it up, soon have all of us immobilized. We are well on our way to forbidding any utterance of an accused to be used against him unless it is made in open court. Guilt or innocence becomes irrelevant in the criminal trial as we flounder in a morass of artificial rules poorly conceived and often impossible of application.

**Senator ERVIN.** Senator Byrd, I wonder if I could make a unanimous consent request. Unfortunately, I have to leave.

**Senator BYRD.** Yes.

**Senator ERVIN.** Mr. Chairman, I would like to ask unanimous consent that my vote may be cast in favor of the nominee.?

**The CHAIRMAN.** Is there objection?

It is so ordered.

**Senator ERVIN.** Thank you.

**Senator BYRD.** I hope and believe, Mr. Burger, that as Chief Justice of the United States you will continue to take a sane and sensible view of the problems of law enforcement. I believe that the people of this country are very concerned about the terrible increase in lawlessness and the decisions of some courts which make it difficult for the authorities to maintain law and order. And I am certain that you share that concern.

I am also pleased that you have stated a strong belief that one of the chief duties of a Federal judge is to exercise judicial self-restraint. In your dissenting opinion in the case of *Kent v. United States*, you made the following statement:

\* \* \* the law requires us to affirm unless the District Judge is "clearly erroneous." Review in this court of District Court findings which rest on observations of the accused, detailed judicial and social files, and vast amounts of testimony, is not a contest of private opinion, or our sociological leanings versus those of others. Our review has a narrow scope and we are as much subject to the commands of statutes and rules as are all others.

I completely agree with you that it is the duty and responsibility of Federal judges to decide cases based on the Constitution of the United States and the several States and that it is not the proper function of

Federal judges to incorporate their personal notions of what is socially, economically, or politically desirable into judicial decisions.

And I hope and I believe that you will continue your support of these views as Chief Justice of the United States.

You have also commendably expressed a concern, which I share, that the courts must scrupulously adhere to the principle of separation of powers. You rendered a dissenting opinion in the case of *Scott v. Macy*. In your opinion in that case, you made the following statements:

The opinion of the court's majority reveals by its own terms that it is usurping powers of the policymaking branches of government . . . I would speculate that it can be read as meaning that the Court now takes over from the Executive the power to formulate "public policy" on employment of sex deviates because that "policy is in something of a state of flux. . ." It would seem to me that if adjustment is needed to changing mores that is indeed a matter of highly sensitive policy. But from whence comes our mandate to make or even suggest policy on this score or our mandate to denounce the policy of the constitutionally authorized branch?

Congress and the Executive make policies in various areas which many reasonable people consider unsound. But policy is not the business of judges.

I sincerely hope and I believe that you will maintain your regard for the doctrine of separation of powers as Chief Justice of the United States.

The last area of your work on the court of appeals upon which I would like to comment is the issue of to what extent the Federal courts should supervise the operations of the public school systems of this Nation. I was gratified to note that you dissented from the judgment of the court of appeals in the cases of *Smuck v. Hobson* and *Hansen v. Hobson*, decided jointly on January 21, 1969. The majority of the court approved the actions taken by Judge Skelley Wright, acting as judge of the district court, in ordering the authorities of the public school systems of the District of Columbia to make drastic and far-reaching changes in the operation of the schools under their jurisdiction, many of which changes I felt, as chairman of the Appropriations Subcommittee on the District of Columbia, could not possibly be carried out without injury to the public system and to the children enrolled therein.

You joined in the dissenting opinion of Judge Danaher and also issued a separate dissenting opinion. You noted the dangers inherent in a Federal court undertaking to supervise the operations of a school system, and you made the following statements in your dissenting opinion:

We, [meaning yourself and Circuit Judge Tamm,] join in Judge Danaher's opinion and his view that sound principles of judicial restraint command that the mandate be vacated assuming, arguendo, that a subject so complex and elusive, and so far beyond the competence of judges, would have warranted judicial action in the first instance.

Several commentators have expressed views which undergird what Judge Danaher has said as to the need for caution and restraint by judges when they are asked to enter areas so far beyond judicial competence as the subject of how to run a public school system. We have little difficulty taking judicial notice of the reality that most of it not all of the problems dealt with in the District Court findings and opinion are, and have long been, much debated among school administrators and educators. There is little agreement on these matters, and events often lead experts to conclude that views once held have lost their validity. The commentary from various sources, including law reviews, tends to supply strong support for Judge Danaher's very sound view on the need for judicial restraint.

Judge Burger, as you probably know, a great many school districts have undertaken to implement the decision of the Supreme Court in the case of *Brown v. Board of Education* by adopting a freedom-of-choice plan of desegregation. Under this plan, a child or his parents chooses which school within the school district he will attend, without regard to race or color. So long as this choice is made freely and without coercion I believe it is a perfectly legitimate and constitutional method of achieving desegregation in the schools.

Some persons have attacked the freedom-of-choice plan because it does not always result in an artificial racial balance. I do not believe that the U.S. Constitution requires racial balance. I sincerely hope that, if the issue of the validity of freedom-of-choice comes before the Supreme Court while you are Chief Justice, you will apply the standards enunciated by you in the *Hobson* cases in determining whether local school boards have the right to operate their schools on such a basis in good-faith manner.

I commend the President of the United States on nominating a man who has had long previous service on the bench. Too often in recent years, nominations have been made to the Supreme Court of the United States of men who have had no previous judicial experience. And this is not to say that previous judicial experience is a necessary prerequisite to outstanding and great service on that Court.

As a matter of fact, there have been members of the Supreme Court of the United States who have been great judges and who did not have previous judicial experience prior to their nomination to that body. Nevertheless, it has become the rule rather than the exception in recent years to appoint individuals to that august body who have not had previous judicial experience, and in this case I am encouraged by the long experience that you have had and the great service you have rendered as a judge.

I congratulate you, Judge Burger, and I shall support with pleasure and pride your nomination to the exalted Office of Chief Justice of the United States.

The CHAIRMAN. Senator Dirksen.

Senator DIRKSEN. Judge Burger, some years ago there was a series of cases: one in Alabama, *Reynolds v. Simms*; one from Tennessee, *Baker v. Carr*—can you hear me, Judge?

Judge BURGER. It is not working very well, Senator Dirksen.

Senator DIRKSEN. I thought I was talking loud enough. And one out of Colorado, *Lucas v. Colorado*. These are cases that involve the so-called one-man, one-vote issue. The High Court finally uttered its decisions, and it was popularized as one man, one vote.

Now, to me it has been amazing that the American press has done a disservice to the people of this country by misadvising them as to what the issue really was.

I would be the last man in the world to quarrel with the principle of the one-man, one-vote rule if that is what a State wants. But I want it done by the State legislature. I want them to determine what their legislative structure should be.

That was not the case here. The Court had to intrude itself. It is what Justice Frankfurter referred to as intruding in "this legislative thicket." And that is exactly it. Now, you partially answered this in your response to the distinguished chairman of this committee, but I

am anxious about your views where it involves moving into the field of legislation and whether that is one of the functions of the Court.

Judge BURGER. Senator Dirksen, I think I would do well to stand on my prior answer, that the Constitution is there. It is the function of judges to try to understand it and try to apply it as they read it. And I have always tried to do it. I hope I will always try to do it in the future wherever I may sit.

Senator DIRKSEN. Something of the same issue has arisen in connection with a recent decision of the High Court in the two cases out of Missouri and New York on congressional redistricting. The language of the Court was that these districts had to be precise. In one case there was a 5 percent variation, I suppose from the median or the norm, and in the other case there was a variation of 3 percent. Even the Census Bureau admits that in taking the census, because of the mobility of our people, that the census is not exactly accurate and it cannot be. In some States, you have Military Establishments, and you have soldiers that may be there for a longer or a shorter period of time. They may take up residence in that State and be there long enough so they can be voters. On the other hand, they will be voters elsewhere.

But under this doctrine if it has to be a precise ascertainment of the parity of these congressional districts, where does it leave the States and where does it leave the legislatures? If they cannot take into account whatever the conditions are in that State, I do not see how you can comply with that kind of a decision of the Court.

So this is a practical matter, and it is in the legislative field. And I am wondering why the Court has to intrude. Of course, I can think of areas where you may have a glaring abuse, but that was not the case here at all.

You may or may not want to comment on it, and if you do not, it is quite all right, but I think I ought to raise the question for the record.

Judge BURGER. I should certainly observe the proprieties by not the undertaking to comment on anything which might come either before the court on which I now sit or on any other court on which I may sit. Those cases dealt with problems which fortunately for our peace of mind our court has not had to deal with. The other circuits have had those matters coming up through their channels. I think I must limit any comment in that way, Senator Dirksen.

Senator DIRKSEN. Of course, Judge, as the lawyers say, it is res adjudicata, it is done, and that is about it. But I have one other question.

In the *Stein v. Oshinsky* case which came out of New York, the children in one of the school districts were reciting a prayer. I think it was a simple prayer, as I recall, "God is great, God is good, and we thank Him for this food."

Well, the superintendent of schools sent an order down, or the principal, that this had to stop; and the parents of those children, and they included gentile, and Jew, and Catholic, and Protestant, went to the district court in New York to find out what their rights were, and the district court sustained the parents. The case went up on appeal to the U.S. circuit court, and the circuit court reversed the district court. In other words, they put a stop to it.

The parents through their attorneys, as I recall, then filed the usual writ of certiorari in order to get their case into the Supreme Court. And the Court refused the writ of certiorari.

Do you want to render an offhand opinion as to whether or not [laughter] as to whether or not by refusing certiorari, that prayer in public schools under the Constitution as interpreted by the High Tribunal cannot be done?

I might warn you, Judge, we are working on it, and we are working hard. And it is going to be on this Senate floor, God willing, while I am alive. And I expect to be alive in my present state of health. It won't be too long before this issue is going to be tried all over again. I just wanted to get an answer, for this reason you find, not about this issue as such, but about the impact and the meaning of that refusal of certiorari. Does that close it so far as the Supreme Court is concerned? Because you will find opinion now all over this country that that was not the intent of the decision in *Stein v. Oshinsky* at all. And others will contend on the other side.

Judge BURGER. Well, Senator Dirksen, I am going to construe your warning to me as a kind of a warning that police give to an accused these days, a warning to be silent.

In all seriousness, this is a matter which I would assume is going to come before the court, the courts generally, and perhaps the Supreme Court, and therefore it would be inappropriate for me to try to analyze the rationale of the denial of certiorari in that case. I just assume that this is one of the subjects which is going to be before the Court over a period of years.

Senator DIRKSEN. It will be. I do not believe there is going to be any doubt about it. The fight has to go on, just like the fight has to go on on one man, one vote. I do not care what the Illinois Legislature does about one man, one vote, so long as they do it. But I do not want it done over here in this big, white, marble building, because that is an intrusion of the legislative field, and that is the reason we have a sub-committee of this committee now that has been actively pursuing the business of the separation of powers. It is too bad that Judge Ervin had to leave because he is the distinguished chairman of that committee, and he has done an extremely noble job in that field. But I think in a number of cases, you have indicated that those are fields of policy where the Court has no business. I applaud the viewpoint that you have expressed in some of these dissents.

I would ask you one question, maybe just for purposes of the record, and you do not have to answer it if you do not want to. But you know there is a columnist who insists that you are a "witch hunter," and I think I ought to ask it for the record, and if you want to answer it, you can. If you do not want to answer it, you do not have to.

Judge BURGER. Well, I think I should say no more than—

Senator DIRKSEN. You know who I refer to.

Judge BURGER. I think I should say no more about that, Senator Dirksen, than the fact that the people who know me best, people who have known me longest in my 46 years in Minnesota, are amused and not disturbed by that suggestion.

Senator DIRKSEN. Of course, Judge, they think I am a witch hunter, too.

The CHAIRMAN. Senator Hruska.

Senator HRUSKA. Thank you, Mr. Chairman. This is either the sixth or seventh time that, as a member of this committee, I have participated in hearings to confirm a nominee to the Supreme Court. And I want

to say that I have never been more pleased by the man the President nominated than I am today.

It is understandable that any nominee to the Supreme Court will be reluctant to express himself on any matter that might come before him. That has been historically the case. However, we still must determine the integrity, the competence, and the experience of the nominee, Mr. Chairman.

Today we fortunately have an extensive and impressive record that the nominee has compiled. This record was compiled as an Assistant Attorney General and as an appellate judge. These duties, together with speeches and lectures that he has given, have given us an opportunity to judge the ability and the temperament and the training and experience that he has had.

Senator DIRKSEN. Mr. Chairman, I would like to intrude long enough to ask whether you contemplate an executive session as soon as this hearing is completed?

The CHAIRMAN. Yes, sir. If we have a quorum, I would like to have an executive session when this hearing is over.

Senator DIRKSEN. Thank you.

Senator HRTSKA. Those speeches and lectures are typified by the speech given by the nominee last September before the Ohio Judicial Conference on the subject of judicial rulemaking. This is an area where the Supreme Court has legislative power, but it was expressly granted by the Congress.

There are few men who by training and ability and temperament are suited to serve on the Supreme Court, and there are even fewer that have the character and the courage and leadership to serve in an outstanding fashion as Chief Justice. I concur wholeheartedly in President Nixon's decision to repose his trust in Judge Burger to be Chief Justice. His diverse background uniquely suits him for the position. I am very, very happy that he has been nominated, and, I shall support his nomination both in the executive session and on the floor of the Senate.

Judge Burger, I congratulate you on your nomination and commend you for the ability and dedication that established your qualifications for the office.

Judge BURGER. Thank you, Senator.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Burger, I congratulate you and President Nixon upon your selection as Chief Justice of the United States. The Chief Justiceship of the United States is the second most powerful position in the world, second only to the Presidency of the United States. I strongly favor your confirmation for two reasons: First, your records indicate you are a man of integrity and character. To me a judge should be "Mr. Integrity." Second, a perusal of your decisions on the District of Columbia Circuit Court of Appeals indicates clearly that you believe in a strict construction of the Constitution in interpreting the law but not legislating, in strong enforcement of the law, in equal treatment for all with favoritism to none, and in preserving the structure of government provided in our Constitution. I shall be pleased and happy to support your confirmation.

The CHAIRMAN. Senator Cook.

Senator Cook. Mr. Chairman, Judge Burger, in your opening remarks and in response to questions from the chairman you felt that

one of the prime responsibilities of your position would be to see that the judicial system should function more efficiently. In a few words really what are your ideas for implementing a more efficient Federal judiciary?

Judge BURGER. Senator Cook, I would have to trespass on your time much too long to even start on it. I have spoken to some of it; namely, the need for judges to recognize that there are people who are not judges who can help us run the system better. Other systems of justice in the world, other judicial systems make a great deal of use of people who are not judges to make it work. In all of England they have, as I am sure all of you know, probably not as many judges as we have in Washington, D.C. of the upper level courts. They use staffs which perform a great many of the functions which are now imposed on judges.

That is one area. There is another area which I can only barely touch on, and that is that we must, we the judges collectively must take another look at the whole area of procedure.

Now, procedure is enormously important. Procedure is what protects people. But procedure can be refined to the point where the machinery breaks down. You can carry so much armament that like King Phillip's Spanish Armada on the way to England, the weight made the ships nonmaneuverable and the British were able to sink those that did not sink by their own weight.

I think we may—and I am not certain on this—I think we may have approached that point in procedure, and that our procedures need to be simplified without in the slightest bit interfering with the legitimate protection of the rights of an accused person.

There will be so many areas that I could not begin to touch on them, and I do not mean this just in the field of criminal law. There are many areas of civil practice which need to be reexamined. One needs only spend a couple of weeks in the courts of England or in Europe to be able to see some of the tremendous efficiency which they have which we do not have, and I think we should borrow from it in this area, too.

Senator COOK. Judge, I really do not want to put you on the spot in saying that Congress itself has not done its job for the judiciary, but I spent a day not too long ago in New York going through the Court of Customs, and I found during that visit that the Court of Customs now has some 400,000 cases. One of the reasons for this tremendous backlog is that they have tried diligently to get a system by which they can computerize all of these cases. As a matter of fact, when motions are filed now it is difficult to even find the files.

Do you feel that part of your responsibility will be to update the attitude of the judiciary in regard to its relationship with Congress, to see to it that the modern tools are put in the hands of the judiciary so that the system may be modernized for the benefit both of the judges and the litigants.

Judge BURGER. I agree very definitely, Senator, and I do not mind your putting me on the spot on the matter of whether Congress has given the courts the proper help. When I was a boy there was a common phrase that was in German and then in our community but in any language it means the same thing, that a carpenter is entitled to have his tools, and he cannot work without them.

Now, the Congress is not solely at fault. I think the judges have not come to the Congress with right kind of picture and the right kind of story of what is needed and why it is needed. And I found out in my brief experience before appropriations committees while I was Assist-

ant Attorney General 16 years ago that committees of Congress do not give you money in appropriations unless you make your case. I think the courts have got to make their case. And I would put as a very high priority studies by the judges and others that would make the case of what tools we need that we do not now have and what we will do with them if you give them to us.

Senator COOK. In that regard, to elaborate slightly on a question that was asked by Senator Tydings in regard to the number of judges and the current caseloads, do you think it might well be necessary in the future to break up some of the Federal circuits.

Judge BURGER. I would certainly regard that as part of the overall reexamination of the whole structure, Senator. The whole thing has to be looked at again.

Senator COOK. Now, just two final questions.

The chairman asked you whether the Constitution was the Constitution and that is what it was. And you answered certainly in the affirmative. And I might ask you this: You have dissented on many occasions because you felt that it was your right and your duty to dissent. And you certainly feel that the right to dissent is an integral part of this society as long as it is done within the framework of the law, do you not?

Judge BURGER. At every level, through the courts, through the public, through students, through every citizen in this country.

Senator COOK. And you certainly do feel that interpretation of the basic doctrine of this country is essential at all times?

Judge BURGER. It must be. Someone must say what it means.

Senator COOK. Thank you, sir. Let me just add one thing.

As a lawyer who only started practicing in 1950, and being a freshman member of this committee, I can only say to you that I consider it a great honor as one of my first acts as member of the Judiciary Committee to confirm the nomination of you to be the Chief Justice of the United States.

Judge BURGER. Thank you, Senator Cook.

The CHAIRMAN. Senator Mathias.

Senator MATHIAS. Thank you, Mr. Chairman.

Judge, I would like to add my personal congratulations and my personal welcome to those that have already been expressed by the chairman and other members of the committee. Let me say that I think in your appearance here today you have certainly been a model of judicial restraint and very properly so. I think that you have met the questions of the committee and yet reserved to yourself the very widest measure of judicial discretion which you will need in years to come. And I think it is a first task which is well passed.

As Senator Cook said, it is very hard for those of us who sit at the end of the bench to fulfill the scriptural promise that the last shall be first in any subject that we might have to explore here today. I would like to revert to the area of judicial administration which my colleague from Maryland, Senator Tydings, has raised and Senator Cook raised, in the light of a statement made in an editorial in the Washington Post on May 23, which said that:

In terms of the administration of the courts, Judge Burger probably has a deeper understanding and certainly has had more experience with the problems involved than any other man ever nominated to be Chief Justice.

This certainly is a deserved and a splendid accolade. It also is a tremendous challenge and a tremendous responsibility. I am encouraged by your answer to Senator Cook that you feel that there are areas beyond the traditional adversary proceedings which we may wish to examine, or at least if not beyond adversary proceedings, auxiliary to them. Do I understand correctly that you would explore the possibilities in this area?

Judge BURGER. With every available implement that we know of, the American Bar Association, the Federal Bar Association, the American Law Institute, the Institute of Judicial Administration, and there are many others that I could name. And I think judges must use these tools. These organizations have done magnificent work because they are a cross section of the legal profession, including judges. And I know that they stand ready to do more. And it is for the judges to ask them. And their contributions have been so generous in the past in terms of the time of lawyers that I know that they will be a big factor in solving, helping to solve some of these problems.

Senator MATILAS. The Chief Justice of the United States, in addition to his constitutional powers, is in a position to exercise tremendous leadership throughout the profession. Do you believe that not only the bench and bar but the law schools and the related institutions can be mobilized to assist us in this drive?

Judge BURGER. Very definitely. In the article which Senator Byrd referred to in the Ohio Bar Journal, I alluded to the tremendous contribution made by the law schools and the bar associations in the formulation of the "Federal Rules of Civil Procedure," which was one of the great, great advances in all the legal history of this country. And the same was repeated in the "Federal Rules of Criminal Procedure." But that process has got to be used to its fullest potential. And the law schools do make a great contribution in that area.

Senator MATILAS. It is a great pleasure to have you here today, sir, and it will be a great pleasure to support your nomination.

Judge BURGER. Thank you, Senator.

The CHAIRMAN. Senator Bayh.

Senator BAYH. Mr. Chairman, I regret that I had to be at another executive committee meeting reporting out a bill and was not able to be here. I understand that Judge Burger has responded excellently to a number of questions, and I can see that little would be gained by furthering this. I just add my compliments, sir, to those that you have already received.

Judge BURGER. Thank you, Senator Bayh. Thank you very much.

The CHAIRMAN. I will ask everyone to keep his seat until Judge Burger goes out of the room. There will be an executive meeting of the committee in this room.

Judge BURGER. Mr. Chairman, may I have the record show my deep appreciation to the past presidents of the American Bar Association, of the Federal Bar and the District Bar and my deep appreciation to the members of this committee for hearing me today. Thank you.

The CHAIRMAN. Yes, sir.

(Whereupon, at 12:20 p.m., the committee recessed to reconvene in executive session.)



## APPENDIX

### TELEGRAMS

COLUMBUS, OHIO, June 1, 1969.

Senator JAMES O. EASTLAND,  
*Chairman, Judiciary Committee,*  
*U.S. Senate, Washington, D.C.:*

I wish to express my strong personal endorsement of Judge Burger's appointment as Chief Justice. His activity in the American Bar Association and particularly his chairmanship of the Committee on Minimum Standards for the administration of criminal justice has been characterized by dedication, intelligence, and a high level of administrative ability. His judicial career has been marked by like qualities. I trust his appointment will have early and favorable action by your committee.

EARL F. MORRIS,  
*Immediate Past President,*  
*American Bar Association.*

PACIFIC PALISADES, CALIF.,  
June 1, 1969.

Senator JAMES O. EASTLAND,  
*Chairman, Judiciary Committee,*  
*U.S. Senate, Washington, D.C.:*

As a former president of the Federal Bar Association, and a former judge of the U.S. Court of Appeals for the Washington, D.C., Circuit, I am happy to join in urging the appointment of Judge Warren Burger as Chief Justice of the U.S. Supreme Court.

JUSTIN MILLER.

MEMPHIS, TENN., June 2, 1969.

Senator JAMES EASTLAND,  
*Chairman, Senate Judiciary Committee,*  
*Washington, D.C.:*

Strongly urge confirmation Jed Burger as Chief Justice, Supreme Court. His qualifications, ability, credit for the position.

EDWARD W. KUEHN,  
*Past President, American Bar Association.*

PREScott, ARIZ., June 3, 1969.

Hon. JAMES EASTLAND,  
*Senate Office Building,*  
*Washington, D.C.:*

As a former president of the American Bar Association and currently as a U.S. district judge, please include in your deliberations my personal recommendation on the confirmation of Hon. Warren E. Burger as Chief Justice of the United States.

WALTER E. CRAIG.

LOS ANGELES, CALIF., June 2, 1969.

Senator JAMES EASTLAND,  
*Chairman, Judiciary Committee,*  
*U.S. Senate, Washington, D.C.:*

May I respectfully be permitted to add my voice as a past president of the American Bar Association heartily approving the nomination and appointment of

Judge Burger as Chief Justice of the Supreme Court of the United States. His record would indicate that under his guidance, ethical conduct and the true function of the Court would be restored.

Most sincerely,

**L. W. WRIGHT.**

CHICAGO, ILL., June 2, 1969.

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

This is to recommend favorable advice and consent to the appointment of Judge Warren E. Burger as Chief Justice of the United States. I was admitted to the bar in Raleigh, Miss., in 1915; in Atlanta, Ga., in 1916; and in Illinois in 1938, where I continue to practice. I was president of the Federal Bar Association in Washington in 1937 and 1938.

**HORACE RUSSELL.**

WASHINGTON, D.C., June 2, 1969.

**Senator JAMES O. EASTLAND,**  
*Chairman, Senate Judiciary Committee,*  
*Washington, D.C.:*

I support the confirmation of Warren E. Burger to be Chief Justice of the United States. Many years of acquaintance and personal affiliation give me personal knowledge of his integrity and reason to urge confirmation as a service to the people of the United States.

**MARGUERITE RAWALT,**  
*Past President, Federal Bar Association.*

WASHINGTON, D.C., June 2, 1969.

**Hon. JAMES O. EASTLAND,**  
*Chairman, Senate Judiciary Committee,*  
*Washington, D.C.:*

As a former president of the Federal Bar Association I urge confirmation of Warren E. Burger who has judgment, legal knowledge, and stands for law and order.

**PAUL H. GANTT,**  
*Past President, Federal Bar Association.*

PHILADELPHIA, PA., June 3, 1969.

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

Regret unable to be present today to support Hon. Warren E. Burger's nomination for Chief Justice. Urge prompt confirmation of this distinguished lawyer, jurist, and American.

**THOMAS G. MEEKER,**  
*Former President, Federal Bar Association.*

BETHESDA, MD., JUNE 2, 1969.

**Senator JAMES O. EASTLAND,**  
*Chairman, Senate Judiciary Committee,*  
*Washington, D.C.:*

I strongly urge that Federal Judge Warren E. Burger be confirmed as Chief Justice of the Supreme Court. Judge Burger's ability and integrity are well known. Confirmation will be in the best interest of the Court and the country.

Respectfully,

**WILLIAM N. MORELL,**  
*National President, Federal Bar Association.*

JUNE 2, 1969.

Hon. JAMES O. EASTLAND,  
*Chairman, Senate Judiciary Committee,*  
*Washington, D.C.:*

I strongly endorse the nomination of Hon. Warren E. Burger to be Chief Justice of the United States and urge his early confirmation by the Judiciary Committee. I was serving as Deputy Attorney General of the United States at the time Judge Burger was sworn in as Assistant Attorney General, and had the opportunity to work closely with Judge Burger in relation to problems affecting the legal profession during the time that I was president of the American Bar Association. I have observed his career on the bench since its inception. It is my opinion that he is fully qualified for the office of Chief Justice and that his discharge of the duties of that high office will reflect credit upon the Court and will benefit the Nation.

Ross L. MALONE.

ST. PAUL, MINN., June 2, 1969.

Hon. JAMES O. EASTLAND,  
*Chairman, Senate Judiciary Committee,*  
*Washington, D.C.:*

On behalf of this institution and myself I am pleased respectfully to urge the confirmation of the appointment of Warren E. Burger as Chief Justice of the United States. His technical skill, moral courage, and personal integrity make him uniquely qualified for this most important of all judicial offices at this crucial moment in our Nation's history.

DOUGLAS R. HEIDENREICH,  
*Dean, William Mitchell College of Law.*

BOSTON, MASS., June 3, 1969.

Senator JAMES EASTLAND,  
*Chairman, Senate Judiciary Committee,*  
*Washington, D.C.:*

Urge approval of Judge Warren Burger whose record reflects integrity, ability, and devotion to constitutional rights.

THOMAS J. O'TOOLE,  
*Dean, Northeastern University School of Law.*

## LETTERS

U.S. COURT OF APPEALS,  
*Washington, D.C., May 29, 1969.*

The CHAIRMAN,  
*Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

My DEAR MR. CHAIRMAN: It has come to my attention that some communication to the Senate described me as a resident of Minnesota. Of course Minnesota is my native State and all my family reside there but I have been a legal resident of the Commonwealth of Virginia for 14 years. I am not aware of what significance, if any, this duality of residence background may have but I thought it desirable that I call the matter to your attention.

Cordially yours,

WARREN E. BURGER.

THE FEDERAL JUDICIAL CENTER,  
 OFFICE OF THE DIRECTOR,  
*Washington, D.C., June 3, 1969.*

Senator JAMES O. EASTLAND,  
*Chairman, Judiciary Committee,*  
*U.S. Senate, Washington, D.C.*

DEAR SENATOR EASTLAND: As a former president of the Federal Bar Association (1944), I am pleased to add my endorsement to the appointment of Judge Warren Burger as Chief Justice of the United States. I need not recount his many accomplishments, of which you are well acquainted. It is sufficient to say that I have

known him for a quarter of a century, worked with him in many professional endeavors and find him highly qualified.

I recommend his confirmation.

Sincerely yours,

TOM C. CLARK, *Director.*

LITTLE ROCK, ARK., June 2, 1969.

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

DEAR SENATOR EASTLAND: This morning I sent you the following telegram:  
"I respectfully and sincerely urge favorable action by your Judiciary Committee and the Senate on nomination of Judge Warren E. Burger as Chief Justice of the United States. Letter in mail."

I am personally acquainted with Judge Burger and I can attest to his outstanding qualifications to be Chief Justice of the United States. All of us at the bar have had the opportunity for years to assay the extremely high quality of his judicial opinions. It has been my privilege to observe closely the monumental work of the Committee on Minimum Standards for the Administration of Criminal Justice of the American Bar Association, of which he is Chairman. Not only is he a distinguished jurist of impeccable character but he is also a gracious gentleman of distinctive bearing.

I genuinely trust that your Judiciary Committee and the Senate will give prompt and favorable action on the nomination of Judge Burger.

Respectfully,

EDWARD L. WRIGHT,  
*Attorney at Law.*

THE FEDERAL BAR ASSOCIATION,  
*Washington, D.C., June 2, 1969.*

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

DEAR SENATOR EASTLAND: It is a pleasure for me to transmit to you letters from the following Past Presidents of the Federal Bar Association in support of the nomination of Warren E. Burger to be Chief Justice of the United States:

James McL. Henderson, Marshall C. Gardner, Conrad D. Philos, Witney Gilliland, Earl W. Kintner, Laurence H. Axman, Bettin Stalling, William L. Ellis, Frank J. Delany, Robert N. Anderson.

In addition to the foregoing, these Past Presidents are sending you telegrams and letters in support of the nomination:

Paul H. Gantt, Richard E. Lankford, John H. Grosvenor, Jr., Thomas G. Meeker, Clarence A. Davis, Judge Stanley N. Barnes, John A. McIntire, James E. Palmer, Jr., Colonel Harold Lee, Miss Marguerite Rawalt, William N. Morrell, Horace Russell, Justin Miller.

We would appreciate these letters and telegrams being made a part of the official record of the hearings on the nomination of the Honorable Warren E. Burger.

Sincerely,

CYRIL F. BRICKFIELD, *President.*

THE FEDERAL BAR ASSOCIATION,  
*Washington, D.C., June 2, 1969.*

Hon. JAMES O. EASTLAND,  
*Chairman, Judiciary Committee of the Senate,*  
*Washington, D.C.*

DEAR SENATOR EASTLAND: Your Committee has generously afforded me the opportunity and honor of presenting the recommendation of the Federal Bar Association that the nomination of the Honorable Warren E. Burger be favorably acted upon by your Committee for the post of Chief Justice of the United States. I should like to add my own enthusiastic personal endorsement of Judge Burger's confirmation to this high position.

It is seldom in a lifetime that one has the privilege of adding his support to a man like Judge Burger. In the more than a decade since our paths first crossed,

I have had the privilege of working with Judge Burger principally in Bar Association activities and have come to recognize him as one of those rare individuals who combines a deep sense of fair play with a keen and abiding concern for the rights of the individual. He has applied a broad gauged understanding toward helping to solve critical problems of the City and the Nation, with an untiring, thoroughly objective, and selfless dedication and a unique ability to lead interested colleagues toward a constructive goal.

One instance comes frequently and vividly to my memory: this was the day of Oswald's assassination, when I shared with him his deep concern at the threat to the constitutional rights of the accused to a fair trial and his determination to find how best to balance the right of the public to be informed with fundamental constitutional rights of the individual. But Judge Burger is not merely a thinker and a talker—he is a man of action. Judge Burger took immediate steps, as the record shows, to urge Bar Associations and other responsible community organizations to take the needed steps toward assuring this necessary balance, toward defining the sensible limits of publicity outside as well as inside the courtroom.

This was merely one instance of Judge Burger's statesmanship in action.

The Nation will be well served with a man such as Judge Burger in the critical post of Chief Justice of the United States. I strongly urge your Committee's favorable action on his nomination.

Respectfully submitted,

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PAUL E. TREUSOHN,  
*President-Elect, The Federal Bar Association.*

THE FEDERAL BAR ASSOCIATION,  
Washington, D.C., June 2, 1969.

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

DEAR SENATOR EASTLAND: I write in support of the nomination of Judge Warren E. Burger to be Chief Justice of the United States.

I have known Judge Burger since 1953 when, as Assistant Attorney General in charge of the Civil Division, he handled legislation pending before the House Judiciary Committee where I was then employed as Counsel. Over the years since then, I have met with him at many meetings of the Federal Bar Association. I have attended Father-Daughter Day gatherings at Stoneridge where we had daughters attending school, and I have been privileged to be a member of the Tom Clark Awards Committee for the Federal Bar Association which Judge Burger has chaired for a number of years.

In my relations with Judge Burger I have found him to be a man of the utmost integrity and with broad legal knowledge and experience. He qualifies most eminently, in my judgment, to be Chief Justice of the United States. I strongly recommend favorable action on his nomination for your committee.

Sincerely,

CYRIL F. BRICKFIELD, *President.*

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BETHESDA, Md., June 2, 1969.

**Hon. JAMES O. EASTLAND,**  
*Chairman, Senate Judiciary Committee,*  
*Washington, D.C.*

DEAR SENATOR EASTLAND: I am pleased to note that President Nixon has submitted the name of Judge Warren E. Burger to your Committee and the Senate for confirmation as Chief Justice of the United States.

Having actively practiced before Judge Burger and many other Federal Courts during the past thirty years, I believe the choice of Judge Burger to be wise and timely. Over the years, Judge Burger's opinions, and his demeanor on the bench have demonstrated a thorough knowledge of the law and its fair and impartial application to the case at hand.

As an officer and past president of the Federal Bar Association, I have worked with the nominee on efforts to improve the practice of law and other legal activities. He has made many worthwhile contributions in this field.

On these bases I wholeheartedly urge that your Committee and the Senate confirm the nomination of Judge Burger as Chief Justice.

Respectfully,

JAMES MCI. HENDERSON,  
*Past President, The Federal Bar Association.*

BOWIE, Md., June 2, 1969.

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

DEAR SENATOR EASTLAND: I am writing you to support the nomination of Warren E. Burger to become Chief Justice of the United States.

I have known Judge Burger since his appointment as an assistant attorney general of the Department of Justice. During this period he has proven that he is a man of integrity, ability and dedication.

During the period 1965-1966, when I was National President of the Federal Bar Association, and during the last two years as a member of the House of Delegates of the American Bar Association, I have had many opportunities to closely observe his dedication to the public interest and to the profession of the law. I can think of no man more qualified for confirmation to this high office.

Sincerely,

MARSHALL C. GARDNER.

CIVIL AERONAUTICS BOARD,  
*Washington, D.C., June 2, 1969.*

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

DEAR SENATOR: The nomination of Judge Warren E. Burger for Chief Justice of the United States would seem to me to be a very significant event in the fortunes of this country.

I have had many reasons to observe his qualities. Some of them arose when he was Assistant Attorney General. As such he appeared in the courts on a number of occasions in support of the actions of the Foreign Claims Settlement Commission, of which I was then Chairman. Many others have occurred during his membership on the Court of Appeals of the District of Columbia Circuit, which frequently reviews decisions of the Civil Aeronautics Board. I have been a member of that Board for about ten years. Still others have pertained to his constant support of activities of the Federal Bar Association, designed to maintain and strengthen the standards and capabilities of U.S. government lawyers.

Judge Burger is an excellent and outstanding lawyer, with a fine understanding of the Federal system and of the Constitution and, equally important, of people and their behavior. He is a highly honorable man, strong, and compassionate.

In my judgment he holds promise to be a very great Chief Justice, and to make an historical contribution to the ability of this country to govern itself.

Sincerely,

WHITNEY GILLILLAND,  
*Past President, Federal Bar Association.*

WASHINGTON, D.C., June 2, 1969.

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

DEAR MR. CHAIRMAN: I write in support of the President's nomination of Honorable Warren E. Burger as Chief Justice of the United States and request that this letter be made a part of the record of your hearings on his nomination.

I am Past President of the Federal Bar Association, 1956-57 and 1958-59. I also am President of the National Lawyers Club, the Federal Bar Building Corporation and the Foundation of the Federal Bar Association, all affiliated with the Federal Bar Association. Judge Burger, both as a Federal lawyer and as a Federal Judge, has supported the efforts of the Federal Bar Association and its affiliated organizations to improve the administration of Justice. For several years, he has been a member of the Board of Directors of the Foundation of the Federal Bar Association, a foundation chartered by the U.S. Congress to improve Federal judicial administration. As such, he has contributed wise and constructive advice in connection with the Foundation's work.

Judge Burger is a kindly, compassionate man whose understanding of people, their strengths and weaknesses, eminently qualifies him to be Chief Justice. His credentials as a lawyer, judge and administrator are equally outstanding.

We are in the Federal Bar Association who have known Judge Burger over the years believe that he merits the wholehearted and prompt approval of the Senate for this high office.

Sincerely,

EARL W. KINTNER.

WASHINGTON, D.C., June 2, 1969.

Hon. JAMES EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate*

MY DEAR MR. CHAIRMAN: As a former National President of the Federal Bar Association (1952-1953), I have the honor whole-heartedly to endorse the nomination of Judge Warren Burger for the Office of Chief Justice of the United States.

For over fifteen years, our numerous programs for improvement of the administration of justice, indeed for the betterment of the image of the law as the very catalyst of order and justice, have benefited by Judge Burger's many significant contributions.

I commend his nomination for your consideration.

Yours truly,

W. L. ELLIS, *Attorney at Law.*

WASHINGTON, D.C., June 2, 1969.

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

DEAR SENATOR EASTLAND: This is to express my personal satisfaction and gratification over the nomination of Judge Warren E. Burger to be Chief Justice of the United States Supreme Court.

My feelings in this regard are probably stronger than those of the average attorney, because of my own past involvement with matters of law involving the federal government. For some years I served the federal government as an attorney, and look back upon those years with nostalgia. My colleagues did me the honor of electing me National President of the Federal Bar Association for 1951 and 1952, and uniquely, at a time when I had just resigned from federal service, and was in private practice of law. Prior to that time, I had served as Chairman of the Committee of General Counsel, composed of the chief law officers of all federal agencies and departments, for a period of two to three years, the Committee having been formed under my Chairmanship, and having continued to date. I mention these circumstances only to demonstrate the strength of my bonds with federal service.

Judge Burger's past career and his record on the Court of Appeals have been exemplary. I share the universal confidence that he will continue such to add lustre to his career, and maintain and perhaps enhance the public esteem for the high office to which he has been nominated, and the institution over which he will preside.

Sincerely yours,

FRANK J. DELANY,  
*Past President, the Federal Bar Association.*

WASHINGTON, D.C., June 2, 1969.

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

DEAR SENATOR EASTLAND: I desire to add to the many endorsements your committee will receive of Judge Warren E. Burger for the high office to which President Nixon has named him.

I have known Judge Burger since his appointment as Assistant Attorney General in charge of the Civil Division of the Department of Justice in which I served. He was highly respected by his staff as a lawyer of great ability and for the knowledgeable interest he took in the matters of the Division.

As Chairman of the Justice Tom C. Clark Award Committee of the Federal Bar Association, it was my good fortune to secure his consent to become chairman of the selection panel of that committee. He has continued to serve as such because of his interest in improving the quality of working lawyers in government. His objectivity and fairness have been noted by the panel members who have included Deans of the law schools, foremost lawyers in the District, and frequently the current Attorney General or a Cabinet Member.

About five years ago Judge Burger delivered the Moors Lecture at American University, Washington College of Law. He discussed in detail the rights not only of the accused, but also the rights of the community and the duties and obligations of the arresting and prosecuting officers. His lecture was impressive because of its fairness to all concerned.

Each year in July, Judge Burger participates in the Institute of Judicial Administration held at the New York University Law School, the purpose of which is to find ways and means of improving appellate process. Judge Burger is dedicated to the uplift of the Courts and the Bar and has himself been a distinguished lawyer and Judge. I feel he will, if confirmed, make a splendid Chief Justice.

Yours,

LAURENCE H. AXMAN,  
*Past President, the Federal Bar Association.*

WASHINGTON, D.C., June 2, 1969.

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

DEAR SENATOR EASTLAND: I deem it a privilege to endorse Judge Warren E. Burger as Chief Justice of the United States.

Judge Burger is distinguished among the members of the Bar as a man of probity, ability, and industry who goes about his task without sham or pretense. He is a man of great common sense. His appointment as Chief Justice would, in my opinion, strike a common cord among all people of good will.

Sincerely,

BETTIN STALLING,  
*Past President, the Federal Bar Association.*

WASHINGTON, D.C., June 2, 1969.

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

DEAR SENATOR EASTLAND: It is with pleasure that I, as a past National President of the Federal Bar Association, urge favorable action by the Senate on the nomination of Judge Warren Earl Burger to be Chief Justice of the United States.

I have known Judge Burger personally for a number of years since he first came to Washington to head the Civil Division in the Department of Justice. In my opinion he is a fine man and a most able lawyer and jurist.

Judge Burger has been active in, and a great aid to, the Federal Bar Association. One of the cardinal purposes of our association is to hold high the standards of the legal profession and especially those of attorneys serving the Federal Government.

Judge Burger's experience in private practice, in the Executive Branch of the Government, and on the United States Court of Appeals for the District of Columbia, add to his obvious and exceptional personal qualifications and abilities, and equip him well to serve as an outstanding Chief Justice.

With best wishes, I remain, Sir, with great respect

Sincerely yours,

JAMES E. PALMER, Jr.,  
*Attorney at Law.*

DISTRICT OF COLUMBIA CHAPTER OF THE FEDERAL BAR ASSOCIATION,  
*Washington, D.C., June 2, 1969.*

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

DEAR SENATOR EASTLAND: As president of the District of Columbia Chapter of the Federal Bar Association, with a membership of approximately 4,500 attorneys, it gives me great pleasure to submit to you, for the record, my personal endorsement of the Honorable Warren E. Burger for Chief Justice of the Supreme Court of the United States.

Judge Burger has been a member of the Chapter for many years and has been an active participant of the Tom C. Clark Award Selection Committee as chairman for ten years. This is an award named for Associate Justice Tom C. Clark for the most outstanding attorney in Government. He participated in the program last week at which the award was made. In this position of responsibility he has demonstrated unusual ability for harmonious leadership. His high standards of professional representation of the Chapter have not only added to its prestige but have been an inspirational contribution to its achievements.

I heartily endorse Judge Burger whom I have known for a good many years, both personally and professionally, and I feel sure that members of the Chapter would like to join me in this letter of endorsement.

Sincerely yours,

MISS E. BONNIE MILLS,  
President.

THE FEDERAL BAR ASSOCIATION,  
*Washington, D.C., June 2, 1969.*

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

DEAR SENATOR EASTLAND: The Federal Bar Association is pleased that it will be represented by a distinguished group of its Past Presidents at the Senate Judiciary Committee Hearing on the nomination of Warren E. Burger to be Chief Justice of the United States. It is expected that the following Past Presidents will be in attendance:

James McI. Henderson, 1907-1908; Marshall C. Gardner, 1905-1906; Conrad D. Philos, 1903-1904; Hon. Whitney Gilliland, 1959-1960; Earl W. Kintner, 1958-1959 and 1950-1957; Laurence H. Axman, 1957-1958; Bettie Stalling, 1953-1954; William L. Ellis, 1952-1953; Frank J. Delany, 1951-52; James E. Palmer, Jr., 1949-1950; Robert N. Anderson, 1942-1943; William N. Morell, 1939-1940.

Also attending will be the following officials of the Federal Bar Association:

Paul E. Treusch, President-Elect; Miss E. Bonnie Mills, President, D.C. Chapter; J. Thomas Roulard, Executive Director.

We appreciate very much this opportunity to express our support for the nomination of Judge Burger.

Sincerely,

CYRIL F. BRICKFIELD,  
President.

WASHINGTON, D.C., June 2, 1969.

Hon. JAMES O. EASTLAND,  
*Chairman, Senate Judiciary Committee,  
Washington, D.C.*

DEAR SENATOR EASTLAND: I wish to take this opportunity to set forth my conviction that the elevation of Circuit Judge Warren E. Burger to the Chief Justiceship of the Supreme Court would be a most fortunate and welcome occurrence at this critical time in our country's history.

As a former Special Assistant to the Attorney General and Legal Coordinator and Reviewer at the Department of Justice concerned with federal tax litigation in the Circuit Courts of Appeals and the Supreme Court, I have had occasion to note the depth and clarity of Judge Burger's legal thinking and the wisdom displayed by him in his pronouncements as Circuit Judge for the District of Columbia Circuit.

Also as a former President of the Federal Bar Association and Chairman of the American Bar Association Committee that organized the International Bar Association I realize from the standpoint of the bar in general the importance of having a person of Judge Burger's sterling character and background in this post so vital to the welfare, security and happiness of the people of our great country.

Sincerely yours,

ROBERT N. ANDERSON,  
*Past President, the Federal Bar Association.*

WASHINGTON, D.C., June 2, 1969.

Senator JAMES O. EASTLAND,  
*Chairman, Judiciary Committee,  
U.S. Senate, Washington, D.C.*

DEAR SENATOR EASTLAND: It has been my good fortune over the past fifteen years to associate with Warren E. Burger in a variety of activities and endeavors. We have worked together in several different capacities in the American Bar Association, the Bar Association of the District of Columbia and the Federal Bar Association.

In the many years in which we have both been members of the Federal Bar Association, of which I was president in 1961-62, I have had a full opportunity to

acquaint myself with his abilities as a lawyer and an advocate, his judicial temperament and his moral integrity. On the basis of my knowledge of this man, I feel compelled to urge the Senate Judiciary Committee to recommend to the Senate that the appointment of Warren E. Burger as Chief Justice of the United States be confirmed.

Respectfully,

JOHN H. GROSVENOR, Jr.

WASHINGTON, D.C., June 4, 1969.

Hon. JAMES O. EASTLAND,  
U.S. Senate,  
Washington, D.C.

DEAR SENATOR EASTLAND: The members of the Federal Bar Association have followed with exceptional interest the selection process for a new Chief Justice of the United States Supreme Court and the eventual nomination of Judge Warren E. Burger.

It is difficult to express fully the sentiments of a large and knowledgeable membership such as ours. I would like, therefore, to present my personal views as a bar official and as a career federal lawyer who has had the privilege to be associated with Judge Burger.

Judge Burger has been a member of our Association since 1958. All of our members render services on a purely volunteer basis in furtherance of our organization's objective of enhancing and improving the federal law and achieving a better understanding of its scope, purpose and application. His membership coincided with the period in which I served in a variety of national offices including that of National President in 1963-1964 and Delegate to the American Bar Association in 1965-1966. We also served as fellow Directors of The Foundation of the Federal Bar Association. It was necessary in these posts for me to secure advice and counsel from Judge Burger on various matters which related to organized bar association activities and affairs. Judge Burger was always prepared to, and did, extend his services on a voluntary basis in the highest traditions of the bar. His advice was always distinctive for objectivity, clarity, soundness and the unique quality of resolving current problems in the light of effective and long range solutions.

As a special assistant for litigation in the Defense Department, I had the responsibility of studying and applying legal guidance and opinions, from Judge Burger, first, while he served as an Assistant Attorney General, and later as a Judge of the Court of Appeals. As a lawyer with considerable experience in federal law, I would like to express my professional respect and admiration for the intellectual integrity of his opinions, their incisive and well reasoned logic, and the breadth and understanding of their legal philosophy. It is based upon these considerations, and a personal knowledge of his professional competence and dedication to the service of the law that I am pleased and honored to add my voice to those from other segments of the legal community who have such an absolute confidence in his qualifications.

Sincerely yours,

CONRAD D. PHILOS,  
*Past National President, Federal Bar Association.*

GEOGETOWN UNIVERSITY LAW CENTER,  
Washington, D.C., May 31, 1969.

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

DEAR SENATOR EASTLAND: I consider it a moral obligation as well as a great honor to write you in support of the confirmation of Chief Justice Designate Warren Earl Burger. I have known him since 1955 and have served with him as a member of two policy boards here at the Georgetown University Law Center. I refer to our Institute of Criminal Law and Procedure and our Institute for International and Foreign Trade Law. In my judgment, he is superbly qualified for the position of Chief Justice. He has demonstrated great balance, clarity of thought and creativity in the consideration of the many policy issues faced by our Research Institutes. Moreover, I have observed his work with the Judicial Conference, his years on the bench and his work on the A.B.A. Committee on

Minimum Standards for the Administration of Criminal Justice. I have discussed legal education with him many times. I find him truly innovative. His thoughts on the professional responsibility of the legal profession are a prime example.

I know I speak for my colleagues when I urge speedy confirmation.

Very truly yours,

PAUL R. DEAN, *Dean.*

THE NATIONAL LAW CENTER,  
June 2, 1969.

Hon. JAMES EASTLAND,  
*Chairman, Judicial Committee, U.S. Senate,*  
*Senate Office Building, Washington, D.C.*

DEAR SENATOR EASTLAND : While I was in the Department of Justice from 1959 to 1961, I first met Warren Burger. Since I have been Dean of the National Law Center of the George Washington University, I have had many occasions to work with him on matters involving the organization of the Bar, Federal lawyers, and the improvement of our judicial system and of criminal law and justice. I am familiar with many of his judicial decisions.

I have the highest regard for his integrity, his moderation, and his mastery of the law, particularly in the areas of administrative, criminal and constitutional problems. His judicial opinions are terse, forceful and accurate, reflecting unusual powers of analysis and reasoning, as well as thorough research.

I believe that in every way he is exceptionally qualified to be Chief Justice of the Supreme Court of the United States. He has repeatedly demonstrated his fair mindedness and his ability and shown that he is zealous to protect the rights of both society and the individual, being mindful of the powers and limitations of government and of the Federal system. For all these reasons, I strongly urge and hope that his nomination by the President to be Chief Justice will be confirmed by the Senate.

Sincerely,

ROBERT KRAMER, *Dean.*

INDIANA UNIVERSITY,  
INDIANAPOLIS LAW SCHOOL,  
*Indianapolis, Ind., May 26, 1969.*

Hon. JAMES O. EASTLAND,  
*U.S. Senator, Senate Judiciary Committee, Senate Office Building,*  
*Washington, D.C.*

DEAR SENATOR EASTLAND : The President has nominated an outstanding Judge to be the Chief Justice of the United States, and I think the nomination is one of the very best ever made. I of course urge the confirmation of Judge Burger, and I hope that it will soon occur.

I write to tell you this, and to say also that I would be happy to appear before the Committee and recommend that the nomination be confirmed, if you think my testimony may be of value to the Committee.

With my best wishes,

Very sincerely,

WILLIAM F. HARVEY,  
*Professor of Law.*

HOUSTON, TEX., *May 22, 1969.*

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

DEAR SENATOR EASTLAND : I write, as a lawyer, to commend to you and your Committee the nomination by the President of the Honorable Warren E. Burger as Chief Justice of the United States Supreme Court, which in due course will come before the Judiciary Committee.

As a member of the Trial Committee for the plaintiffs in the Texas City Disaster litigation, I had professional contact with Judge Burger, then in the Department of Justice. I have also had occasion to appear before him in cases that I have had in the United States Court of Appeals for the District of Columbia Circuit.

I have found Judge Burger to be possessed of strong character, high moral principles and personal integrity beyond question. Professionally, he clearly is able,

understanding and blessed with technical proficiency of the highest character. As a Judge he has evidenced a balanced and reasoned consideration of the issues before him with due regard for those principles of our jurisprudence which have brought this Country to its high estate, as those principles are tempered with justice and equity. In my opinion, he has the talents and qualities that augur for the administration and discharge of the functions and duties of Chief Justice in accordance with the highest traditions of that office.

This is a nomination in the interests of the Bar and the Country generally. I commend it to the favorable action of your Committee.

Very truly yours,

THOMAS FLETCHER.

RICHMOND, VA., May 29, 1969.

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

DEAR SENATOR EASTLAND: I write to express my enthusiastic personal endorsement of the Hon. Warren E. Burger for Chief Justice of the Supreme Court.

It has been my privilege to know Judge Burger for a number of years. During the past four years I have been closely associated with him in the important work of the American Bar Association in developing standards for the improvement of the administration of justice. You and members of your Committee are no doubt familiar with the draft standards already published, several of which have been approved by the House of Delegates of the American Bar Association.

Since August of last year, Judge Burger has been Chairman of the Criminal Justice Project of the ABA and has provided conspicuously able leadership.

The Committee will, of course, be familiar with Judge Burger's impressive record on the bench. He has, during his service as Assistant Attorney General and U.S. Circuit Judge, become widely known and respected by the bar of our country. Indeed, I think it can be said fairly that the nomination of Judge Burger has been received with unique satisfaction and approval by the bench and the bar generally.

Judge Burger will be one of the great Chief Justices.

With my best wishes,

Sincerely,

LEWIS F. POWELL, Jr.

CEDAR RAPIDS, IOWA, May 31, 1969.

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

MY DEAR SENATOR EASTLAND: It is my understanding that your committee will soon consider the qualifications of the Honorable Warren E. Burger for confirmation as Chief Justice of the United States. It is my judgment that Justice Warren E. Burger would make an outstanding Chief Justice of the United States.

During my term as president of the American Bar Association, 1959-1960, I became aware of the very high capabilities of Justice Burger in relation to his legal mind. Since that time I have watched his progress and have at no time found any reason to change my opinion of either his ability or his character.

Justice Burger is not only an able Judge but is also a most capable administrator. In addition to this, he still recognizes his obligations as a lawyer to perform a public service.

Justice Burger has taken the time from a very busy schedule to act as Chairman of the Special Committee of the American Bar Association on Minimum Standards for the Administration of Criminal Justice. This willingness to participate in the activities of the organized Bar as a public service is not only appreciated by his brother lawyers, but makes a valuable contribution to the public.

My personal pride in our profession is enhanced when I see lawyers like you and Justice Burger sacrifice themselves for accepting the responsibility, in your case as a senator and in the case of Judge Burger as a judge, rather than to continue the substantial practice of this profession.

It is my sincere hope that your committee will agree with the great majority of lawyers throughout the country in approving the appointment of Justice Warren E. Burger as Chief Justice of the United States.

Respectfully,

JOHN D. RANDALL.

WASHINGTON, D.C., May 29, 1969.

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

DEAR SENATOR EASTLAND: As a former law clerk of Judge Burger (1957-58) anything I have to say in his support will be heavily discounted. I know, and certainly an insignificant addition to the enormous support which stands behind him. Nevertheless, for what it is worth, I would like to make the following comments in support of his nomination.

Judge Burger's chief quality is his ability to appreciate the position of all parties to a dispute. Even though he rules against you, he makes you feel that he has considered your point of view, so that you say, I lost but I got a fair hearing. This is the highest quality a judge can have.

This same quality appears in another form when it comes to dealing with the people around him—he is energetic and generous, and yet in the end firm in his resolve. These are the qualities of a leader, and these will serve him well in his role of Chief Justice.

If any generalizations describe the Judge's legal philosophy, I would say the words "fair" and "practical" are most appropriate. He is primarily interested in doing justice for the particular case (hence is "fair"), but he also gives weight to what would be the consequences of a decision, in terms of its impact on the predictability of the law and administration of the law (hence is "practical"). In other words, he considers all the factors, and not merely those of the particular case. While all judges try to do this, of course, the weight Judge Burger gives to the non-particular factors is perhaps more in harmony with the national sentiment.

The country, the Court, and the legal profession will be fortunate to have Judge Burger take his seat as Chief Justice.

Sincerely,

CHARLES A. HOBBS.

### STATEMENTS

#### STATEMENT BY SENATOR GORDON ALLOTT

Mr. Chairman, because I was to be with President Nixon as he delivered the commencement address at the Air Force Academy in Colorado Springs, June 3d, the distinguished Senior Senator from Illinois, and ranking Minority Member of the Senate Judiciary Committee graciously consented to place this statement in the hearing record.

I am most pleased to unhesitatingly support the President's nomination of Warren Earl Burger as Chief Justice of the United States Supreme Court.

I have known and respected Judge Burger for over 25 years, and I must say that I can think of no one whose integrity, abilities and judicial temperament are better for this high office.

As my colleagues know, I have been a critic of the Supreme Court for many years now. The Court has overstepped its Constitutional bounds on many occasions by "legislating" rather than "interpreting." The President, by all accounts, shares this view. Thus, he chose a man who has the same respect for the Constitution as our Founding Fathers.

That, indeed, is one of the most encouraging aspects of this appointment. There is no need to describe Judge Burger as a "conservative" or "liberal" or "moderate." These terms are not as important as the one used often by the President, namely "strict constructionist."

Much has also been said about Judge Burger's personal integrity. I can only add that in the years I have known him he has over and over again proved himself to be a man of unimpeachable reputation who will lead the Supreme Court to a standard of excellence thought to be forgotten in modern times.

I know that this Committee agrees with the President that this is perhaps Mr. Nixon's most important appointment during his term of office.

It is, therefore, with great personal pride and pleasure that I commend his nomination to the Judiciary Committee.

## STATEMENT OF SENATOR SAM J. ERVIN, JR.

Mr. Chairman, in his speech nominating Judge Warren Burger to be the next Chief Justice of the United States, President Nixon mentioned that the selection of a new Chief Justice was the most important nomination a President makes during his term of office. I definitely agree with the importance the President places on this nomination. In fact, last year in a speech to the Senate I characterized the office of Chief Justice as being more powerful than that of the Presidency in its impact upon constitutional government.

Since coming to the Senate, my experience has led me to the conclusion that most nominees to the Supreme Court are men of high intelligence, character, and scholarship. Of course, these attributes are necessary ingredients for a Justice of the Court and Judge Burger certainly possesses them. However, when a Senator undertakes to discharge his duty under Article II to judge the qualifications of a nominee to the Supreme Court, his inquiry should not be limited to the intelligence, character, and scholarship of the nominee, but should extend to his judicial philosophy which includes his willingness to subject himself to that most precious of all judicial virtues—self-restraint. In other words, no matter what other gifts or attainments one may possess, he is not qualified to be a Supreme Court Justice unless he is both able and willing to subject himself to the self-restraint which enables him to accept the Constitution as the rule for the government of his judicial action and makes him refrain from attempting to revise or update that instrument according to his personal views as to what is desirable when he undertakes to interpret it.

This self-restraint is usually the product of long and laborious legal work as a practicing attorney or long and laborious judicial work as a judge of an appellate court or a trial court of general jurisdiction. It is sometimes the product of long and laborious work as a teacher of law. In the case of Judge Burger, he has had long experience participating in the administration of justice as a practicing lawyer and as an Assistant Attorney General in charge of the Civil Division at the Department of Justice. For the last thirteen years, he has been a member of the U.S. Circuit Court of Appeals for the District of Columbia.

However, while experience is necessary, a more revealing and reliable indication of a Judge's willingness to lay aside his personal notions of what a constitutional provision ought to say and to base his interpretation of its meaning solely upon its language and history is found in the cases in which he has participated while a member of the court.

In the past, I have attempted to determine a nominee's judicial philosophy by exploring with this Committee his past court opinions, if he sat on the bench; his speeches; or other indicia of his judicial temperament. As with all previous nominees to the Supreme Court, I have studied Judge Burger's decisions and recent speeches. After doing these things in the past, it often became necessary for me, as a member of this Committee, to ascertain whether the nominee could reconcile his decisions with the words of the Constitution and the numerous prior decisions of the Court placing contrary interpretations upon them. I must admit that Judge Burger's words and actions as reflected by his decisions while on the Circuit Court of Appeals pose no such problem for me today and make my task on this Committee immeasurably easier and more enjoyable than it has been in the past.

In short, from a study of his words and deeds, I believe the appointment of Warren Burger to the Supreme Court will begin a return to constitutional government in the United States as far as the Supreme Court is concerned, and I wholeheartedly support his nomination.

Mr. Chairman, I would like to have inserted into the hearing record the following items at the close of my remarks:

- (1) A speech by Judge Burger given to the Ohio Judicial Conference in Columbus, Ohio, September 4, 1968, entitled "Rulemaking by Judicial Decision: A Critical Review."
- (2) A speech by Judge Burger given to the commencement class at Ripon College, Ripon, Wisconsin, on May 21, 1967.
- (3) Excerpts from recent opinions by Judge Burger which appeared in the May 30, 1969, issue of the *Congressional Quarterly*.
- (4) The majority opinion in the case of *Powell v. McCormack*, 395 F. 2d 577, (1968) which was written by Judge Burger.
- (5) The case of *Frazier v. United States* decided by the U.S. Court of Appeals for the District of Columbia on March 14, 1969. The dissenting opinion was written by Judge Burger.

[From the Congressional Record, May 23, 1960]

### RULEMAKING BY JUDICIAL DECISION : A CRITICAL REVIEW

(By Judge Warren E. Burger, Washington, D.C.)\*

The State of Ohio has taken a significant step forward in vesting rule-making power in its judiciary in "partnership" with the Legislature. As our society has become more complex it has spawned an array of new problems and that should not surprise us. History teaches us that progress always reveals new needs to be met and that is how Man worked his way out of the swamps and the jungles and the forests.

This complexity of our society has manifested itself in a very marked way in terms of improvements in law and in judicial administration. In an earlier day legislators had more time it seems, to adjust the machinery of government, including the machinery of the courts, to meet new problems. It is clear that in the Twentieth Century legislative bodies have not found the time to respond to all the needs which are served by judges.

You now have the initiative of important rule-making power, and at the threshold it may be useful to dwell for a short time on the strengths, the weaknesses and the pitfalls which can attend the exercise or failure to exercise this power.

#### SOME HISTORY

I will direct myself to some history which, in terms of the law, is recent—the events of the use and non-use of rule-making power in the Federal system over the past 30 years with particular emphasis on the past dozen years as it relates to rules of criminal procedure.

You know this history as you know the creed of your church, but it bears repeating for the same reason people remind themselves of their moral guides every Sunday in church.

I believe the points I will make concerning use of rulemaking power are shared by a growing number of judges, lawyers and, I am glad to say, by an increasing number in the academic community. Too many law professors for a long time gave uncritical applause to anything and everything they could identify as an expansion of individual "rights," even when that expansion was at the expense of the rights of other human beings—the innocent citizens—presumably protected by the same Constitution. I see signs of a constructively critical attitude by law teachers toward some of the judicial techniques employed in recent years to make reforms in criminal law procedure and rules of evidence.

As we look back we can see that for about the first 150 years of our history the criminal law and its procedures remained fairly simple and quite stable. For 25 to 30 years after that there was a considerable ferment in criminal procedure and the rules of evidence, and in the last 10 years, more or less, we have witnessed what many scholars describe as a "revolution in criminal law." Today we have the most complicated system of criminal justice and the most difficult system to administer of any country in the world. To a large extent this is a result of judicial decisions which in effect made drastic revisions of the code of criminal procedure and evidence and to a substantial extent imposed these new procedures on the states.

This was indeed a revolution and some of these changes made were long overdue. All lawyers take pride, for example, in a case like *Gideon v. Wainwright*, which guarantees a lawyer to every person charged with a serious offense. The holdings of the Supreme Court on right to counsel, on trial by jury instead of trial by press, and on coerced confession will always stand out as landmarks on basic rights. These were appropriate subjects for definitive constitutional holdings rather than for rulemaking procedure to which I now turn. (In fairness, it must be said that some states had achieved these improvements long before the Supreme Court did so.)

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\*Text of an address delivered by Judge Burger to the Ohio Judicial Conference in Columbus, Ohio, Sept. 4, 1969.

Judge Burger is a graduate of St. Paul College of Law (LL.B. magna cum laude, 1931) ; was awarded a Doctor of Laws degree in 1968 by Mitchell College of Law; was on the faculty of the Mitchell College of Law from 1931 to 1948; practiced law in Minnesota from 1935 to 1953; was assistant U.S. Attorney General from 1953 to 1956, and has been on the bench of the U.S. Court of Appeals, Washington, D.C., since 1956.

**AD HOC OR "BY THE BOOK?"**

My central point tonight is, that as we look back, it seems clear now that the Supreme Court should have used the mechanism provided by Congress for making rules of criminal procedure rather than changing the criminal procedure and rules of evidence on a case-by-case basis.

If a large undertaking like framing rules of procedure is performed on an *ad hoc basis*, we may be right some of the time, but if we do it "by the book," we are likely to do it correctly all of the time. Surely it is arguable that the basic concepts of orderly procedure must apply to the enormously complex task of rewriting a code of criminal procedure. Over these past dozen years, however, the Supreme Court has been revising the code of criminal procedure and evidence "piecemeal" on a case-by-case basis, on inadequate records and incomplete factual data rather than by the orderly process of statutory rulemaking.

I suggest to you that a large measure of responsibility for some of the bitterness in American life today over the administration of criminal justice can fairly be laid to the method which the Supreme Court elected to use for this comprehensive—this enormous—task. My thesis assumes the correctness of the objectives the Court sought to reach in all of these controversial holdings. To put this in simple terms, the Supreme Court helped make the problems we now have because it did not "go by the book" and use the tested, although admittedly slow process of rulemaking through use of the Advisory Committee mechanism provided by Congress 30 years ago.

**JUDGES AND COURTS NOT "IMMUNE"**

If anyone should think it unseemly that a judge should undertake to analyze and comment on the actions of the highest court, let me suggest that no court and no judge should be immune from examination of its functioning. Moreover, the need for such study is in direct proportion to the degree of reviewability of the particular court. A court which is final and unreviewable needs more careful scrutiny than any other. Unreviewable power is the most likely to indulge itself and the least likely to engage in dispassionate self-analysis. Presidents, governors and legislators, like most state judges, can be recalled by the people for good reasons—or none, but Judges of Federal constitutional courts cannot be recalled.

Chief Justice Warren, and more recently Chief Justice-designate Fortas, have reaffirmed the value of constructive criticism of the courts and of judicial action. Of course, this is as it should be. In a country like ours, no public institution, or the people who operate it, can be above public debate. The important thing is that public discussion of the courts be constructive, objective and calm and not emotional or bitter or personal.

I question tonight not the court or the last decade's holdings of the court but its methodology and the loose ends, confusion and bitterness that methodology has left in its wake. There is no legitimate place in American life for some of the acrimonious, irrational criticism of the Supreme Court and it ought to stop.

**THE BASIC FUNCTION OF JUDGES**

The basic function of Judges is to decide cases and resolve controversies. In performing that function, a court of last resort must, as we all know, construe and interpret constitutions, statutes, rules, contracts, wills and trusts and in so doing it will frequently "make" law. This is inherent in the evolution of common law. But traditionally the making of codes of procedure or evidence, or rule-making, is essentially a legislative function and this, as many noted legal scholars have pointed out, is because courts do not have the fact-gathering machinery or indeed the time needed for this difficult task; it is not because of a lack of competence. No one could seriously challenge the competence of nine Justices of the Supreme Court to draft a code of criminal procedure, provided they could take the time and have the staff facilities necessary.

Facts and information are the raw materials of the law whether in deciding a particular case or in framing rules of procedure; nowhere in this more crucial than in the development of procedures. Rarely can one case or even a dozen cases, and no one text or authority nor even a dozen writers, supply an adequate factual foundation for building a structure of rules of procedure. Indeed, raw information and raw facts alone are not enough, for all raw material is useless, and can even be misleading, until it is processed. We have techniques in rulemaking for this processing which are tried and tested. They are based on the adversary

system itself, drawing on centuries of experience which taught us to defer conclusions until we had allowed the clash of opposing points of view and the competition of ideas to supply a base or predicate for acting and drafting.

#### NEED FOR ORDERLY RULEMAKING

It was, as I suggested, more than 30 years ago that the legal profession, the courts and Congress recognized the need for an orderly rule-making procedure for the Federal system. Federal judges, and particularly the Supreme Court, acknowledged that the press of their own daily work and the narrowness of the records of particular cases before them were obstacles to sound rulemaking.

It was also recognized that a legislative body, even with a great number of lawyers in its membership, was not a satisfactory instrument for making detailed rules of civil or criminal procedure. From the premise that neither the courts nor Congress could perform this function alone, a rule-making procedure was established by law to enable the Supreme Court to prescribe rules by use of an Advisory Committee appointed by the Court. This advisory "legislative" body included lawyers, judges and law professors. It in turn was to carry on hearings, seminars and empirical studies and then submit the proposed rules to the Supreme Court. The Court after study was empowered to approve and adopt them. Under the statute they were then to be sent to Congress and, absent a modification within a stated period, they would become the law. This as we know was the process by which the Federal Rules of Civil Procedure were born. This is what you are now about to do.

The genius of this scheme was that it was a joint enterprise of the Judiciary and Congress and the legal profession as a whole. While there were some critics of the Federal Rules of Civil Procedure so produced, the method of their drafting, preparation and adoption brought about overwhelming acceptance among lawyers, judges, scholars and public. First, there was a broadly based and representative Advisory Committee selected by the Supreme Court and as an official body it had great stature. Second, the Committee consulted every organization which was entitled to be heard. Bar associations and law schools carried on extensive studies and seminars at the request of the Advisory Committee. By the time the rules were drafted, they represented the best thinking of thousands of lawyers, judges and scholars in every state and local bar. This technique came to be recognized as a remarkably effective means of codifying rules of procedure and has been copied by many states. It is one of the significant contributions of modern law. Once the Civil Rules were an accomplished fact, the Supreme Court, acting under this same statute, created an Advisory Committee for Criminal Rules. For three years this Committee of eminent and representative members of the profession, including many Federal judges, conducted studies, held hearings, consulted other groups, and prepared a tentative draft of the Federal Rules of Criminal Procedure. This was then circulated to thousands of lawyers and judges for criticism and comment. The Judicial Conferences of the eleven circuits and a great many bar associations held seminars to study and report their views on the proposed rules. The Advisory Committee then revised its tentative rules to take into account the suggestions received and circulated a second preliminary draft and the grinding processes of study, challenge, debate and criticism were repeated. By this stage, the Department of Justice, state prosecutors, defense lawyer groups and bar associations and law professors had all been given a "day in court."

After being examined and approved, these rules were adopted by the Supreme Court and sent to Congress, whose acquiescence made them law. That was 15 years ago.

#### THE PAST DOZEN YEARS

The sheer volume of holdings the past dozen years in what have been essentially changes in rules of criminal procedure and evidence has placed the Supreme Court directly in the business of creating on a case-by-case basis important new criminal rules which dwarf the Federal Rules of Criminal Procedure in impact even if not in volume. I suspect that a dozen years ago the Supreme Court did not anticipate the scope of its "revolution" in criminal procedure, for even in retrospect the starting point is not clear.

A substantial number of lawyers, judges and scholars believe that when the Supreme Court found itself traveling down the road of codifying detailed rights and procedures under the Bill of Rights perhaps that was a good time to pause. Such a pause was urged, not only by the Court's dissenters, but by responsible voices, including Judges Lumbard and Friendly of the Second Circuit, Justice

Walter Schaefer of the Illinois Supreme Court, and Dean (now Solicitor General) Griswold, among others. I have said for five years or more what I say to you now. In such a pause the Court would have done well to ponder land and carefully whether it was time for the entire subject of criminal procedural rules to be submitted to a Supreme Court Advisory Committee so that this remarkably efficient process could be directed to a broad scale re-examination of all the problems which the Supreme Court was concerned with, including the elusive concepts and problems of eyewitness identification at police lineup procedures, to mention but one example on which judges generally have little or no first hand knowledge or experience.

#### A DANGEROUS, MISCHIEVOUS WEAKNESS

There is a dangerous and even mischievous weakness in making or revising sweeping general rules of procedure and evidence on a case-by-case basis. The axiom of lawyers that "hard cases make bad law," applies and by the very nature of the review jurisdiction of the Supreme Court the cases it decides to review are usually "hard" cases and not the ordinary or usual kind of case. The Court's limited time often requires that the "easy" cases be left to others. The state cases which come to the Court give them less choice, especially in a period of escalating constitutional concepts, but essentially the Supreme Court is its own "traffic manager."

These "hard" cases usually come to the Court on the narrow record of but one case which frequently presents emotionally appealing situations that confuse and blur the bedrock consequences of a broad holding. With deference, I suggest that these cases are not always briefed and argued by men qualified by experience to present a case of great magnitude and consequence. Indeed, members of the Court have been heard to complain about the inadequacy of presentation. When the presentation for the accused is inadequate the mechanism of a brief from a friend-of-the-court is used. The Supreme Court cannot impose a friend-of-the-court on the State as an Appellee and this is where the States have been weak.

In short, the narrow record of the particular case, the appealing aspects of the "hard" case, and the presentation by inadequate briefs and arguments from lawyers who never before, and perhaps never again, will see the hallowed chambers of the Supreme Court, all combine to have a large issue decided without the careful, painstaking, deliberative processes of the Supreme Court's Advisory Committees which I have already described.

Justice White, dissenting in *United States v. Wade*, which established new rules for police lineups, said:

"The Court assumes a narrower evil as the basis for its rule—improper police suggestion which contributes to erroneous identifications. The Court apparently believes that improper police procedures are so widespread that a broad prophylactic rule must be laid down, requiring the presence of counsel at all pre-trial identifications, in order to detect recurring instances of police misconduct. I do not share this pervasive distrust of all official investigations. None of the materials the Court relies upon supports it. Certainly, I would bow to solid fact, but the Court quite obviously does not have before it any reliable, comprehensive survey of current police practices on which to base its new rule. Until it does, the Court should avoid excluding relevant evidence from state criminal trials."

Justice Black was even sharper with the five majority Justices; he said in his dissent:

"\* \* \* even if this Court has power to establish such a rule of evidence, I think the rule fashioned by the Court is unsound. The "tainted fruit" determination required by the Court involves more than considerable difficulty. I think it is practically impossible. How is a witness capable of probing the recesses of his mind to draw a sharp line between a courtroom identification due exclusively to an earlier lineup and a courtroom identification due to memory not based on the lineup?"

The careful study processes of an Advisory Committee in rulemaking would have explored all these avenues, sifted out the facts, and worked out a reconciliation and accommodation of the differing points of view. More than that, such a Committee would refuse to act unless it had the "solid fact" basis Justice White and three other Justices referred to instead of the individual speculation of five Justices who may never have witnessed a lineup in a police station.

It is interesting to note that the briefs in the *Miranda* case filed by 29 States and the National District Attorneys' Association strongly urged the Supreme Court not to resolve great issues on a narrow record of a few cases without the

broad study which characterized the development of the Federal Rules of Criminal Procedure.

The Supreme Court brushed this off, saying: "Where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them."

All of us would agree that the Supreme Court should not let Advisory Committees or Congress "abrogate" any part of the Constitution, but I respectfully point out that four members of the Court disagreed with the five and that for nearly 200 years the "constitutional rights" which emerged from some of these cases were not seen by anyone. I hasten to add that no Court should ever be precluded from recognizing a constitutional right previously overlooked, but the Supreme Court's historic reluctance to "reach" for constitutional issues might well have led to allowing the rule-making process to function first as it has so admirably in the past before resolving a constitutional point.

#### LEADERSHIP SHOULD COME FROM THE COURT

Leadership in improving the administration of justice should, of course, come from the Supreme Court and under the statutory procedure it is not bound by what the Advisory Committee finally submits any more than it gives advance constitutional approval by adopting a set of rules. But for the life of me, I cannot see why the Supreme Court should assume this enormous task singlehanded and ignore the thousands of lawyers, judges and professors and such helpful groups as the ALI and others.

Members of the Supreme Court have been known to express regret and even annoyance from time to time at the lack of support for the Court's holdings from the legal profession and the Judiciary. But that should not be surprising when valid arguments have been responsibly advanced by four Justices in dissent urging the Court to go slowly and seek more reliable empirical data on the issue at hand and this is met by a lofty comment that on constitutional doctrine the Court "does not conduct a poll." With four Justices and a large segment of the legal profession protesting that no constitutional doctrine is involved in the particular case, the five should not expect that their arch comment about polls disposes of the matter. A possible explanation for widespread lack of support for some of the Court's holdings lies in the homely reality that the legal profession would like to be in on the takeoff—perhaps via the statutory rule-making process—if they are to be of help in explaining landing which shake up the passengers.

You will recall that in *United States v. Wade*, Justice Black, speaking in dissent, said somewhat acidly:

*"I have never been able to subscribe to the dogma that the Due Process Clause empowers this Court to declare any law, including a rule of evidence, unconstitutional which it believes is contrary to tradition, decency, fundamental justice, or any of the other wide-meaning words used by judges to claim power under the Due Process Clause. \* \* \* I have an abiding idea that if the Framers had wanted to let judges write the Constitution on any such day-to-day beliefs of theirs, they would have said so instead of so carefully defining their grants and prohibitions in a written constitution. With no more authority than the Due Process Clause I am wholly unwilling to tell the state or federal courts that the United States Constitution forbids them to allow courtroom identification without the prosecution's first proving that the identification does not rest in whole or in part on an illegal lineup. Should I do so, I would feel that we are deciding what the Constitution is, not from what it says, but from what we think it would have been wise for the Framers to put in it. That to me would be 'judicial activism' at its worst. I would leave the States and Federal Government free to decide their own rules of evidence. That, I believe, is their constitutional prerogative."*

Justice Black was addressing himself to the merits of what the Court was doing, whereas I am concerned with the procedure. But if his view has validity on the merits, surely it supports my thesis that the statutory rule-making process is better adapted to the Court's objective than trying to embalm a detailed rule in the Constitution under the Sixth Amendment right to counsel clause and without retroactive effect.

Some people think the word "consensus" has become a "bad" word, but I for one do not. It is only by developing a consensus that any of the great issues of the country are resolved and the matter of crime and criminal law is indeed one of the great issues. Granting for the moment the power as distinguished from the wisdom of drafting a detailed codification of rights and rules of evidence via

constitutional interpretation, when these rules reach uniformly into every precinct station and sheriff's office in every town and hamlet in a nation of 200 million troubled and anxious people, I respectfully submit that the slower rule-making process would be more likely to produce a consensus and that the course of sound judicial statesmanship would have used that method. Among other things, the "sunburst" doctrine of discovery of constitutional rights which spring into being as of midnight on a stated day could have been avoided.

#### AN ADVANTAGE

There is, of course, another rather obvious advantage in statutory rule-making processes which is especially relevant in a period when the Federal Judiciary, and the Supreme Court particularly, is under attacks which renders a great many people confused and uncertain. The advantage lies in the support which develops slowly and steadily as the rule-making process unfolds, involving as it does not only the Advisory Committee but subcommittees, seminars and task forces which include hundreds of lawyers, judges, prosecutors and scholars—the entire spectrum of the legal profession and state and local bar associations all over the country. As the process is enriched by the information and experience and ideas which these participants contribute, a massive base of support for the ultimate result builds up. This insures its acceptance and gives those who are affected a "lead" time to make adjustments in their habits and practices.

There is an even more serious flaw in constitutionalizing details of procedure and evidence better left to the more flexible machinery of statutory rulemaking. That process, while slow and cumbersome, produces more effective guidelines because rules can be stated more simply and precisely than a judicial opinion. Moreover, rulemaking leaves open the door for change and adjustment to the realities of subsequent experience, whereas altering a constitutional ruling or changing a constitutional trend calls for a sharp break with the past. The more recent the rule to be changed, the greater the blow to stability of constitutional doctrine.

Yet we must recognize that the constitutional concepts "tacked on" in these dozen years or so may not be as permanent as they appear when they are consistently arrived at by the margin of one vote with four Justices sharply suggesting that the cake which the Court was baking did not have all the essential ingredients for a good cake and that it has not been in the oven long enough. To paraphrase one of the felicitous lines of Elizabeth Barrett Browning, consequences "so wrought may be unwrought so." Thus, the constitutional result so wrought against the protest of four, may be "unwrought" by so simple a happening as the advent of one of two new Justices. Whatever one's view of the merits of any particular ruling so cast aside, this is a highly unsatisfactory method of improving criminal justice. Even those who do not admire some of these rulings do not want to see constitutional doctrine rise and fall like governments under the Fourth Republic of France.

#### ANOTHER CHALLENGE TO THE COURT

Another challenge has been made of the Supreme Court's almost undignified haste to clothe detailed rules of evidence and police station procedure in the garb of constitutional doctrine. That mechanism may seem to render the rule beyond the reach of Congressional modification, but it has a melancholy tendency to depreciate the standing of constitutional doctrine even in the eyes of those who fully approve the end result reached. Constitutional doctrine in criminal justice ought to be a steady line on the graph of history, always upward, avoiding peaks and valleys. Looking back over the past dozen years one is left to wonder what has become of the Court's firm policy never to decide a case on a constitutional ground if any other plausible ground was available.

The doctrine of judicial supremacy is firmly established in this country, but we have never accepted a concept of judicial infallibility. Herein lies much that would suggest cogent reasons for a belief that several hundred well-trained and sophisticated legal minds functioning within the rule-making process free from the pressures of an appealing case might well do a more comprehensive job of drafting a workable set of rules than nine extraordinarily busy men with no more than a short time to devote to any one case, and without the fact-finding facilities and staffs of an Advisory Committee appointed by the Supreme Court.

Nowhere is this more in evidence than in the cases dealing with the elusive and difficult problems of eyewitness identifications. The role of the lawyer is ill-defined

and pregnant with questions of conflict of interest. The lawyer goes to the lineup in the partisan role of an advocate but may be called upon to be a monitor and hence a potential witness, a role that will require him to abandon his advocate assignment. If he does this, will it not be said that he is somewhat a "tainted" witness because he began as a partisan advocate? One instance has already occurred in which the lawyer hastily called to the police station advised his client to lie face down and refuse to cooperate with the police. The police then had all the persons in the lineup lie in the same posture to be viewed by the witnesses, and one can see the confusion engendered by having these witnesses stepping gingerly among the prostrate bodies in the lineup. Will this become a new legal form—the lie-down lineup? If the witnesses observe all this confusion, and see which person is causing it, as they might, which side has tainted the process of identification with prejudice?

#### GETTING RULES IN THE STATES

It is correct that the rulemaking procedure under the Federal system provides no automatic means for making the rules applicable to the State. But that is by no means a dispositive objection. We must remember that once the soundness of the Federal Rules of Civil Procedure were seen, many States followed the leadership of the Supreme Court and adopted comparable rules of civil procedure for the States, in some cases almost a "Chinese" copy of the Federal Rules. Laying aside Justice Black's cogent arguments that procedure should be left to the States, the record shows that no real leadership has ever been exerted to persuade the States to adopt more enlightened and efficient criminal rules comparable to the 1944 Federal Rules of Criminal Procedures.

I have already pointed out that in adopting a rule proposed by an Advisory Committee, the Supreme Court does not prejudge its constitutionality. There of course, is always a process of interpretation, but I hardly need to offer evidence that construing and applying detailed rules, carefully worked out gives far fewer problems to trial courts, prosecutors, defense counsel and police than applying nuances of many of the new case-made rules of procedure.

The Supreme Court has tended to feel it could lay down broad objectives in these sensitive areas of interrogation and identification and leave it for others to work out the details. But these are crucial details which should have been worked out in advance as four Justices so sharply pointed out and indeed it is clear to many qualified persons that, had these problems and all their ramifications been thought through, other and different solutions might have been found acceptable to all members of the Court.

For three years, now, the American Bar Association has been engaged in what may be one of the most comprehensive and significant studies made of the administration of criminal justice in America. It is the Project on Minimum Standards of Criminal Justice, which has occupied a vast amount of the time of 80 lawyers, judges and law professors who make up the six Advisory Committees and the Special Committee which guides the whole project. Using methods somewhat like those which evolved the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure and lately the Federal Rules of Appellate Procedure, this Committee has published nine Reports which the House of Delegates of the American Bar Association has approved. Six or seven additional Reports will issue.

Probably no one will agree with everything in all of these Reports, for they cover the entire range of administration of criminal justice from arrest to ultimate confinement, when that occurs. Whether one agrees or not with all that is said, these Reports contain a rich treasure of raw material which can help any court or legislature in making rules or codes of criminal procedure. They will be made available to you. Material such as this and the long experience under the Civil and Criminal Federal Rules give the States a vast storehouse of material which has been tested. You will not need to plow hard ground to develop a sound set of rules in Ohio but can draw on all that has gone before.

#### CLARIFICATION IS IMPERATIVE

The matter of clarifying the whole range of Rules of Criminal Procedure, including the new rules and procedures developed by the Supreme Court in various opinions, is imperative. It seems clear now, with the benefit of hind sight, that many of the problems sought to be solved by the controversial holdings of the Su-

preme Court on criminal procedure and evidence over the past dozen years, would have better been submitted to an Advisory Committee appointed by the Supreme Court (under Title 18, Section 3771). But that is in the past and it is more important to look ahead. It is ten years since the *Mallory case*, yet the guidelines of that subject are still neither clear nor comprehensive. And the courts have not begun to come to grips with all the problems which will flow from the very recent lineup and identification holdings.

As to the Federal Rules, I submit that either by creation of a new Advisory Committee or by enlarging studies now being carried on, the whole area of criminal procedure and all the problems touched upon in the holdings on interrogation, preliminary hearings, police line-ups, eyewitness identification, for example, be committed to reexamination and re-appraisal. By this procedure we can clear the air, clarify the ground rules, and get in with Society's basic responsibility of protecting an ordered liberty as well as protecting the rights of accused persons. We must do the best we can with the cases which arise under rules already laid down. On these there can, of course, be no moratorium. We should look back only as it contributes to visibility on the problems ahead.

Now as you look ahead I am sure that under the leadership of your great Chief Justice, Kingsley Taft, you will write a bright chapter in the history of Ohio law.

[From the Congressional Record, Sept. 14, 1967]

**REMARKS OF HON. WARREN E. BURGER, JUDGE, UNITED STATES COURT OF APPEALS,  
WASHINGTON, D.C., AT RIPPON COLLEGE, MAY 21, 1967**

A century ago plus one year, when this college was born, the country was confronted with many agonizing problems. Then as now the nation had recently experienced the great national trauma of the assassination of its President. Then as now the nation was struggling to fulfill to the Negro minority the promises of the Declaration and the Constitution. Then as now war occupied the minds of the people and the leaders, but happily by 1866, the shooting had stopped, and they were trying to bind up the wounds.

The people who lived in that period, the people who launched this institution were hopeful, and optimistic with a characteristic Mid-western confidence in their ability to meet and solve all problems.

Today, a century later, our people are not so optimistic or so confident, but I suspect that you, the members of this class, being young and hopeful, are not apprehensive or shaken by the debris of unsolved problems or the challenge of the new ones. It is good you have this buoyancy and optimism for you will need it in the years ahead.

We could well discuss today War and Peace, Poverty and Affluence, the breakdown of the home, the declining influence of the church, the disintegration of cities, or any one of dozens of similar problems which lie on your doorstep. All of these problems and more will compete for your attention in the final third of this 20th Century.

I will limit myself to one problem, but it is one which, like war, will affect every American and hang over every home and lurk at every dark corner. It is the problem which we might call Crime and Punishment—the problem of those persons who cannot seem to adjust to an orderly life pattern of study, work, family ties, and responsible citizenship, but instead, turn to crime. Perhaps this is not a conventional Commencement subject, but these are not ordinary times and people are not being entirely conventional these days.

Society's problem with those who will not obey law has never loomed so large in our national life as it does today. People murder others in this country at the rate of more than one for every hour of the day. There are more than 140 crimes of theft every hour; assault and violence and rape grow comparably. The murder rate is 10,000 human lives a year, which is higher than the death rate in our current military operations in Viet Nam which inspire such emotional and violent public demonstrations. And the growth rate of crime is now far greater than the growth in our population.

Perhaps the most alarming thing is the large amount of crime committed by persons under age 20, which suggests that homes, parents, schools, churches and communities have somewhere failed. Even worse is the fact that the highest rate of repeaters—recidivists—is in this under 20 age bracket. Nearly 60% of the 20 and under are repeaters.

In 1964, for the first time in our national history, the subject of crime became an issue in a national Presidential campaign. It became an issue because a vast

number of people of this country were deeply apprehensive about the security of their homes, their children, their possessions and their personal safety on the streets, especially in large cities. This led President Johnson to create a National Commission on Law Enforcement and Administration of Justice under the Chairmanship of the Attorney General of the United States, with a score of distinguished Americans and a staff of highly qualified experts. The summary of crime statistics I have just given you is drawn from the recent Report of that Commission.

One week ago I attended a Conference in Washington to which the President had called about 100 lawyers, judges and others concerned with law enforcement, to consider ways of implementing the Crime Commission's Report. In spite of the enormous burdens he carries, the President came to the Conference and, among other things, said that next after the war in Viet Nam, the problems of law enforcement ranked highest.

We often hear the claim that the breakdown of law and order is due to this decision or that decision of some court—most often of the Supreme Court. It would be good if things were that simple, for if the overruling of one or two opinions would solve the problems of crime, I suspect the Supreme Court would be willing to reconsider. It is no aid to sensible public discourse to attribute the crime problem to any one decision or any one court.

Unfortunately, the problems and their solutions are far too complex to be resolved so easily. Let's probe into it.

Our whole history as a nation reflects a fear of the power of Government and a great concern for individual liberty, and these feelings led to place many protections around persons accused of crime. This has resulted in the development of a system of criminal justice in which it is often very difficult to convict even those who are plainly guilty. You know that this was a response to the abuses which people had suffered from the absolutist attitudes of rulers in Europe and in England in the 16th and 17th Centuries.

During the middle of this century—that is, from about 1933 to 1966—we have witnessed more profound changes in the law of criminal justice than at any other period in our history. In addition to court decisions, there have been many legislative enactments in both Congress and State Legislatures which have enlarged the protections of a person who is accused of crime. No nation on earth goes to such lengths or takes such pains to provide safeguards as we do once an accused person is called before the bar of justice and until his case is completed.

But governments exist chiefly to foster the rights and interests of its citizens—to protect their homes and property, their persons and their lives. If a government fails in this basic duty it is not redeemed by providing even the most perfect system for the protection of the rights of Defendants in the criminal courts. It is a truism of political philosophy rooted in history that nations and societies often perish from an excess of their own basic principle. In the vernacular of ordinary people, we have expressed this by saying, "Too much of a good thing is not good."

We know that a nation or a community which has no rules and no laws is not a society but an anarchy in which no rights, either individual or collective, can survive. A people who go to the other extreme and place unlimited power in Government find themselves in a police state, where no rights can survive.

Our system of criminal justice, like our entire political structure was based on the idea of striking a fair balance between the needs of society—we tried to establish order while protecting liberty. It is from this we derive the description of the American system as one of ordered liberty. To maintain this ordered liberty we must maintain a reasonable balance between the collective need and the individual right, and this requires periodic examination of the balancing process as an engineer checks the pressure gauges on his boilers.

What are the dominant characteristics of our system of criminal justice today? First, it is a system in which there are many checks and reviews of the acts and decisions of any one person or tribunal. Second it is a system which reduces to a minimum the risk that we will convict an innocent person. Third, it is a system which provides the utmost respect for the dignity of the human personality without regard to the gravity of the crime charged. There are exceptions to these generalities in some States and in some courts, but I think this is a fair appraisal of the plus side of our system of criminal justice.

What are some of the negative aspects of our system?

1. Our criminal trials are delayed longer after arrest than in almost any other system.

2. Our criminal trials extend over a greater number of days or weeks than in almost any other system.

3. Accused persons are afforded more appeals and re-trials than under any other system.

4. We afford the accused more procedural protections, such as the exclusion and suppression of evidence and the dismissal of cases for irregularities in the arrests or searches, than under any other system.

It sometimes happens that a development in the law which is highly desirable, standing alone, interacts with an equally desirable improvement and produces a result which is largely or even totally lacking in social utility. Let me give one example: the bail reforms of recent years were long overdue and helped to give meaning to the constitutional provisions on bail; similarly the decisions and statutes assuring a lawyer to every person charged with serious crime, were long overdue. Now look at the interaction: every person charged has a lawyer supplied to him and at the same time he has enlarged rights to be released without posting a conventional bail bond.

We can now see that in a great many cases, no matter how strong the evidence against him, or how desirable the long range value of a guilty plea and the benefits of reduced charges and more moderate sentencing, the two "good" things—bail reform and free defense—interact to discourage a guilty plea because the "jail house grapevine" tells the accused that the thing to do is enter a not guilty plea, demand release without bond, and then use every device of pretrial motions, demands for a new lawyer, and whatnot to delay the moment of truth of the trial day. This means up to two years' freedom during which witnesses might die, or move, or forget details while the case drags on the calendar and consumes untold time of judges, lawyers and court staffs to process motions and continuances. This is one of the large factors in the congestion of the criminal dockets. Here, to repeat, two basically good things combine to produce a result never intended and wholly lacking in social utility or any meaningful relationship to the proper administration of criminal justice, in short an excess of basic principle.

If there is a general impression that the administration of justice is not working, one important result is that the deterrent effect of the law and punishment is impaired or lost. If people generally—law abiding and lawless alike—think the law is ineffective two serious impacts occur: the decent people experience a suppressed rage, frustration and bitterness and the others feel that they can "get by" with anything.

This is not because the people—good people or bad people—read the opinions of appellate courts. Of course they don't. But they *read about* and *hear about* the extraordinary cases, and as I suggested, they read and hear most about the failures of the law as in the Chessman and Willie Lee Stewart type of cases (which ran an agonizing course in the courts for 10, 12 years). Some people, have scornfully said that lawless people never read appellate court opinions. Quite true, but is the real issue whether people read the opinions or is it whether the *actions* of courts which are widely publicized have an effect on public attitudes? The celebrated case which takes 5 to 10 years to complete is common talk in the best clubs and the worst ghettos. If lax police work and lax prosecution will impair the deterrent effect of the law, repeated reversals and multiple trials in the highly publicized cases will likely have a similar effect. The existence of "speed traps" and the knowledge of vigorously enforced traffic laws will make us all more careful drivers. Many people, even though not all, will be deterred from serious crimes if they believe that justice is swift and sure. Today no one thinks that.

Is a society which frequently takes 5 to 10 years to dispose of a single criminal case entitled to call itself an "organized" society? Is a judicial system which consistently finds it necessary to try a criminal case 3, 4, 5 times deserving of the confidence and respect of decent people?

These are the negative factors. But by that I do not mean to say that any one of these is unreasonable or undesirable in and of itself. It is a hard fact, however, that in the present state of law there are more and more cases in which a defendant is tried and re-tried and re-tried again so that the trials and appeals may extend anywhere from 2-3-5 and occasionally as much as 10 years.

Many people tend to think of the administration of justice in terms of the criminal trial alone because this is the part of the process which occurs in the local community, but more than that because it is charged with the human element; it is exciting, colorful and dramatic. This is why the movies and TV have given so much time to criminal trials.

But this is not the whole of the administration of justice. The total process is a deadly serious business that begins with an arrest, proceeds through a trial, and is followed by a judgment and a sentence to a term of confinement in a prison or other institution. The administration of justice in any civilized country must embrace the idea of rehabilitation of the guilty person as well as the protection of society. In recent years, we have been trying to change our thinking in order to de-emphasize punishment and emphasize education and correction.

I have suggested that our system of trials to determine guilt is the most complicated, the most refined, and perhaps the most expensive in the world. We now supply a lawyer for any person who is without means and it is the lawyer's duty to exercise all of his skills to make use of the large number of protective devices available to every defendant. But where do we stand in the second stage of the administration of criminal justice—the treatment and disposition of those who are found guilty? We can gain some light by a comparison of our entire system with the countries of North Europe.

To begin with we find that in Norway, Sweden, Denmark and Holland, for example, there is much less crime generally than in the United States. In Sweden, with a million people, there are about 20 murders each year, and crimes of other kinds are appreciably at a lower rate than in this country. Washington, D.C., with about 800,000 population, has 160-170 murders each year.

I assume that no one will take issue with me when I say that these North Europe countries are as enlightened as the United States in the value they place on the individual and on human dignity. When we look at the two stages of the administration of criminal justice in those countries, we find some interesting contrasts. They have not found it necessary to establish a system of procedure which makes a criminal trial so complex or so difficult or so long drawn out as in this country. They do not employ our system of 12 men and women as jurors. Generally speaking their criminal trials are before 3 professional judges. They do not consider it necessary to use a device like our 5th Amendment under which an accused person may not be required to testify. They go swiftly, efficiently and directly to the question of whether the accused is guilty. By our standards their system of finding the facts concerning guilt or innocence is almost ruthless. In those systems they do not have cases like Chessman's in California or others you have read about where the accused has countless hearings and trials and re-trials and reviews over 10 or 12 years. In these long drawn out cases everyone loses sight of the factor of guilt and even the most guilty convict comes to believe the press releases of his own lawyer.

Here in our comparison we encounter an interesting paradox. The swift and efficient justice in North Europe is followed by a humane and compassionate disposition and treatment of the offender. The whole process from the moment of arrest to the beginning of sentence is free from the kind of prolonged conflict which characterizes our administration of criminal justice in which we have glorified and idealized the adversary system with its clash and contest of advocates.

I recently made comparisons of specific cases in Holland, Denmark and in the United States. A typical case in Denmark, for example, is disposed of in about six weeks and the first offender is almost always placed on probation under close supervision and free to return to a gainful occupation and normal family life. It is not unusual, as I have said, for an American case to have 2 or 3 trials and appeals over a period of from 3 to 6 years. When the American defendant is finally sentenced after this prolonged process, he has been engaged in a bitter warfare with Society for years.

Even after the American is committed to a prison we afford him almost unlimited procedures to attack his conviction or seek reduction of his sentence, and as a result American courts are flooded with petitions from prisoners and the warfare continues. Under our system the "jailhouse lawyer" has become an institution. In short, while the correction system struggles to help the man reconcile his conflict with Society, the statutes and judicial decisions encourage him to continue the warfare.

If the prisoner is like most human beings his battle with authority and in the courts develops a complex of hostilities long before he goes to prison. These hostilities are directed toward the police who caught him, the witnesses who accused him, the District Attorney who prosecuted him, the jurors who judged him, and the judge who sentenced him, and finally, even the free public defender who failed to win his case. I doubt that any defendant can conduct even prolonged warfare with Society and not have his hostilities deepened and his chance of

rehabilitation damaged or destroyed. To encourage the continuance of this warfare with society after he reaches the prison hardly seems a sound part of rehabilitation, nor is it likely to contribute to restoring him to good citizenship.

Let me pursue our paradox: when we in America have lavished 3 or 5 or even 10 years of the complex and refined procedural devices of trials, appeals, hearings and reviews on our defendant, our acute concern seems to exhibit itself. Having found the accused guilty—as 80 to 90% of all accused persons are found—we seem to lose our collective interest in him. In all but a few States we imprison this defendant in places where he will be a poorer human being when he comes out than when he went in—a person with little or no concern for law or for his fellow men and very often with a fixed hatred of all authority and order, and he is mindlessly and aggressively determined to live by plundering and looting.

In referring to the North Europe countries, I do not intend to suggest that they have completely solved all these problems, but only that they seem to deal with them more intelligently and less emotionally. They do so by recognizing that for the most part people who commit crimes are out of adjustment with society and that confusion and personality problems have something to do with this. They do not find that any useful social purpose is served by giving him 2 or 3 trials and 2 or 3 appeals and drawing out the warfare with Society. And when they finally make the decision to deprive a guilty person of his liberty, they look ahead to the day when he will be free. They probe deeply for the causes of his behavior and to do this they place behavior scientists in the prisons. We do this, but only in a token sense. In the Federal Prison System, which is far better than most of the States, there is a ratio of approximately 1 psychiatrist or psychologist for each 1,500 inmates. In the State prisons the ratio of psychiatrists to prisoners is far less—as little as 1 psychiatrist for each 5,000 inmates; some States in the United States have none. And remember, we are talking about maladjusted people confined by Society with a purpose of healing them.

Yet in tiny Denmark the ratio is roughly 1 psychiatrist for each 100 prisoners and in the maximum security prisons, where the dangerous and incorrigible prisoners are confined, the ratio is 1 psychiatrist for each 50 prisoners.

The vocational and educational programs available in our best prisons are a help, but the rate of return of prior offenders shows that something is not working. With few exceptions in the more enlightened States the basic attitude of Legislatures is that criminals are bad people who do not deserve more. (Wisconsin happens to be among the most advanced of the States and this is not surprising when we remember that most of those who populate this State derive from the enlightened countries of North Europe.)

In part the terrible price we are paying in crime is because we have tended—once the drama of the trial is over—to regard all criminals as human rubbish. It would make more sense, from a coldly logical viewpoint, to put all this "rubbish" into a vast incinerator than simply to store it in warehouses for a period of time only to have most of the subject come out of prison and return to their old ways. Some of this must be due to our failure to try—in a really significant way—to change these men while they are confined. The experience of Sweden, Denmark and the other countries I mentioned suggests two things: that swift determination of guilt and comprehensive study of each human being involved and extensive rehabilitation, education and training may be the way. This, and programs to identify the young offenders at a stage early enough to change them, offer the best hope anyone has suggested.

In all of these countries there is also a more wholesome attitude toward the prisoner after he is released. The churches and the Government cooperate in maintaining what are called "after-care societies" which have existed for hundreds of years. Through these societies each released prisoner has an experienced and friendly counselor and advisor to assist him with his problems. These people are volunteers who might be compared with citizens in this country who take part in the VISTA program or the Big Brother movement.

Now you will perhaps be asking what does all this have to do with you. Perhaps only a few of you will become lawyers or judges or Congressmen. But that is precisely why I have tried to focus your minds on the problem which President Johnson, only last Saturday, placed second to ending the war in Viet Nam.

We lawyers and judges sometimes tend to fall in love with procedures and techniques and formalism. But as war is too important to be left to Generals, justice is far too important to be left exclusively to the technicians of the law.

The imbalance in our system of criminal justice must be corrected so that we give at least as much attention to the Defendant after he is found guilty as before.

We must examine into the causes and consequences of the protracted warfare our system of justice fosters. Whether we find it palatable or not, we must proceed, even in the face of bitter contrary experiences in the belief that every human being has a spark somewhere hidden in him that will make it possible for redemption and rehabilitation. If we accept the idea that each human, however bad, is a child of God, we must look for that spark.

Should you come to the conclusion, as you watch our system of justice work, that we lawyers have built up a process that is inadequate or archaic or which is too cumbersome or too complex, or if you think we have carried our basic principle too far, or if for any reason you think the system does not meet the tests of social utility and fair fairness, you have a remedy. You have the right and the ultimate power to change it. Neither the laws nor the Constitution are too sacred to change—we have changed the Constitution many times—and the decisions of judges are not Holy Writ. These things are a means to an end, not an end in themselves. They are tools to serve you, not masters to enslave you.

Some of the elders may wonder whether the next generation, whose activities we see portrayed daily in unflattering settings, will be concerned with these problems. I think you will. I reject the idea that your generation as a whole is the Alienated Generation; on the contrary, there is much more evidence that you are the Involved Generation—one which has shown a unique quality which has too long been missing in American life. It is a quality which leads young people away from getting rich in advertising agencies and banks and brokers' offices, and into work with human beings through agencies like the Peace Corps and in Government service. In this unique quality lies the hope—indeed the best hope—to relieve the dismal picture I have been discussing.

This missionary zeal of your generation may find solutions.

[From the Congressional Quarterly, May 30, 1969]

#### CHIEF JUSTICE-DESIGNATE BURGER: A SELF-PORTRAIT

##### BAIL RELEASE

May 16, 1969: *U.S.A. v. Andrew B. Jackson*. Jackson was convicted of burglary and grand larceny. The Court's majority sent the case back to District Court for a statement of its reasons for denying bail. Burger dissented, saying: "The reasons for the District Court's denial of bail are so obvious as to require no explanation." He added "It would be incredible if the District Judge—or any judge—would release Appellant pending his appeal against the background of his record. . . .

"We have expressed deep concern over crowded criminal dockets which led the District Court to assign 13 of its 14 Active Judges to criminal cases and in these circumstances I should think it sound to conclude that those Judges have more important things to do than writing ritualistic memoranda for our edification on a record as plain as this one."

##### COURT CONDUCT

May 1, 1969: *James W. Taylor v. U.S.A.* In the Court's opinion Judge Burger noted:

"The Government may prosecute vigorously, zealously with hard blows if the facts warrant, for a criminal trial is not a minutiae. Nevertheless, there are standards which a Government counsel should meet to uphold the dignity of the Government. The language of the prosecutor here was hardly in keeping with what the Courts and the public expect of its representatives. We take this occasion to remind the bar, prosecutors and defense counsel alike, that we expect—indeed insist—that their conduct reflect that they are officers of the court as well as advocates for a cause.

"Perhaps under the pressures of inordinately heavy criminal calendars which place all the participants under strain we have all become too tolerant of violations of canons and customs; hence our observations are not intended to condemn but to guide future conduct."

##### RIGHTS OF ACCUSED

March 14, 1969: *Eugene R. Frazier v. U.S.A.* Judge Burger dissented from that part of the Court's opinion relating to statements Frazier made to the police. Judge Burger referred to *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Mallory v. United States*, 354 U.S. 449 (1957).

He noted that "the majority leans heavily on *Mallory v. United States* . . . , the standing of which has been drawn into serious doubt by recent Congressional enactments."

" . . . Moreover it is unsound to treat *Mallory* and *Miranda* as closely related; the former is a quantitative test of time delay, the latter is a qualitative test of the circumstances of the interrogation.

"Of more concern is the majority's expansion of *Miranda* into a *per se* exclusionary rule thereby transcending the Fifth Amendment requirement that only those statements elicited through *compulsion* be excluded from evidence. Indeed, *Miranda* itself cannot be read as going beyond the language of the Fifth Amendment. Any lingering doubts on this score were resolved by a recent exposition on the subject by the Supreme Court. In discussing the scope of *Miranda* the Court pertinently noted . . . that, 'since at least as long ago as 1807, when Chief Justice Marshall first gave attention to the matter in the trial of Aaron Burr, all have agreed that a necessary element of compulsory self-incrimination is *some kind of compulsion*.' (Emphasis added) . . .

"In *Miranda* the Supreme Court held that certain warnings must be given to a suspect before 'custodial interrogation' could be conducted. . . . The articulation of a stringent waiver requirement was merely a device through which the Court sought to ensure that Fifth Amendment guarantees were not unduly impaired at pretrial interrogations. The guidelines set forth in *Miranda* were means serving constitutionally prescribed ends; as artifices of implementation they are subordinate and only incidental to the rights they were designed to secure. By postulating a waiver concept, the Court did not intend to eclipse the threshold inquiries into the presence of compulsion and the quality of police conduct attending the making of inculpatory statements. This is the background of controlling legal principles on which this case ought to be decided.

" . . . There is not a scintilla of evidence suggesting that what had been forthcoming from Appellant's (Frazier's) lips was the result of unreasonable or improper police conduct. . . . The most that can be said from Appellant's statements is that he may have *unintentionally* incriminated himself. The Fifth Amendment, however, serves neither to discourage nor to prohibit self-incrimination, it militates only against *compulsory* self-incrimination."

"Having complied with the postulates of *Miranda*, it was the absolute duty of the police as law enforcement agents to investigate promptly the circumstances of the crime and the suspect's possible participation. I am somewhat at a loss to know what more the Government could or should have done to comply with the directives of *Miranda*. Even if Frazier did not understand the privilege against self-incrimination, the majority's approach is unrealistic and goes beyond the mandates of any decided cases. It seemingly expects the police to detect indications of misunderstanding and lack of knowledge which are so subtle that not even the judges would recognize the problem.

"The seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances is giving rise to myriad rules, sub-rules, variations and exceptions which even the most alert and sophisticated lawyers and judges are taxed to follow. Each time judges add nuances to these 'rules' we make it less likely that any police officer will be able to follow the guidelines we lay down. We are approaching the predicament of the centipede on the fly-paper—each time one leg is placed to give support for relief of a leg already 'stuck,' another becomes captive and soon all are securely immobilized. Like the hapless centipede on the flypaper, our efforts to extricate ourselves from this self-imposed dilemma will, if we keep it up, soon have all of us immobilized. We are well on our way to forbidding *any* utterance of an accused to be used against him unless it is made in open court. Guilt or innocence becomes irrelevant in the criminal trial as we flounder in a morass of artificial rules poorly conceived and often impossible of applications."

#### POLICE AND ARRESTS

**Feb. 18, 1969: *Raymond T. Davis, Jr., v. U.S.A. and Kenneth M. Sams v. U.S.A.***  
Writing the Court's opinion in a pickpocket arrest case, Judge Burger said concerning probable cause for arrest:

" . . . We need not blindfold the police, nor ask them to abandon their experience when they encounter situations which call for the effective intervention they initiated here.

"The test of probable cause is not what reaction victims—or judges—might have but what the totality of the circumstances means to police officers. Conduct innocent in the eyes of the untrained may carry entirely different 'messages' to the experienced or trained observer."

#### COURTS AND INTEGRATION

Jan. 21, 1969: *Carl C. Smuck v. Julius W. Hobson, et al.*, and *Carl F. Hansen v. Julius W. Hobson*. These were appeals from a 1967 opinion by Circuit Judge J. Skelly Wright, a colleague of Judge Burger's on the Court of Appeals who heard the case because district judges were defendants. The case concerned a finding of racial and economic segregation in District of Columbia schools. (See box) Judge Burger dissented from the majority opinion questioning that ". . . a subject so complex and elusive, and so far beyond the competence of judges, would have warranted judicial action in the first instance."

The dissenting opinion noted that Judge Wright himself concluded his lower court opinion by saying it was regrettable that the court must act in an area so alien to its expertise.

Judge Burger noted: "Several commentators have expressed views which undergird . . . the need for caution and restraint by judges when they are asked to enter areas so far beyond judicial competence as the subject of how to run a public school system. We have little difficulty taking judicial notice of the reality that most if not all of the problems dealt with in the District Court findings and opinion are, and have long been, much debated among school administrators and educators. There is little agreement on these matters, and events often lead experts to conclude that views once held have lost their validity."

#### JUDICIAL AUTHORITY

Jan. 3, 1969: *Rudolph N. Thornton v. Hon. Howard F. Corcoran*. Judge Burger said:

"To me it is not simply irregular for judges to instruct physicians on how they should make a diagnosis; in my view the order . . . commanding the Superintendent of St. Elizabeths Hospital to hold a conference and make a tap recording of that conference was a flagrant abuse of judicial power."

#### SEPARATION OF POWERS

Dec. 13, 1968: *Sylvia H. Thompson v. Clark M. Clifford*, an appeal challenging the authority of the Secretary of the Army to bar interment at Arlington National Cemetery of Robert G. Thompson, a World War II combat hero subsequently convicted of conspiracy to advocate the violent overthrow of the Government.

Judge Burger concurred with part of the majority opinion but said: "I cannot join in the reasoning of the court that 'the secretary lacked power to exclude Thompson's remains from interment in a national cemetery . . . because Congress conferred upon the decedent a right to burial . . . '

"Congress . . . specifically provided that the right was conditioned by 'such regulations as the Secretary of the Army may . . . prescribe . . .' . . . I suggest that the majority is simply substituting its personal views of public policy for the policy decisions of the Legislative and Executive branches of government—and necessarily so because of narrow grounds to the same end. Neither the language of the statute nor legislative history warrants the majority's conclusion."

Sept. 11, 1968: *Bruce C. Scott v. John W. Macy, Jr., chairman, U.S. Civil Service Commission, et al.*, a dispute over denial of a federal job based on homosexual grounds. This was another opinion involving a separation of powers. In his dissent Judge Burger said:

"The opinion of the court's majority reveals by its own terms that it is usurping powers of the policymaking branches of government . . . I would speculate that it can be read as meaning that the Court now takes over from the Executive the power to formulate 'public policy' on employment of sex deviates because that 'policy is in something of a state of flux . . .' It would seem to me that if adjustment is needed to changing mores that is indeed a matter of highly sensitive policy. But from whence comes our mandate to make

or even suggest policy on this score or our mandate to denounce the policy of the constitutionally authorized branch?

"Congress and the Executive make policies in various areas which many reasonable people consider unsound. But policy is not the business of judges."

#### FREEDOM OF SPEECH

Sept. 25, 1968: *Robert Watts v. U.S.A.*, an appeal from conviction on charges of threatening President Johnson's life at a W.E.B. DuBois Club meeting. Judge Burger said:

"Meeting these claims directly, we conclude that the First Amendment does not prevent proscription of utterances that comprises knowing and willful threats to the life or safety of the President . . . Simply because first amendment rights are in the 'balance,' Congress is not precluded from regulating particular individual activity . . .

". . . The assassination, or even attempted assassination, or suspicion of a conspiracy to this end, of no living person can upset the nation's—even the world's—equilibrium as does such action directed at a President of the United States.

"When the interests to be protected are evaluated in the light of first amendment safeguards, the consequences here sought to be prevented afford a valid basis for reasonable limitation on speech."

#### COURTROOM ETHICS

Sept. 17, 1968: *John Harris, Jr. v. U.S.A.* Judge Burger wrote in the Court's opinion:

"The frequency with which violations of standards of permissible argument occur is disturbing. We must rely primarily on the trial judges to make clear that they do not want such argument. Since a large number of lawyers—prosecutors and defense attorneys alike—seem to be uninstructed in the rudimentary elements of proper advocacy, trial judges may well need to take steps to make the 'ground rules' known to the lawyers who appear before them and to deal promptly and firmly with deviations from proper conduct.

". . . Lawyers who fail to learn or remember the rules of courtroom conduct may need the forcible reminders which will tend to upgrade the courtroom performance of lawyers generally."

#### COMMUNICATIONS REGULATION

April 30, 1969: *General Telephone Co. of California et al v. Federal Communications Commission*, a cable television (CATV) case. Judge Burger said "It seems clear that as the outlines of the CATV problem emerged the Commission acted within the scope of the Act (Communications Act of 1934) and consistently with the broad purposes of the Act by treating its responsibilities as comprehensive and pervasive. Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority: 50 states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication." Affirming the FCC's decision and order, he said of the companies involved: "They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission."

#### CONGRESSIONAL POWER

March 14, 1969: *Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board, also National Mediation Board v. Brotherhood of Locomotive Engineers*. In a concurring opinion Judge Burger said: "The controversies which led to the creation of Board 282 [set up by Congress to impose compulsory arbitration] and subsequent events might well cause some doubts in Congress as to the Board's construction of the statute, but this cannot encourage us, as admittedly is often done by judges, to read the statutes—a euphemism for rewriting it—as we think Congress should have drafted it. That the course we are compelled to follow may well prolong this unhappy history of wasteful strife is a matter within the power and province of Congress."

## JUDICIAL RESTRAINT

July 30, 1968: *Morris A. Kent, Jr., v. U.S.* In his dissent from the majority opinion, Judge Burger said:

"...the law requires us to affirm unless the District Judge is 'clearly erroneous.' Review in this court of District Court findings which rest on observations of the accused, detailed judicial and social files, and vast amounts of testimony, is not a contest of private opinion, or our sociological leanings versus those of others. Our review has a narrow scope and we are as much subject to the commands of statutes and rules as are all others."



**Adam Clayton POWELL, Jr., et al.,  
Appellants,**

v.

**John W. McCORMACK, Speaker of the  
House of Representatives et al.,  
Appellees.  
No. 20807.**

**United States Court of Appeals  
District of Columbia Circuit.**

**Feb. 28, 1968.**

**As Amended July 30, 1968.**

Action for injunctive and other relief on basis of unconstitutionality of House Resolution excluding Congressman-elect from membership in House of Representatives. The United States District Court for the District of Columbia, George L. Hart, Jr., J., 266 F.Supp. 354, denied application for three-judge court and dismissed complaint, and plaintiffs appealed. The Court of Appeals, Burger, Circuit Judge, held that the claim of Congressman-elect was one "arising under Constitution" within constitutional provision extending federal judicial power to causes and controversies arising under Constitution. The Court further

held that the Congressman's claim to his seat presented "case or controversy" within constitutional provision extending federal judicial power to case or controversy arising under federal Constitution. The Court also held that statute giving district courts original jurisdiction of all civil actions which arise under Constitution was grant of jurisdiction to entertain the action. In addition the Court held that issues raised by the action were non-justiciable, and that Resolution of House of Representatives excluding Congressman-elect from membership was not "act of Congress" within statute requiring three-judge district court to hear application for injunction restraining enforcement of act of Congress for repugnance to Constitution.

Affirmed.

#### 1. Courts C=283(1)

Claim of Congressman-elect that House Resolution excluding him from membership in Congress violated Constitution was one "arising under Constitution" within constitutional provision extending federal judicial power to cases and controversies arising under Constitution. U.S.C.A.Const. art. 1, § 2, cl. 2; § 5, cl. 1, 2; art. 3, § 2, cl. 1.

See publication *Words and Phrases* for other judicial constructions and definitions.

#### 2. Courts C=281

Claim of Congressman-elect to House of Representatives seat from which he had been excluded by House Resolution which he claimed was unconstitutional presented "case or controversy" within constitutional provision extending federal judicial power to case or controversy arising under federal Constitution. U.S.C.A.Const. art. 1, § 2, cl. 2; § 5, cl. 1, 2; art. 3, § 2, cl. 1.

See publication *Words and Phrases* for other judicial constructions and definitions.

#### 3. Courts C=283.3(6), 285, 283(1)

##### Declaratory Judgment C=274

Statute giving district courts original jurisdiction of all civil actions which

arise under Constitution was grant of jurisdiction to entertain action by Congressman-elect for injunctive relief, mandamus and declaratory judgment on basis that his exclusion from membership in House of Representatives was in violation of Constitution. U.S.C.A.Const. art. 1, § 2, cl. 2; § 5, cl. 1, 2; art. 3, § 1; 28 U.S.C.A. § 1331(a).

#### 4. Courts C=281

Issues raised by action of Congressman-elect complaining of his exclusion from House of Representatives were non-justiciable.

#### 5. Courts C=101

Resolution of House of Representatives excluding Congressman-elect from membership was not "act of Congress" within statute requiring three-judge district court to hear application for injunction restraining enforcement of act of Congress for repugnance to Constitution. 28 U.S.C.A. § 2282.

See publication *Words and Phrases* for other judicial constructions and definitions.

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Mr. Arthur Kinoy, New York City, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, Messrs. Frank D. Reeves and Herbert O. Reid, Sr., Washington, D. C., with whom Mr. William M. Kunstler, New York City, and Mrs. Jean Campor Cahn, Washington, D. C., were on the brief, for appellants.

Mr. Bruce Bromley, New York City, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, with whom Messrs. Lloyd N. Cutler, John H. Pickering, Louis E. Oberdorfer, Max O. Truitt, Jr., and Timothy B. Dyk, Washington, D. C., were on the brief, for appellees.

Messrs. Thomas D. Barr, John R. Hupper and Jay E. Gerber, New York City, members of the bar of the Court of Appeals of New York, were also on the brief for appellee and were granted leave to appear in this case pro hac vice.

Before BURGER, McGOWAN and LEVENTHAL, Circuit Judges.

**BURGER, Circuit Judge.**

This case presents for the first time the question whether courts can consider claims that a Member-elect has been improperly excluded from his seat in the United States House of Representatives. On the basis of findings by that body that Member-elect Adam Clayton Powell, Jr., had been guilty of misconduct as a Member of a prior Congress and of contumacious conduct toward the courts of the State of New York, the House voted to exclude him from the seat in the 90th Congress to which he had been elected in 1966 by the voters of the 18th Congressional District of New York.<sup>1</sup>

This suit was brought by Mr. Powell and thirteen voters<sup>2</sup> of the 18th Congressional District of New York in the United States District Court for the District of Columbia. Appellants sought injunctive relief, mandamus, and a declaratory judgment against Appellees who are Members and officials of the House of Representatives of the 90th Congress. Appellees were sued individually, in their official positions, and as representatives of all Members of the House of Representatives.<sup>3</sup> The complaint was accompanied by a motion to convene a statutory three-judge court. The District Court dismissed Appellants' complaint for want of subject matter jurisdiction, *Powell v. McCormack*, 266 F.Supp. 354 (D.D.C. 1967).

While Appellants' claims actually arose as a result of action taken by the House at the time of the organization of the 90th Congress, the factual genesis of that action derived from events involving the alleged conduct of Member-elect Powell during earlier Congresses. The underlying events were summarized in a House Report as follows:

During the 89th Congress open and widespread criticism developed with

1. Mr. Powell was thereafter re-elected to the Congress in the special election called to fill the vacancy determined to exist by reason of his exclusion. He has not since presented himself to take the oath.
2. Appellants are Adam Clayton Powell, Jr., Philip Randolph, Percy E. Sutton, Bas-

respect to the conduct of Representative Adam Clayton Powell, of New York. This criticism emanated both from within the House of Representatives and the public, and related primarily to Representative Powell's alleged contumacious conduct toward the courts of the State of New York and his alleged official misconduct in the management of his congressional office and his office as chairman of the Committee on Education and Labor. There were charges Representative Powell was misusing travel funds and was continuing to employ his wife on his clerk-hire payroll while she was living in San Juan, P. R., in violation of Public Law 89-90, and apparently performing few if any official duties.

In September 1966, as the result of protests made by a group of Representatives serving on the Committee on Education and Labor, the Committee on House Administration, acting through its chairman, issued instructions for the cancellation of all airline credit cards which had been issued to the Committee on Education and Labor and notified Chairman Powell that all future travel must be specifically approved by the Committee on House Administration prior to undertaking the travel.

The Special Subcommittee on Contracts of the Committee on House Administration, under the chairmanship of Representative Hays of Ohio, conducted an investigation into certain expenditures of the Committee on Education and Labor, which focused primarily on the travel expenses of Chairman Powell and of the committee's staff during the 89th Congress, and the clerk-hire status of Y. Marjorie Flores. Hearings were held on December 19, 20, 21 and 30, 1966, and a

<sup>1</sup> Patterson, J. Raymond Jones, Lillian Upshur, Julian Jack, Geraldine L. Daniels, Antonio Mendez, Hilda Stokley, Margaret Cox, Fannie Allison, Charles B. Rangel, and James P. Jones.

<sup>2</sup> See pp. 584, 585 *infra*.

report (H. Res. [s]o) 2340) was filed just prior to the end of the 89th Congress. \* \* \* Subsequent to the report of the Hays subcommittee and prior to the organization of the 90th Congress, the Democrat Members-elect, meeting in caucus, voted to remove Representative-elect Powell from his office as chairman of the Committee on Education and Labor.<sup>4</sup>

The 90th Congress met to organize on January 10, 1967. At that time Member-elect Van Deerlin, of California, objected to the administration of the oath to Member-elect Powell.<sup>5</sup> Upon request, Member-elect Powell stepped aside while the oath was administered to the other Members-elect. Shortly thereafter Representative Udall, of Arizona, introduced a resolution that the oath be administered to Member-elect Powell and that the question of his final right to be seated as a Member of the 90th Congress be referred to a select committee. The debate on this resolution centered on whether to seat Member-elect Powell or to delay his seating pending a committee investigation. Before a vote was taken, Member-elect Powell was permitted to make a statement to the House. The Udall resolution was replaced by a substitute resolution offered by Representative Ford, of Michigan, which was then adopted as House Resolution 1, 90th Congress, 1st Session.<sup>6</sup>

House Resolution 1 referred to a Select Committee the question of whether or not Mr. Powell should be seated. This Select Committee was to be comprised of

4. H.R.Rep. No. 27, 90th Cong., 1st Sess., 1-2 (1967) (footnote omitted). The earlier report concluded that Representative Powell and certain staff employees deceived the approving authorities as to travel expenses and that the record raised a strong presumption that the payment of funds to Mr. Powell's wife violated existing law. H.R.Rep. No. 2340, 89th Cong., 2d Sess. 6-7 (1966).
5. 113 Cong.Rec. H 4 (daily ed. Jan. 10, 1967). The proceedings on January 10, 1967, in the House are found in *id.* at H 4-16.
6. The roll call vote to bring the Udall resolution to a vote was 120 yeas, 305 nays.

nine members selected by The Speaker, four of whom would be members of the minority party, designated by the Minority Leader. The Select Committee was authorized to hold hearings and compel the attendance of witnesses and the production of documents by subpoena. House Resolution 1 prohibited Mr. Powell from being sworn in or seated until the House acted on the Committee report. Mr. Powell, however, was permitted to receive the pay, allowances, and emoluments of a Member during the course of the investigation. The Select Committee was to report to the House within five weeks after its members were appointed.

On January 19, 1967, The Speaker appointed nine lawyer-Members to the bipartisan Select Committee.<sup>7</sup> The Select Committee wrote Mr. Powell on February 1, 1967, inviting him to testify and respond to interrogation before the Committee on February 8, 1967. The stated scope of the testimony and interrogation was to include Mr. Powell's

qualifications of age, citizenship and inhabitancy, and the following other matters:

(1) The status of legal proceedings to which [Mr. Powell was] a party in the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which [he had] been held in contempt of court;

(2) Matters of [Mr. Powell's] alleged official misconduct since January 3, 1961.<sup>8</sup>

*Id.* at II 13-14. After the Ford substitution was agreed upon, the amended resolution was approved by a roll call vote of 304 to 0. *Id.* at II 10.

7. The Select Committee members were Emmanuel Celler (N.Y.) (Chairman), James O. Corman (Calif.), Claude Pepper (Fla.), John Conyers, Jr. (Mich.), Andrew Jacobs, Jr. (Ind.), Arch A. Moore, Jr. (W. Va.), Charles M. Teague (Calif.), Clark MacGregor (Minn.), and Vernon W. Thomson (Wis.).

8. Letter from Emmanuel Celler to Adam Clayton Powell, Jr., February 1, 1967, in Hearings on H.Res. 1 Before Select Comm. Pursuant to H.Res. 1, 90th Cong.,

## POWELL v. McCORMACK

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The letter further advised Mr. Powell that he could be accompanied by counsel and that the hearings would be conducted in accordance with House Rule XI, paragraph 20.<sup>9</sup>

Mr. Powell appeared at the February 8 hearing, accompanied by his attorneys. At this time the Chairman, Mr. Cellar, without objection from Mr. Powell, took official notice of the published hearings and conclusions of the Special Subcommittee on Contracts of the Committee on House Administration, relating to the investigation of Mr. Powell conducted during the 89th Congress. See note 4 *supra*, and accompanying text. The Chairman then explained that, in addition to the rights set forth in the letter of February 1, counsel for Mr. Powell would be permitted a reasonable length of time for oral argument and Mr. Powell would be permitted to make a statement to the Committee on all matters as to which he was invited to testify.

Counsel for Mr. Powell moved that the Committee limit its inquiry to Mr. Powell's age, citizenship, and inhabitancy and that, because the scope of the Committee's inquiry was constitutionally limited to these three requirements, it immediately terminate its proceedings and report to the House that Mr. Powell was entitled to his seat.<sup>10</sup> After oral argument on these motions Mr. Powell's counsel made several procedural motions

<sup>9</sup> 1st Sess. 5 (1967) (hereinafter *Hearings*).

After a meeting of counsel for Mr. Powell and counsel for the Select Committee held on February 3, 1967, the Committee's chief counsel wrote to Mr. Powell's counsel on February 6, 1967, stating:

[T]he Select Committee desires to interrogate Mr. Powell [as to] paragraphs 1 to 11 of the "Conclusions" contained in the Report of the Committee on House Administration, Special Subcommittee on Contracts (pp. 6 and 7) relating to an investigation into expenditures during the 89th Congress by the House Committee on Education and Labor and the clerk-hire status of Y. Marjorie Flores (Mrs. Adam Clayton Powell).

Letter from William A. Geoghegan to Mrs. Jean C. Cahn, February 6, 1967, in *Hearings* 59.

asserting the invalidity of the Committee proceedings for failure to provide adequate notice and comply with the due process requirements of an adversary proceeding. In addition, certain specific procedural rights were requested:

1. Fair notice as to the charges now pending against him, including a statement of charges and a bill of particulars by any accuser.
2. The right to confront his accuser, and in particular to attend in person and by counsel, all sessions of this committee at which testimony or evidence is taken, and to participate therein with full rights of cross-examination.
3. The right fully in every respect to open and public hearings in every respect in the proceedings before the select committee.
4. The right to have this committee issue its process to summon witnesses whom he may use in his defense.
5. The right to a transcript of every hearing.<sup>11</sup>

After the Committee took these motions under advisement, Mr. Powell was questioned by counsel for the Committee. After a few questions, Mr. Powell's counsel objected and insisted that Mr. Powell would not proceed further without a ruling on his pending motions. The Select Committee then recessed and, upon reconvening, the Chairman denied all of the

<sup>10</sup> Rule XI, paragraph 20, prescribes committed procedures. In addition to internal housekeeping provisions, it entitles a witness at any hearing to be accompanied by counsel, to submit statements in the discretion of the committee, and to obtain a transcript of testimony, upon payment of costs. H.R.Doc. No. 019, 87th Cong., 2d Sess. 304-308 (1963).

<sup>11</sup> Documentary evidence that Mr. Powell met these three requirements had been previously submitted to the Committee and made part of the record at the hearings. *Hearings* 14-25. Briefs in support of these motions were filed by counsel for Mr. Powell and the American Civil Liberties Union.

<sup>11</sup>. *Hearings* 54.

motions. With specific reference to the procedural motions, the Chairman said:

This is not an adversary proceeding. The committee is going to make every effort that a fair hearing will be afforded, and prior to this date has decided to give the Member-elect rights beyond those afforded an ordinary witness under the House rules.

The committee has put the Member-elect on notice of the matters into which it will inquire by its notice of the scope of inquiry and its invitation to appear, as well as by conferences with, and a letter from its chief counsel to the counsel for the Member-elect.

Prior to this hearing the committee decided that it would allow the Member-elect the right to an open and public hearing and the right to transcript of every hearing at which testimony is adduced.

The committee has decided to summon any witnesses having substantial relevant testimony to the inquiry upon the written request of the Member-elect or his counsel.

The Member-elect certainly has the right to attend all hearings at which testimony is adduced and to have counsel present at those hearings.<sup>13</sup>

After these rulings by the Chairman, Mr. Powell was interrogated, but upon advice of counsel he refused to answer any questions except those relating to his age, citizenship, and inhabitancy in New York. At the end of the February 8 hearing, the Chairman denied a request that Mr. Powell be permitted to make a statement at that time, suggesting that it should be renewed subsequently.<sup>14</sup>

By a letter of February 10, Mr. Powell was informed that the next hearing would be held on February 14. He was further advised that, upon written application, the Select Committee would summon any witnesses "having substantial relevant

testimony to the inquiry. \* \* \*" The letter stated:

The Select Committee has deferred decision on the question raised by the original motion of your counsel as to whether the qualifications for membership in the House, specifically enumerated in Article I, Section 2, of the Constitution, age, citizenship, and inhabitancy, should be deemed exclusive. Further, we are of the opinion that the Select Committee is required by House Resolution 1, 90th Congress, to inquire not only into the question of your right to take the oath and be seated as a member of the 90th Congress, but additionally and simultaneously to inquire into the question of whether you should be punished or expelled pursuant to the powers granted by the House under Article I, Section 5, Clause 2 of the Constitution. In other words, the Select Committee is of the opinion that at the conclusion of the present inquiry, it has authority to report back to the House recommendations with respect to your seating, expulsion or other punishment.<sup>14</sup>

Finally the letter queried whether in both the seating phase and the punishment and expulsion phase, Mr. Powell would refuse to testify about the legal proceedings against him and his alleged official misconduct. He was again invited to testify and advised he would be allowed to make a statement.

At the hearing on February 14 attended by Mr. Powell's attorneys but not by Mr. Powell, it was stated that Mr. Powell would not testify concerning the court proceedings or alleged official misconduct in either phase of the Committee's inquiry. Mr. Powell's attorneys reasserted their position that age, citizenship, and inhabitancy were the exclusive qualifications, and, further, took the position that no inquiry on the question of punishment or expulsion was possible until a Member had been seated,

13. Hearings 59.

14. Hearings 107.

14. Letter from Emanuel Celler to Adam Clayton Powell, February 10, 1967, in Hearings 110.

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and that the two issues—seating and punishment or expulsion—could not be merged into one proceeding.<sup>16</sup> The Select Committee then proceeded to hear evidence concerning the New York litigation involving Mr. Powell and evidence concerning the air travel, expense reimbursement and bank accounts of Mr. Powell and his associates.

Neither Mr. Powell nor his attorneys attended the final hearing of the Select Committee on February 16. At that time testimony was received from Mrs. Adam Clayton Powell (Y. Marjorie Flores) with respect to her financial affairs and those of her husband. Testimony was also received from a former assistant to Mr. Powell concerning disbursements for airplane travel. After the close of the hearings, counsel for Mr. Powell submitted another brief, reiterating the points previously raised.

On February 23, 1967, the Select Committee issued its report. Mr. Powell was found to be over 25 years of age, a United States citizen for more than 7 years, and, on the date of his election, an inhabitant of the State of New York.<sup>17</sup> The Committee also found, however, that Mr. Powell had asserted an unwarranted privilege and immunity from the processes of the courts of the State of New York; had wrongfully and wilfully diverted House funds for use of others and himself, in his capacity as a Member of Congress and as a committee chairman; and had made false reports on expenditures of foreign exchange currency to the Committee on House Administration.<sup>18</sup> Based on these findings of fact, the Select Committee recommended the adoption of a resolution stating:

1. That the Speaker administer the oath of office to the said Adam Clayton Powell, Member-elect from the 18th District of the State of New York.

18. *Hearings 111-18.*

18. The Committee report noted that no question as to Mr. Powell's age or citizenship had been raised but that members of the House and the public questioned his inhabitancy. H.R.Rep. No. 27, 90th Cong. 1st Sess. 5 n. 7 (1967).

2. That upon taking the oath as a Member of the 90th Congress the said Adam Clayton Powell be brought to the bar of the House in the custody of the Sergeant-at-Arms of the House and be there publicly censured by the Speaker in the name of the House.

3. That Adam Clayton Powell, as punishment, pay to the Clerk of the House to be disposed of by him according to law, \$40,000. The Sergeant-at-Arms of the House is directed to deduct \$1,000 per month from the salary otherwise due the said Adam Clayton Powell and pay the same to said Clerk, said deductions to continue while any salary is due the said Adam Clayton Powell as a Member of the House of Representatives until said \$40,000 is fully paid. Said sums received by the Clerk shall offset to the extent thereof any liability of the said Adam Clayton Powell to the United States of America with respect to the matters referred to in the above paragraphs 3 and 4 of the preamble to this resolution. [See pp. 884, 885 *infra*.]

4. That the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 90th Congress.

5. That if the said Adam Clayton Powell does not present himself to take the oath of office on or before March 13, 1967, the seat of the 18th District of the State of New York shall be deemed vacant and the Speaker shall notify the Governor of the State of New York of the existing vacancy.<sup>19</sup>

The report and proposed resolution of the Select Committee were presented to the House on March 1, 1967.<sup>20</sup> Although notice of this submission had been published in the Congressional Record,<sup>21</sup> Mr.

17. *Id.* at 81-82.18. *Id.* at 84.

19. The relevant proceedings on March 1, 1967, are found at 113 Cong.Rec. H 1018-57 (daily ed. March 1, 1967). .

20. 113 Cong.Rec. D 106 (daily ed. Feb. 24, 1967).

Powell did not appear in the House on March 1. The House extensively debated the proposed resolution, considering, *inter alia*, whether age, citizenship, and inhabitancy were the sole grounds for exclusion from membership in the House; whether the House should first seat Mr. Powell and then determine whether to punish or expel him; and whether a two-thirds vote would be required to exclude him on the basis of the Select Committee's findings. At the conclusion of debate, the House rejected, by a vote of 222 to 202, a motion to bring the resolution to an immediate vote. Mr. Curtis, of Missouri, offered an amendment to the Committee resolution; the thrust of the amendment was to exclude Mr. Powell and declare his seat vacant. At this point The Speaker ruled that a majority vote would be sufficient to pass the resolution if so amended.<sup>21</sup> After further debate this amendment was adopted by a roll call vote of 248 to 176. The amended resolution was then agreed upon, 307 to 116. The Select Committee's proposed preamble was then adopted so that House Resolution 278, 90th Congress, 1st Session, in its final form read:

~~WHEREAS, The Select Committee appointed Pursuant to H.R. Res. 1 (90th Congress) has reached the following conclusions:~~

~~First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship, and Inhabitancy for membership in the House of Representatives and holds a Certificate of Election from the State of New York.~~

~~Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the~~

<sup>21.</sup> 113 Cong. Rec. II 1042 (daily ed. March 1, 1907). Mr. Curtis, speaking to his proffered amendment, stated:

~~During the debate on the resolution, for which this is a substitute, I advanced my own theory on what power was derived from the power of expulsion. I said that I felt the power of~~

court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964 to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D. C. or the State of New York as required by law.

Fourth, as Chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administrative Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member; Now, therefore, be it

~~Resolved, That said Adam Clayton Powell, Member-Elect from the Eighteenth District of the State of New York, be and the same hereby is excluded from membership in the 90th Congress, and that the Speaker shall notify the Governor of the State of New York of the existing vacancy.~~

~~Thereafter, Appellants brought the suit from which the present appeal derives. Because of its importance to the resolution of the issues here presented, some attention must be devoted to the nature of the present claims. By their own statement of this case, Appellants~~

~~expulsion very clearly implied the right of exclusion. I do not see how anyone can argue very seriously against this implied power.~~

~~Also, if this is true, then in my own judgment exclusion would require a two-thirds vote.~~

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sued the Members of the present House of Representatives in a class action. Their complaint in the District Court named Representatives John W. McCormack, Carl Albert, Gerald R. Ford, Emanuel Celler, Arch A. Moore, Jr., and Thomas B. Curtis "individually and, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, as representatives of a class of citizens who are presently serving in the 90th Congress as members of the House of Representatives." Speaker McCormack was also named in his official capacity. The Clerk of the House of Representatives, the Sergeant-at-Arms and the Doorkeeper were each named individually and in their official capacities.

Appellants' complaint challenged the action of the House by claiming that "House Resolution No. 278 is null and void and in violation of the Constitution of the United States, in particular Article I, Section 2(2) thereof which sets forth the exclusive qualifications for membership in the House of Representatives," and also because "it violates Article I, Section 1 (2, cl. 1) of the Constitution of the United States which provides that members of the House shall be elected by the people of each state." It further alleged that the House action violated the "basic rights" of the electors of the 18th Congressional District of New York and that, as non-white citizens, these electors were being denied their rights under the fifth, thirteenth, and fifteenth amendments, and, as females, certain of the electors were being denied their rights under the nineteenth amendment. The complaint also attacked House Resolution 278 as a bill of attainder, an ex post facto law and as cruel and unusual punishment. Appellants further asserted that the hearings conducted by the Select Committee violated the fifth and sixth amendments by denying "the elemental rights of due process, including but not limited to notice of charges, the right of confrontation of witnesses, effective representation by counsel who could cross-examine witnesses in regard to any matter alleged. \* \* \*

Appellants' complaint also challenged the actions of certain of the individuals here sued as follows. Speaker McCormack was alleged to have violated the fifth amendment in declaring a vacancy in the 18th Congressional District contrary to Article I, section 2(4), (5), section 3(6), (7) and section 5(2), and 2 U.S.C. § 8 (1964). The Speaker was also challenged for his refusal to administer the oath to Mr. Powell ("under color and authority of his office and the illegal and unconstitutional actions of the House of Representatives") and for his threat to exclude Mr. Powell from occupancy of his office space. The complaint further stated that the Clerk of the House threatened to refuse to perform the services for Mr. Powell to which a duly-elected Congressman is entitled, that the Sergeant-at-Arms refused to pay Mr. Powell his salary, and that the Doorkeeper threatened to refuse to admit Mr. Powell to the House Chamber.

We take special notice of the manner in which Appellants characterized their action: "this is a proceeding to restrain the enforcement, operation or execution of House Resolution No. 278. \* \* \* The relief prayed for by the Appellants was that a statutory three-judge court be convened, that it grant a permanent injunction restraining Appellees from executing House Resolution 278, and that it issue a permanent injunction restraining Speaker McCormack from refusing to administer the oath, the Clerk from refusing to perform the duties due a Member of the House, the Sergeant-at-Arms from refusing to pay Mr. Powell, and the Doorkeeper from refusing to admit Mr. Powell to the Chamber. The requested injunction would also restrain the named Representatives "and all other members of the class of citizens they represent who are members of the House of Representatives from taking any action to enforce House Resolution No. 278 or any other action which will deny to plaintiff Adam Clayton Powell, Jr., the right to be seated. \* \* \* The complaint also asked for declaratory judgment that the denial of his seat violated

the Constitution. In addition, Appellants requested writs of mandamus to require Speaker McCormack to administer the oath of office and to compel the relief requested against the other named officials. Finally, Appellants requested preliminary injunctions granting similar relief pending adjudication of the claims.

After detailed pleading and arguments of counsel, the District Court denied Appellants' application for a three-judge court, dismissed the complaint "for want of jurisdiction of the subject matter," and denied the motion for a preliminary injunction. Powell v. McCormack, 200 F.Supp. 354, 360 (D.D.C.1967). On April 27, 1967, this court denied Appellants' motion for summary reversal. Appellants' petition for writ of certiorari prior to judgment in this court was denied by the Supreme Court on May 29, 1967, Powell v. McCormack, 387 U.S. 933, 37 S.Ct. 2056, 18 L.Ed.2d 995 (1967).

While those legal proceedings were pending Mr. Powell was re-elected to the House of Representatives on April 11, 1967. The formal certification of election was received by the House on May 1, 1967. Mr. Powell has not presented himself again to the House or asked to be given the oath of office.

#### *Claims and Issues*

The issues on this appeal raise profound questions of constitutional law which go to the very heart of our form of government of powers delegated to separate branches by a written constitution. Inextricable are fundamental aspects of our commitment to representative government with elected legislators responsible directly to the people.

Appellants contend:

- (a) that dismissal of the complaint in the District Court for want of jurisdiction was error;
- (b) that the claims are justiciable;
- (c) that refusal to seat Mr. Powell who was over twenty-five years of age, more than seven years a citizen and an inhabitant of New York

violated Article I, sections 2 and 5 of the Constitution;

- (d) that House Resolution 278 inflicted on Mr. Powell a punishment in violation of the Constitution;
- (e) that Mr. Powell's exclusion from the House violated Due Process;
- (f) that Mr. Powell's exclusion from the House violated rights of the voters of his district to a free choice of their representative;
- (g) that federal courts have power to grant relief requested; and
- (h) that the District Court erred in refusing to certify the necessity for a three-judge court.

The Appellees contend:

- (a) that the Speech or Debate Clause of Article I is an absolute bar to the action;
- (b) that there is no federal subject matter jurisdiction;
- (c) that the complaint presents a political question; and
- (d) that the claims asserted are not justiciable.

#### *Constitutional Provisions*

Because we will have frequent occasion to refer to the text of certain constitutional provisions, we set out here some of the pertinent sections involved in this case:

Art. I, § 2, clause 2: "No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

Art. I, § 5, clause 1: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of Absent Members, in such Manner, and under such Penalties as each House may provide."

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Art. I, § 5, clause 2: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."

Art. I, § 6, clause 1: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

Art. III, § 2, clause 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; \* \* \*."

## PART I

CAN THE COURT ACT?  
JURISDICTION

Historically there have been at least two concepts of the exercise of federal jurisdiction. One is the classical concept that once jurisdiction was found, a court could not decline to act. In *Cohen v. Virginia*, 10 U.S. (6 Wheat.) 284, 404, 5 L.Ed. 267 (1821), for example, Chief Justice Marshall articulated the view that:

We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

22. Both competing theories are discussed in BICKEL, *THE LIABILITIES OF GOVERNMENT* 40-65 (1962). Professor Bickel himself comes very close to the second concept in his views on prudential techniques for avoiding the exercise of jurisdiction. Bickel, Foreword: *The Passive Virtues*, 75 HARV.L.REV. 40 (1962). A more thorough analysis is set forth in Schlesinger, *Judicial Review and the Political Question*:

*See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178, 2 L.Ed. 60 (1803); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV.L.REV. 1, 2-9 (1960). A second view is that, where a court finds jurisdiction, it may nevertheless decline to exercise its power. L. HAND, *THE BILL OF RIGHTS* 14-18 (1958); Finkelstein, *Judicial Self-Limitation*, 87 HARV.L.REV. 338 (1923).<sup>23</sup>

Much of what has been said and written on the concepts of jurisdiction, discretionary jurisdiction, justiciability, case or controversy, and political question, and any effort to fix firm boundaries defining these concepts, is now merged into a series of cases,<sup>24</sup> the most significant of which for our purposes is *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Almost imperceptibly at first, but quite clearly by the 1962 holding in *Baker*, the Supreme Court had established more comprehensive guidelines for identifying federal subject matter jurisdiction and justiciability. Since the present case turns on a constitutional grant of power to a co-equal branch, the application of these guidelines presents what Mr. Justice Brennan termed in *Baker*, "a delicate exercise in constitutional interpretation," *id.* at 211, 82 S.Ct. at 706.

When a court finds that the subject matter of the case is inappropriate for judicial consideration, *Baker* now establishes that it is nonjusticiable and the court declines to exercise admitted jurisdiction:

The District Court was uncertain whether our cause withholding federal judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject matter for

A Functional Analysis, 76 TALM. L.J. 517 (1960).

23. See, e. g., *Gomillion v. Lightfoot*, 364 U.S. 330, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); *Colegrove v. Green*, 328 U.S. 540, 90 S.Ct. 1108, 90 L.Ed. 1432 (1940); *Coleman v. Miller*, 307 U.S. 438, 59 S.Ct. 972, 83 L.Ed. 1886 (1939).

*Judicial consideration*—what we have designated “*nonjusticiableity*.” The distinction between the two grounds is significant. In the instance of non-justiciableity, consideration of the cause is not wholly and immediately foreclosed; rather, the Court’s inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not “arise under” the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a “case or controversy” within the meaning of that section; or the cause is not one described by any jurisdictional statute.

*Baker v. Carr*, *supra*, at 108, 82 S.Ct. at 700 (emphasis added).

The difficulties arising from the terms used on this elusive subject are suggested by the comments of other members of the Court in *Baker*. Mr. Justice Harlan, for example, described the majority holding as an “abrupt departure \* \* \* from judicial history.” He went on to note:

Once one cuts through the thicket of discussion devoted to “jurisdiction,” “standing,” “justiciableity,” and “political question,” there emerges a straightforward issue \* \* \*. Does the complaint disclose a violation of a federal constitutional right \* \* \*, a claim over which a United States District Court would have jurisdiction under 28 U.S.C. § 1943(3) and 42 U.S.C. § 1983? The majority opinion does not actually discuss this basic question, but, as one concurring Justice [Stewart] observes, seems to decide it “*sub silentio*.” *Ante*, p. 261, 82 S.Ct. p. 733.

*Baker v. Carr*, *supra*, at 380-381, 82 S.Ct. 691, 771 (Harlan, J., dissenting).

In *Baker*, where the Court was dealing with state action, what the Court said, perhaps as much as what it did, staked

out something of the new dimensions of federal subject matter jurisdiction, justiciableity, the political question and other doctrines. If *Baker* was, as Mr. Justice Frankfurter thought, “a massive repudiation of the experience of our whole past,” *Id.* at 267, 82 S.Ct. at 737 (dissenting opinion), it is a holding which points the way for us as to the issues of jurisdiction and justiciableity.

Mr. Justice Brennan in *Baker* enumerated three criteria each of which must be present to establish the existence of federal subject matter jurisdiction:

- (1) the cause must “arise under” the Federal Constitution, laws, or treaties (or fall within one of the other enumerated categories of Article III, section 2), and
- (2) the cause must be a “case or controversy” within the meaning of Article III, section 2, and
- (3) the cause must be described in a jurisdictional statute enacted by Congress.

*Id.* at 198, 82 S.Ct. at 700.

#### 1. Arising Under the Federal Constitution.

[1] Subject to congressional enactment, Article III, section 2, grants federal courts jurisdiction over “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; \* \* \*.” In 1875 Congress used similar language in a statute granting federal courts general and original jurisdiction over such cases. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. See 28 U.S.C. § 1331(a) (1964). A commentator has recently noted that:

[t]he key phrase, both in the Constitution and in the statute, is “arises under.” Though the meaning of this phrase has attracted the interest of such giants of the bench as Marshall, Waite, Bradley, the first Harlan, Holmes, Cardozo, and Frankfurter, and has been the subject of voluminous scholarly writing, it cannot be said that any clear test has yet been de-

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veloped to determine which cases "arise under" the Constitution, laws, or treaties of the United States.

## C. WRIGHT, FEDERAL COURTS 48 (1963).

Appellants' complaint in the District Court is predicated on the several Article I powers of the House, Article III, and on the Bill of Rights and Civil Rights Amendments. Neither the litigants nor the District Court<sup>24</sup> challenged the substantiality and importance of the constitutional claims, one of the most significant factors in the determination of subject matter jurisdiction.<sup>25</sup> Thus, leaving for subsequent discussion the question of whether the case "arises under" in the context of the statutory grant of jurisdiction, this case would appear to present a substantial claim which arises "directly" under the Constitution,<sup>26</sup> and thus "arises under" in the context of the constitutional grant of jurisdiction of Article III. This conclusion is fortified by the broad reading given to Article III by Chief Justice Marshall in *Osborn v. President, etc., Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846-858, 6 L.Ed. 204 (1824). See WRIGHT, *supra*, at 48-52; Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U.P.A.L.REV. 639, 649 (1942).

Appellees argue that the issue presented by this case arises exclusively and finally under Article I, section 5, and thus the case is withdrawn from the judicial power articulated in Article III. Their argument, which has the support

of various contemporary constitutional authorities,<sup>27</sup> is that the text of the Constitution—"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members"—carved out from the Article III judicial powers all jurisdiction of the courts to review congressional judgment under this clause. Stated in another way, Appellees' argument is that the Constitution assigned this special kind of judging function to the Legislative Branch.<sup>28</sup> If so, it is the Constitution's allocation of powers that requires this result, rather than any failure of the claim to arise under the Constitution. Article III grants judicial power to cases "arising under" the Constitution as a whole, not under any particular provision of it.

## 2. Case or Controversy.

[2] It is clear from the debates at the Philadelphia Convention that the Framers intended Article III's requirement of "case or controversy" to mean cases or controversies "of a judiciary nature." E. g., 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (rev. ed. 1966). Analysis of English and Colonial precedents shows that after a long and bitter struggle judicial bodies were denied the power of review over legislative judgments concerning elections and qualifications of members. See 1 H. REMICK, THE POWERS OF CONGRESS IN RESPECT TO MEMBERSHIP AND ELECTIONS 1-62 (1920); see generally M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMER-

24. Powell v. McCormack, 200 F.Supp. 384, 385-390 (D.D.C.1962).

25. Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were "so attenuated and unsubstantial as to be absolutely devoid of merit." *Newburyport Water Co. v. City of Newburyport*, 103 U.S. 501, 570, 24 S.Ct. 553, 557, 48 L.Ed. 700 or "frivolous." *Bell v. Hood*, 327 U.S. 678, 688, 68 S.Ct. 773, 80 L.Ed. 930. That the claim is unsubstantial must be "very plain." *Hart v. B. F. Keith Vaudeville Exchange*, 202 U.S. 271, 274, 48 S.Ct. 540, 57 L.Ed. 977.

*Baker v. Carr*, *supra*, 309 U.S. at 190, 83 S.Ct. 691 (footnote omitted).

26. Minckin, *The "Federal Question" in the District Courts*, 53 COLUM.L.REV. 107, 107-08 (1953).

27. See Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW 30 (E. Cahn ed. 1954); Schrapp, *supra* note 22, at 530-40; Wechsler, *supra*, at 8.

28. Appellees' argument finds its logical basis in the classical theory of judicial review previously discussed. Under that view, as Professor Wechsler noted, the primary question is whether the Constitution commits the "autonomous determination" of the issue to another coordinate branch. Wechsler, *supra*, at 7-8.

ICAN COLONIES (1943); C. WITTKO, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (1921). Nothing at the Convention suggests that the "case or controversy" language of Article III was intended to change this familiar and historical allocation of powers. See 2 M. FARRAND, *supra*, at 30, 182-33, 186. Indeed, where departures from English precedents were intended they were explicitly written into Article III; for example, the provision extending judicial power to include cases in equity, 2 *id.* at 428.

No cases have been cited as directly holding, and our search has not revealed any basis for saying, that a claim to a seat in the House is of a kind traditionally the concern of courts in the sense, for example, that Mr. Justice Frankfurter viewed traditional cases as those which English courts dealt with at the time of our Convention, *Joint Anti-Nazi Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring); *Coleman v. Miller*, 307 U.S. 433, 460, 59 S.Ct. 972, 83 L.Ed. 1385 (1939) (Frankfurter, J., concurring); see *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568, 59 S.Ct. 667, 83 L.Ed. 987 (1939). All traditions must have a genesis, however, and legal traditions are no exception. One might view *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966), for example, as departing from existing federal traditions when it found jurisdiction over a state legislator's claim to his seat. It is interesting, however, that nowhere in the opinions of the three-judge *Bond* court

29. The Court merely stated: "Our conclusion \* \* \* that this cause presents no justiciable 'political question' settles the only possible doubt that it is a case or controversy." *Baker v. Carr, supra*, 300 U.S. at 198, 82 S.Ct. at 700.

30. Appellants also rely on the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1964), and the Three Judge Court statute, 28 U.S.C. § 2282 (1964), but it is clear that these statutes are not jurisdictional. *Skelley Oil Co. v. Phillips Petroleum Co.*, 399 U.S. 607, 671-672, 70

is there any discussion of "case or controversy." *Bond v. Floyd*, 251 F.Supp. 333 (N.D.Ga.1966). Nor did the Supreme Court opinion in *Bond* elaborate on the "case or controversy" aspect. The presence of a case or controversy was seemingly taken for granted or decided *sub silentio*. The same is true in *Baker v. Carr*. Although *Baker* explicitly tabulates "case or controversy" as one of three indispensable factors for jurisdiction, nowhere in that opinion is there any discussion indicating just how the reapportionment of state electoral districts fell within the scope of matters "of a judiciary nature."<sup>29</sup> Yet the holding plainly assumes that a case or controversy was presented.

Against this background we can hardly conclude that Mr. Powell's claim to a seat in the House fails to present a case or controversy as those terms must now be construed.

### 3. Statutory Grant of Jurisdiction.

[3] Even where the requisites of Article III, section 2 are met—that is, the claim presents a case or controversy which "arises under" the Constitution or laws of the United States—jurisdiction of federal courts is dependent on an affirmative grant by Congress. U. S. CONST. art. III, § 1; *Baker v. Carr, supra*, 309 U.S. at 198, 82 S.Ct. 691; *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1868).

Our examination of the various jurisdictional statutes relied upon by Appellants reveals that jurisdiction can be based only on 28 U.S.C. § 1331(a) (1964),<sup>30</sup> the relevant provision of which

S.Ct. 870, 94 L.Ed. 1104 (1960) (declaratory judgment); *Cadillac Publishing Co. v. Summersfield*, 97 U.S.App.D.C. 14, 227 F.2d 20, cert. denied, 350 U.S. 901, 76 S.Ct. 170, 100 L.Ed. 701 (1955) (same); *Van Buskirk v. Wilkinson*, 210 F.2d 735 (9th Cir. 1964) (three judge court). The civil rights statutes relied upon, 42 U.S.C. §§ 1971(a) (1), 1981, 1983 (1964), and 42 U.S.C. § 1971(a) (2) (1964), as amended, § 16, 70 Stat. 445 (1965), are not applicable because they deal either with state action or with specific acts of voter discrimination which are not

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In: "The district courts shall have original jurisdiction of all civil actions \* \* \* [which arise] under the Constitution, laws, or treaties of the United States." Although there is a paucity of legislative history for the statute, see generally FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 65-66 (1927), commentators agree that a broad grant of jurisdiction was intended. Mishkin, *supra* note 20, at 100; Chdnbourn & Lovin, *supra*, at 644-645 (1942); Forrester, *The Nature of a "Federal Question,"* 16 TULANE L. REV. 362, 374-385 (1942). We have already determined that this case "arises under" the Constitution for the purposes of the Article III definition of judicial power. While section 1331 is not to be equated with the potential for federal jurisdiction in Article III, see e. g., Zwickler v. Koota, 389 U.S. 241, 246-247 n. 8, 88 S.Ct. 391, 10 L.Ed.2d 444 (1967), and cases cited therin, we conclude that the statute is broad enough to operate as an affirmative jurisdictional grant here. See, e. g., Gully v. First Nat'l Bank, 290 U.S. 100, 112-114, 57 S.Ct. 68, 81 L.Ed. 70 (1936); Bergman, *Appraisal of Federal Question Jurisdiction,* 46 MICH. L. REV. 17, 39-45 (1947).<sup>31</sup>

alleged to have been involved here. Appellants' final jurisdictional predicate, 28 U.S.C. § 1331(4) (1964) is equally unavailing. To the extent that it might confer jurisdiction as to federal deprivation of civil rights protected by Acts of Congress, those very acts, we have just noted, are not applicable here.

31. Appellees argue that 28 U.S.C. § 1334 (1964), conferring jurisdiction to recover possession of office but excluding the office of Representative in the House, plainly denied jurisdiction in cases like this. See Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948), cert. denied, 339 U.S. 904, 99 S.Ct. 491, 03 L.Ed. 1000 (1949). That statute, however, is limited to election disputes. In addition, it requires that the sole question involved arise out of the denial of voting rights on account of race, color or servitude.

For other dismissals based on lack of a jurisdictional statute see, Peterson v.

## PART II

SHOULD THE COURTS ACT?  
JUSTICIABILITY—DISCRETION TO ACT

[4] Having found that under *Baker* jurisdiction arises, we now turn to the inquiry as to the appropriateness or inappropriateness of the subject matter of Appellants' claims for judicial consideration. Absent federal subject matter jurisdiction there would be nothing on which a court could act, but "In the instance of nonjusticiable, consideration of the cause is not wholly and immediately foreclosed; rather, the court's inquiry necessarily proceeds" to determine whether a duty and its breach can be identified and determined and a remedy molded. *Baker v. Carr, supra*, 369 U.S. at 198, 82 S.Ct. at 700.

Appellees argue that the cause presents on its face a "political question."<sup>32</sup> But the fact that a claim seeks the enforcement of a political right or a claim to political office, as here, does not necessarily mean that it raises a "political question." See, e. g., Bond v. Floyd, *supra*. The term "political" has been used to distinguish questions which are essentially for decision by the political branches from those which are essentially for adjudication by the judicial branch.

32. *Hens. 233 N.Y.Supp. 12 (N.Y.Town 1961)* (suit to enjoin voting officials from unlocking voting machines after congressional election); *Krogh v. Hornor, 8 F.Supp. 933 (N.D.Ill.1934)* (suit for writ of prohibition against Governor's issuance of certificates of election of Congressman).

33. The standard authorities on the nature of a "political question" are: Frank, *supra* note 27, at 30-43; Pox, *THE SUPREME COURT AND POLITICAL QUESTIONS* (1930); Field, *The Doctrine of Political Questions in the Federal Courts,* 8 MINN.L.L.J. 485 (1924); Finkelstein, *Judicial Self-Sabotage*, 37 HARV.L.REV. 338 (1924); Finkelstein, *Further Notes on Judicial Self-Sabotage*, 30 HARV.L.REV. 221 (1920); McCloskey, *Forward: The Reapportionment Case,* 70 HARV.L.REV. 54, 59-64 (1903); Sharp, *supra* note 22; Weston, *Political Questions*, 38 HARV.L.REV. 298 (1923).

In some areas the political question can be readily discerned; for example, the conduct of foreign policy is vested exclusively in the Executive, e. g., *United States v. Curtiss-Wright Export Corp.*, 290 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936); *Oetjen v. Central Leather Co.*, 246 U.S. 207, 302, 38 S.Ct. 300, 62 L.Ed. 726 (1918), whereas the power to declare war or raise armies is vested in the Congress, U. S. CONST. art. I, § 8. Even in these areas questions can arise on the peripheries so that the labels of "foreign policy" or "state of war" are not automatic barriers to all judicial scrutiny, e. g., *The Three Friends*, 166 U.S. 1, 63-66, 17 S.Ct. 495, 41 L.Ed. 897 (1897); *Baker v. Carr*, *supra*, 300 U.S. at 212-213, 82 S.Ct. 691, and cases cited therein. No purpose would be served in pursuing delineation and we refer to it only to indicate that the law does not pivot on labels, even those of constitutional origin.

Appellees stress the applicability of a series of cases containing language indicating that the exercise of congressional power to judge the qualifications of members is beyond the scope of the judicial power, i. e., the courts have no jurisdiction at all. In the cases cited to us, either the issue of jurisdiction was never reached,<sup>33</sup> or the language relied upon is dictum.<sup>34</sup> Nevertheless, we note that they treat this congressional power as exclusive.<sup>35</sup>

The only holding of this court which bears directly on the issue is *Sevilla v. Elizalde*, 72 App.D.C. 108, 112 F.2d 29 (1940). In *Sevilla*, a resident of the Philippine Commonwealth sought a bill in equity to enjoin the resident commission-

er of the Philippines from holding office because he lacked the requisite qualifications. The qualifications were specified in the Independence Act which provided for the resident commissioner to have a seat but no vote in the United States House of Representatives. The court characterized his role as partly a diplomatic resident of a "foreign" state and partly a territorial delegate to Congress. Noting that the question of the qualifications of foreign diplomats was committed to the Executive, and the question of the qualifications of a delegate was committed to Congress, this court held that the case presented a political question:

Courts have no jurisdiction to decide political questions. These are such as to have been entrusted by the sovereign for decision to the so-called political departments of government, as distinguished from questions which the sovereign has set to be decided in the courts.

\* \* \* \* \*

Article I, section 5 of the Constitution provides that "each house shall be the judge of the elections, returns and qualifications of its own members \* \* \*." And the Supreme Court has recognized that although these powers are judicial, as distinguished from legislative or executive, in type, they have nevertheless been lodged in the legislative branch by the Constitution.

*Id.* at 111, 116, 112 F.2d at 82, 87. The *Sevilla* holding standing alone might well be dispositive of the instant appeal but it must be read in light of cases since then, culminating in *Baker*.

<sup>33</sup> *E. g.*, *Seymour v. United States*, 77 F.2d 577, 584, 90 A.L.R. 890 (8th Cir. 1935).

<sup>34</sup> *Reed v. County Commissioners*, 277 U.S. 370, 389, 48 S.Ct. 531, 72 L.R. 924 (1928); *Jones v. Montague*, 104 U.S. 147, 153, 24 S.Ct. 611, 48 L.Ed. 918 (1904); *Johnson v. Stevenson*, 170 F.2d 108, 110 (5th Cir. 1948), cert. denied, 330 U.S. 904, 60 S.Ct. 491, 98 L.Ed. 1009 (1940); *Application of James*, 241 F.Supp. 858, 860 (S.D.N.Y.1946); *Peterson v. Sears*,

<sup>288 F.Supp. 12, 13-14 (N.D.Iowa 1944);</sup> *Keogh v. Horner*, 8 F.Supp. 933, 935 (S.D.Ill.1934); *In re Voorhis*, 291 F. 673, 675 (S.D.N.Y.1923).

<sup>In three of these cases, *Johnson*, *Peterson*, and *Keogh*, the decision was based on lack of an appropriate jurisdictional statute.</sup>

<sup>35</sup> For state cases to a similar effect see *Laxalt v. Cannon*, 80 Nev. 588, 307 P.2d 400 (1964); *In re Williams' Contest*, 109 Minn. 510, 270 N.W. 596 (1906).

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The Supreme Court case on which the Sevilla court relied in reaching its conclusion is *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 49 S.Ct. 452, 78 L.Ed. 867 (1929). There a Senate investigation into the election of a Senator involved the subpoena of a witness to testify as to the source of campaign contributions. He refused to appear and the Senate ordered him arrested and brought to the Chamber. The Supreme Court held that the Senate had the power to bring a witness before it by arrest warrant pursuant to the exercise of its power to judge the qualifications of its Members.<sup>26</sup> More importantly, the Supreme Court noted that the power to judge encompassed the power to "render a judgment which is beyond the authority of any other tribunal to review," *id.* at 613, 49 S.Ct. at 465. See Mr. Justice Douglas' concurring opinion in *Baker v. Carr*, *supra*, 369 U.S. at 242 n. 2, 82 S.Ct. at 723: "Of course each House of Congress, not the Court, is 'the Judge of the Elections, Returns, and Qualifications of its own Members.'"

Nonjusticiability of a question because it is found to be essentially political is declared by *Baker* to be a doctrine peculiar to confrontations within the federal establishment and derives from the fundamental structure of our system of divided and separate powers.<sup>27</sup> In *Baker* and *Bond* any possible confrontation was between federal power and a state. Cautiously avoiding any attempt to state the exclusive criteria for identifying a political question, Mr. Justice Brennan in *Baker* suggested six factors to be found

26. In *Barry* the Senate was not judging qualifications in the sense here involved but inquiring into whether, because of fraud and illegal conduct of the candidate, no "election" had been held.

27. [I]n the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

"prominent on the surface" of a political question case. They bear restatement:

- [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- [2] or a lack of judicially discoverable and manageable standards for resolving it;
- [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
- [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
- [5] or an unusual need for unquestioning adherence to a political decision already made;
- [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr, supra*, at 217, 82 S.Ct. at 710.

Treating them as "symptoms" of a nonjusticiable political question, rather than as the exclusive criteria for identifying one, we turn to their application to this record, having in mind that under *Baker* the presence of any one of these six factors may be a bar to justiciability. This much *Baker* has settled.

(1) Article I, section 5 of the Constitution would seem in plain terms to vest in the House "a textually demonstrable constitutional commitment of the issue" of a judging function concerning the

*Baker v. Carr, supra*, at 210, 82 S.Ct. 700. See *McCloskey, supra* note 32, at 02.

*Luther v. Borden*, 48 U.S. (7 How.) 1, 12 L.Ed. 581 (1840), is the foremost of the guaranty clause cases. Although the dispute there arose within a state, the court focused on the potential conflict between the federal judicial power and the obligation of the legislative and executive branches to fulfill the guaranty clause.

elections, returns and qualifications of its own Members. The language that "Each House shall be the judge" can hardly mean less than that the Members, for this purpose, become "judges," withdrawing judging of qualifications from the judicial branch.

Mr. Powell and the class Appellants contend that what was textually committed to the House by Article I, section 5, was the narrow power to judge whether a Member-elect met the Article I, section 2, criteria of age, citizenship and inhabitancy and no more. On its face, section 5 commits the power to judge qualifications to the House *in some measure*.<sup>32</sup> Although it may not be necessary to decide whether the power is confined to section 2 criteria or limited in some other respect, it is clear that a general power of judging has been committed by the Constitution to the House. If other factors, now to be considered, render the claims inappropriate for consideration, we need not rely on what seems to be a textual commitment.

(2) Are there "judicially discoverable and manageable standards for resolving" the issues raised? Laying aside for the present the availability of an efficient judicial remedy, it would be difficult to say that there are no "manageable standards" for adjudicating the issues raised. Familiar judicial techniques are available to construe the meaning of Article I, section 2, criteria of age, citizenship, and inhabitancy and to decide whether those are the sole grounds on which a Member-elect may constitutionally be excluded. The language of *Baker*, "manageable standards for resolving" the claims, must, however, be read in light of the earlier formulation inquiring "whether protection for the right asserted can be judicially molded." When we consider whether the available "manageable standards" are adequate for resolving the question

<sup>32</sup>. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or .. whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitu-

in the sense of solving and settling it, we are forced to conclude that courts do not possess the requisite means to fashion a meaningful remedy to compel Members of the House to vote to seat Mr. Powell or to compel The Speaker to administer the oath.

(3) This case does not present aspects to which the third criterion of *Baker* applies since the determination of the scope of a constitutional grant of power is not an "initial policy determination of a kind clearly for nonjudicial discretion," such as a declaration of war.

(4) It is difficult to see, assuming a decision favorable to Mr. Powell, that there could be an efficient judicial resolution which was contrary to the action of the House "without expressing lack of respect due coordinate branches of government." Appellants urge that the courts should not concern themselves with the prospect of a direct confrontation because Members of the House, or a majority of them, would as a matter of comity, respect a holding of this court and abide by its rulings. The issue is not, however, what reaction could be expected from the coordinate branch, but the nature of the judicial mandate requested.

(5) There does not seem to be present, except as it arises out of paragraphs (1) and (4) above, "an unusual need for unquestioning adherence to a political decision already made." This fifth criterion of *Baker* has no direct relevance here as it would for example to a specific foreign policy determination within the scope of Executive power. See, e. g., *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948); *Eminente v. Johnson*, 124 U.S.App.D.C. 56, 361 F.2d 73, cert. denied, 386 U.S. 929, 87 S.Ct. 287, 17 L.Ed.2d 211 (1966); *Pauling v. McNamara*, 118 U.S.App.D.C.

tional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

*Baker v. Carr*, *supra*, at 211, 82 S.Ct. at 706 (emphasis added).

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50, 331 F.2d 706 (1963), cert. denied, 377 U.S. 933, 84 S.Ct. 1336, 12 L.Ed.2d 297 (1964).

(6) There is, in only a limited sense, and perhaps not at all in the sense contemplated by *Baker*, a "potentially of embarrassment from multifarious pronouncements by various departments on one question." However, if we view the risk of conflicting pronouncements by the House and the courts as within this criterion, the potential for embarrassment is rather obvious. A judicial mandate to seat Mr. Powell would in effect be a command to The Speaker to administer the oath contrary to the terms of House Resolution 278. The command to seat Mr. Powell might be obviated were we to hold that our mandate constituted an "equity substitute" for a resolution of the House, the effect of which would be to treat him as having been sworn and seated. But the resulting confusion from such conflicting pronouncements seems clear.

It would therefore appear that not one but probably several of the *Baker* "symptoms" of nonjusticiableness are prominent on the surface of the claims asserted and indeed are inextricable from them; this alone might well be sufficient to warrant a conclusion of "the inappropriateness of the subject matter for judicial consideration." *Baker v. Carr*, *supra*, 360 U.S. at 108, 82 S.Ct. at 700. *Baker*, it will be recalled, emphasizes the difference between jurisdiction and justiciableness. After stating that the distinction "is significant," the Court noted:

In the instance of nonjusticiableness, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.

*Ibid* (emphasis added).

If we read "duty" and "breach" in the conventional judicial sense, good argu-

ments can be advanced that we can judicially identify the asserted duty of the House to seat a qualified Member-elect, and that a breach of such a duty can, in the abstract, be judicially determined. We will assume, *arguendo*, that these hurdles are cleared. However, when we come to the next inquiry, "whether protection for the right asserted can be judicially molded," we are confronted with problems quite different from and indeed not present in adjudications of conventional equitable claims or claims involving state action. Although Professor Wechsler was not pointing to precisely the problem we have here, his characterization of political questions is apropos: "what is crucial \* \* \* is not the nature of the question but the nature of the answer that may validly be given by the courts." Wechsler, *supra*, at 18.

In *Baker*, the Supreme Court concluded that protection for the rights arising under the equal protection clause could be molded, saying "we have no cause at this stage to doubt the District Court will be able to fashion relief \* \* \*." *Baker v. Carr*, *supra*, at 108, 82 S.Ct. at 690. No further elucidation of this is found in the Court's opinion. The only other reference to the scope and mechanics of the relief to be molded is the comment of Mr. Justice Douglas that "any relief accorded can be fashioned in the light of well-known principles of equity." *Id.* at 260, 82 S.Ct. at 727 (Douglas, J., concurring opinion).

Can the District Court mold relief which will protect the rights here asserted? Looking first to the complaint in the District Court, we find that after the prayer for a three-judge court, the complaint asks judgment:

- (1) to enjoin execution of House Resolution 278;
- (2) to require The Speaker of the House to administer the oath to Mr. Powell;
- (3) to enjoin all Members of the House from any action to enforce Resolution

278 or otherwise to deny Mr. Powell his seat;

(4) for declaratory judgment declaring House Resolution 278 null and void;

(5) for injunctive and mandatory relief addressed to non-elected employees of the House relating to access to the House, pay, and other perquisites of the office of a Member.

Any Judgment which enjoined execution of House Resolution 278, or commanded the Speaker of the House to administer the oath, or commanded Members of the House as to any action or vote within the Chamber would inevitably bring about a direct confrontation with a co-equal branch and if that did not indicate lack of respect due that Branch, it would at best be a gesture hardly comporting with our ideas of separate co-equal branches of the federal establishment. These circumstances would give rise to a classic political question and fall within the definition of such a question under *Baker*. On this record, therefore, the claims of Appellants for coercive equitable relief are inappropriate for judicial consideration.

#### *Appropriateness of Subject Matter for Declaratory Relief*

[4] Although we have determined that we cannot mold relief in coercive form, we next consider Appellants' claims for a declaratory judgment independent

88. One of the reasons, not present here however, that declaratory relief should be considered independently of other relief is the fact that coercive relief "looks only to some immediate need, whereas the declaration of rights, by clarifying the legal relations, has prospective value in stabilizing the legal position. \* \* \*" *BONCHARD, DECLARATORY JUDGMENTS* 433 (2d ed. 1941).

40. All authorities agree that the purpose of a declaratory judgment is to settle actual controversies before they ripen into violations of law or breaches of duty and to afford relief from uncertainty and insecurity by a "premature" adjudication. See, e. g., *BONCHARD*, *supra* note 89, at 200; *Luckenbach S.S. Co. v. United States*, 312 F.2d 545 (2d Cir. 1963);

of the coercive equitable relief sought.<sup>39</sup> *Cf. Zwickler v. Kootin*, 380 U.S. 241, 253-254, 88 S.Ct. 301, 10 L.Ed.2d 444 (1967). The Declaratory Judgment Act provides:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief in or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201 (1964).<sup>40</sup>

A declaratory judgment is *sui generis*, neither strictly legal nor equitable, *United States Fidelity & Guaranty Co. v. Koch*, 102 F.2d 288, 290-291 (3d Cir. 1939). In common with equitable relief, however, it recognizes judicial competence to declare rights without imposing a duty to do so, i. e., its exercise is discretionary. *Public Affairs Associates, Inc. v. Rickover*, 360 U.S. 111, 112, 82 S.Ct. 580, 7 L.Ed.2d 604 (1962).<sup>41</sup> It is clear that this discretion must be exercised judiciously and cautiously, with regard for the circumstances of the case and the purpose of a declaratory judgment. The Supreme Court recently noted:

[T]he propriety of declaratory relief in a particular case will depend upon

*Scott-Burren Storm Corp. v. Wilcox*, 104 F.2d 880 (8th Cir. 1962).

41. *See Zemel v. Rusk*, 391 U.S. 1, 85 S.Ct. 1371, 14 L.Ed.2d 170 (1965); *Public Service Commission v. Wykoff Co.*, 344 U.S. 237, 73 S.Ct. 230, 97 L.Ed. 201 (1952); *Eccles v. Peoples Bank*, 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed. 784 (1948); *Great Lakes Dredge & Dock Co. v. Huffman*, 310 U.S. 203, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); *Brillhart v. Excess Ins. Co.*, 310 U.S. 491, 63 S.Ct. 1173, 80 L.Ed. 1020 (1942); *Lumpkin v. Connor*, 123 U.S.App.D.C. 371, 300 F.2d 503 (1960); *Marcello v. Kennedy*, 114 U.S.App.D.C. 147, 312 F.2d 874 (1962), cert. denied, 378 U.S. 933, 88 S.Ct. 1830, 10 L.Ed.2d 692 (1968).

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a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power.

Public Service Commission v. Wykoff, *supra* note 41, 344 U.S. at 243, 73 S.Ct. at 240 (emphasis added). Some of the same factors which led us to hold that judicial consideration of the claims was not appropriate, dictate a holding that we decline to undertake declaratory relief. Declaratory relief in this case is particularly inappropriate since it could not finally terminate the controversy,<sup>42</sup> indeed, it might well tend to resurrect the very conflict our holding of inappropriateness seeks to avoid.<sup>43</sup> Our conclusion is reinforced by Mr. Justice Frankfurter's opinion in *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946), which, although modified in other aspects by *Baker* and its progeny, remains relevant with respect to the discussion of declaratory judgments:

And so, the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy "would be justiciable in this Court if presented in a suit for injunction . . . ." *Nashville, C. & St. L. R. Co. v. Wallince*, 288 U.S. 249, 262, 53 S.Ct. 345, 348, 77 L.Ed. 780, 87 A.L.R. 1191.

*Id.* at 551-552, 66 S.Ct. at 1199. See also *Actna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1934); 6A MOORE, FEDERAL PRACTICE § 57-14, at 3078 (2d ed. 1964) ("The Declaratory Judgment Act does not attempt, nor can it be used to avoid this fundamental judicial principle [political questions].") .

#### The Claims of Voters

We cannot be unmindful of the claims which relate to the highly important constitutional rights to vote and to be

represented by the choice reflected by the voting process. These are by no means unimportant claims. The "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964); see *Weber v. Sanders*, 376 U.S. 1, 18, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). The right of all voters who meet a state's qualifications to vote is protected by the Constitution and by congressional acts, *Ex Parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884); *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), and the qualifications established by the states may not discriminate either in terms of race or color, U.S. CONST. amend. XV, or in terms of sex, U. S. CONST. amend. XIX, or by weighing unfairly the votes of those in one geographical area or electoral district over the votes of others, e. g., *Weber v. Sanders, supra*.

The rights so protected, however, relate to the initial right to vote—the right to say who shall be the representative. They do not directly extend to the right to have that particular representative be seated in Congress under all circumstances. The Constitution itself, as we have noted earlier, sets explicit limits on the right of electors to have whomever they choose sit in Congress: it fixes eligibility requirements of age, citizenship and inhabitancy in Article I, section 2; additionally Congress can determine the times, places and manners of holding the elections under Article I, section 4; and Congress is granted exclusion and expulsion powers. Certainly these provisions make clear that the carefully guarded right to vote for whomever the elector desires does not necessarily carry

42. *Cf. Cha-Toine Hotel Apartments Bldg. Corp. v. Shogren*, 204 F.2d 258, 268 (7th Cir. 1963); *United States v. Jones*, 176 F.2d 278, 280 (9th Cir. 1949).

43. See *Sellers v. Johnson*, 69 F.Supp. 778, 788 (S.D.Iowa 1948), *rev'd on other*

grounds, 163 F.2d 877 (8th Cir. 1947), cert. denied, 332 U.S. 801, 68 S.Ct. 356, 92 L.Ed. 421 (1948); *Doebler Metal Furniture Co. v. Warren*, 70 U.S.App. D.C. 60, 129 F.2d 48 (1942) (dictum).

with it a concomitant right to have that person seated in the Congress. In *United States v. Classic*, *supra*, the Court made clear that the right is not absolute: "That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in §§ 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted," *id.* at 316, 61 S.Ct. at 1038 (emphasis added).<sup>44</sup>

We have already noted that the holding in *Bond v. Floyd*, *supra*, was bottomed on state action which imposed a penalty on Bond for exercising his first amendment rights to discuss public issues. The Supreme Court's rationale would apply equally if Bond had been excluded from the state university because of his speeches. The Court did not reach the question of the standing of Bond's constituents to assert claims on their own behalf. *Id.* 385 U.S. at 137 n. 14, 87 S.Ct. 339. The class Appellants have not argued their claims in terms of first amendment rights, but lurking in the language of the Court in *Bond* can be detected some hint of a possible relationship between first amendment rights to political expression and the related right of voters to have their views articulated for them in Congress.<sup>45</sup>

44. We think the language of the court in *Berry v. United States ex rel. Cunningham*, *supra*, while not directly dealing with the right to vote as here developed, is relevant to the relationship between the power of Congress to exclude or expel and the right of a citizen to vote:

The equal representation clause is found in Article V, which authorizes and regulates amendments to the Constitution; "provided, \* \* \* that no state, without its consent, shall be deprived of its equal suffrage in the Senate." This constitutes a limitation upon the power of amendment, and has nothing to do with a situation such as the one here presented. The temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the ex-

The essence of representative government is the one speaking for the many; hence the rights of those who are to be represented must always be accorded high standing and any infringement must be carefully scrutinized. Nevertheless, we have seen that even this crucial right is hedged in by various restrictions which arise out of the Constitution itself. The same Constitution which guarantees the right to expression and the right to vote also limits the powers of courts.

The right to vote is not an academic right; its primary objective is frustrated when the person elected cannot assume the powers and responsibilities of office. Nevertheless, the subject matter of Mr. Powell's claim and the voting claims of the class Appellants are so interrelated that neither can be regarded as having an existence entirely independent of the other; in the context of this case, they stand or fall together. It must follow that as Mr. Powell's claims are inappropriate for judicial consideration, so also are those of the class Appellants.

Our conclusion that the subject matter of the suit is inappropriate for judicial consideration is not inconsistent with the conclusion of Judge Hart. *Powell v. McCormack*, 260 F.Supp. 354 (D.D.C.1967). He found that the subject matter embraced a "political question" under *Baker*

arise of a constitutional power, and no more deprives the state of its "equal suffrage" in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion.

*Id.* 270 U.S. at 615-616, 40 S.Ct. at 455-456.

45. The germ of this concept can be found in the language of the Court in *Bond* that a legislator's speech is protected so that the people may hear from their legislator and "also so they may be represented in governmental debates by the person they have elected." *Bond v. Floyd*, *supra*, at 130-137, 87 S.Ct. at 349-350. See also Melklojohn, *The First Amendment Is an Absolute*, 1961 SUR.V. CR.R. 245, 254; Comment, 35 U.Chi.L.Rev. 151, 170-172 (1967).

and relied on this to conclude that there was no jurisdiction. Our application of Baker leads to the conclusion that the presence of a "political question" does not invariably preclude jurisdiction but rather affords a basis for declining to exercise it. The decisions of the District Court and of this court both are bottomed on concepts of separation of powers.<sup>46</sup>

### PART III

#### THE SPEECH OR DEBATE CLAUSE

Appellees treat the Speech or Debate Clause under their argument on jurisdiction and urge that it bars any court from questioning Members of the House of Representatives, individually or collectively, with respect to legitimate legislative activities and that this includes the exercise of their constitutional responsibility to vote on the seating of a Member-elect. Treatment of this claim has been deferred because it is not entirely clear whether it goes to jurisdiction or some other bar to granting the relief sought. For our purposes we need not resolve that classification. Since two of the four Supreme Court holdings on the Clause are barely two years old the point merits some comment.

46. As I read the concurring observations of my colleagues, a majority agree on the essential holdings that (a) the court has jurisdiction, (b) the claims in this case are inappropriate for judicial consideration, and (c) a three-judge court was not required. *Baker* is definitive; it is recent, and it is authoritative; and there is no need to stray beyond the now outer limits it establishes for jurisdiction, justiciability and political questions. I do not express a view as to whether exclusion may be accomplished for reasons outside section 2 criteria, nor do I rely on the fact that more than two-thirds of the House voted for Resolution 27A in its final form. The Speaker had made a ruling that a simple majority was sufficient and it is the essence of speculation to place any reliance on the quantum of the vote as actually cast. The Speaker ruled that Members were voting on exclusion, not on expulsion. The contention which merges exclusion and expulsion powers seems to me part of what is inappropriate for judicial consideration.

The Clause confers personal immunity on each Member of the House but it is not strictly a personal right since its purpose is to protect the legislative process in our system of representative government. The broad sweep of the bar is suggested by what the Supreme Court said about a legislator's burdens of responding to and defending a suit growing out of his legislative activities in *Tonney v. Brandhove*, 341 U.S. 307, 377, 71 S.Ct. 783, 788, 95 L.Ed. 1010 (1951):

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for private indulgence but for public good.

\* \* \* The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazards of a judgment against them based on a jury's speculation as to motives. (Emphasis added.)

The language of Article I, section 6, clause 1 is simply that "for any Speech or Debate in either House, they [Members] shall not be questioned in any other Place." That Clause had its genesis in the English Bill of Rights proclaimed by the Parliament of 1688-89.<sup>47</sup> The

47. "That the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament," 1 Will. & Mary s. 2, c. 2 (1689), reprinted in T. SWINBURNE, *EDWARDIAN ENGLISH CONSTITUTIONAL HISTORY* 440, 451 (Blacknett ed. 1908).

The privilege of freedom of speech and debate was first included in the Speaker's petition to the King requesting certain Parliamentary privileges in 1541. An earlier indication of this privilege occurred during the reign of Richard II, when a member of Parliament who had introduced a bill containing reflections upon the King's extravagance was condemned to death. In a subsequent reign, the member's petition to annul the judgment on the ground that it was introduced and debated in Parliament was granted. G. WITTEK, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 23-24 (1921).

As is pointed out in *United States v. Johnson*, 383 U.S. 109, 182-183 n. 13, 80

struggles arising in England were re-enacted in the American colonies where immunity for acts within the legislative chambers was asserted by the colonial lawmakers, see JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA: 1727-1740, at 242 (1910); see generally, M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 93-97 (1943). Indeed, the Supreme Court as recently as 1961 noted that "[f]reedom of speech and action in the legislature was taken as a matter of course by those who served the Colonies from the Crown and founded our Nation." *Tenney v. Brandhove*, *supra*, at 372, 71 S.Ct. at 786.<sup>49</sup>

So well known and accepted was this legislative immunity doctrine that the records of the Constitutional Convention show it was written into Article I without opposition or debate.<sup>50</sup> The objectives of the delegates can be gleaned from the writings of James Wilson, perhaps the most influential member of the Committee on Detail which drafted the provision for the convention:

In order to enable and encourage a representative of the publick to dis-

S.Ct. 740, 15 L.Ed.2d 981 (1961), language similar to that ultimately codified in 1849 was adopted in a statute of 1613, 4 Henry VIII, c. 8, as a result of the prosecution of Strode, a member of the House of Commons, for introducing certain meddling legislation in which he had a personal interest. All of the early cases reveal a struggle between privilege and prerogative—between King and Parliament or its members whom the King believed to be meddling in non-Parliamentary affairs. The struggle reached culmination in the prosecution of Eliot and other members of Commons for making seditious speeches and conspiring to restrain the Speaker from adjourning the session. The defendants pleaded Strode's Act but the court held it to be a private bill. Eliot's Case, 3 How.St.Tr. 294, 800 (1629). Thereafter, in 1667, Parliament declared Strode's Act to be a general law. See T. TAUNWELL-LANONRAD, *supra*, at 240-50, 377-78.

49. That the privilege was firmly embedded in English practice is revealed from Blackstone's writings:

For, as every court of justice hath laws and customs for its direction, some

charge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense.

## 2 WORKS OF JAMES WILSON 421 (Mc-Closkey ed. 1967).

The scope of the Clause has been considered by the Supreme Court four times. First, in *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1880), the plaintiff, a recalcitrant witness before a House committee, was arrested and imprisoned by the Sergeant-at-Arms pursuant to a resolution of the House. The Supreme Court held that, although the imprisonment of Kilbourn was indeed unlawful, the Speech or Debate Clause constituted a bar to civil claims against the Speaker and the Members of the House, *id.* at 205, 26 L.Ed. 377.<sup>51</sup>

It seems to us that the views expressed in the authorities we have cited are sound and are applicable to this

of the civil and canon, some of the common law, others their own peculiar laws and customs, as the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parlamenti*.

\* \* \* It will be sufficient to observe that the whole of the law and custom of Parliament has its original from this one maxim, "that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere."

1 BLACKSTONE'S COMMENTARIUM \*103.

50. The first notation of the Clause comes from a document in James Wilson's handwriting, considered by the Committee on Detail. 2 M. KARRAHL, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 100 (rev. ed. 1900). Subsequent documents contain the first full expression of the Clause as it was reported to the convention and adopted. 2 *id.* at 100, 181, 240.

51. The Court remanded the case as to the officers of the House, and plaintiff eventually recovered against them, *Kilbourn v. Thompson*, 11 D.L.R.(C). (MacArthur & Mackay) 402 (1880).

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case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committee, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.

*Id.* at 204, 26 L.Ed. 377 (emphasis added).

*Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), was the second case to come before the Supreme Court on the Speech or Debate Clause. Brandhove was called to testify before a state legislative committee and when he refused to respond was held in contempt. The Supreme Court relied upon the general doctrine of legislative immunity, reflected in Article I, to insulate the members of the state legislature from suit. The opinion focused on the historical immunity of legislators from civil or criminal liability for their exercise of the privileges of speech and debate, within the sphere of legitimate legislative activity. *Id.* at 377-378, 71 S.Ct. 783.

In the third case to reach the Supreme Court, *United States v. Johnson*, 383 U.S. 169, 86 S.Ct. 740, 15 L.Ed.2d 681 (1966), a former Congressman challenged his conviction for violation of federal conflict of interest laws and conspiracy, asserting the immunities of the Clause. The conspiracy count was based in part

51. The entire thrust of the opinion suggests that the holding rests on the fact that a criminal indictment charged a Member of the House with conduct barely motivated—"precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *United States v. Johnson*, 383 U.S. 169, 86 S.Ct. 740, 758 (1966). If Appellants' claims are read as asserting that the votes of the House Members were racially motivated it is clear that the Supreme

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on a speech delivered by him in the House, for which the Congressman was found to have received substantial sums of money claimed by the prosecution to be a bribe. The Fourth Circuit reversed and Chief Judge Sobeloff phrased the issue in terms of jurisdiction:

This is the first case, within our knowledge, squarely raising the question whether the congressional privilege deprives a court of jurisdiction to try a member on a criminal charge of accepting money to make a speech in the House of which he is a member.

387 F.2d 180, 186 (4th Cir. 1964).

In affirming the Fourth Circuit the Supreme Court accepted the linkage of the Article I Clause with the English and Colonial precedents, characterizing its adoption into Article I as a culmination of the

history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators.

383 U.S. at 178, 86 S.Ct. at 754. That the Clause must be "read broadly to effectuate its purposes," is made abundantly clear:

[T]he privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.

*Id.* at 181, 86 S.Ct. at 755. The Supreme Court did not discuss the claim of Johnson in jurisdictional terms.<sup>51</sup>

Court views motives of legislators, however unworthy, as irrelevant. Mr. Justice Frankfurter's statement in *Broadmoor* is sweeping:

The claim of an unworthy purpose does not destroy the [Speech or Debate] privilege. \* \* \* The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 180, 8 L.Ed. 163, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

The most recent of the four cases involving the Clause is *Dombrowski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967). This court affirmed summary judgment for the defendants in a suit against a Senate Committee Chairman and its chief counsel for injunctive relief and damages flowing from an alleged conspiracy between the defendants and Louisiana state officials to seize property and records of the petitioners in violation of their fourth amendment rights. *Dombrowski v. Burbank*, 128 U.S.App.D.C. 190, 358 F.2d 821 (1966) (per curiam). The Supreme Court affirmed as to the Committee Chairman. It reversed and ordered a new trial only as to the chief counsel:

It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, *Kilbourn v. Thompson*, 103 U.S. 168, 204, 28 L.Ed. 377 (1881), that legislators engaged "in the sphere of legitimate legislative activity", *Tenney v. Brandhove*, *supra*, 341 U.S. 367, at 370, 71 S.Ct. 788, 95 L.Ed. 1019, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.

387 U.S. at 84-85, 87 S.Ct. at 1427 (omissions added).

If the Members of the House who are Appellees here cannot be "questioned in any other place," it would seem that they need not answer in any other place, including courts. From this it is arguable that had the class defendants elected to ignore the complaint, the District Court might have had an obligation to apply

<sup>41</sup> See cases cited in *State of Arizona v. State of California*, 293 U.S. 423, 456, 51 S.Ct. 522, 526, 75 L.Ed. 1184. *Tenney v. Brandhove*, *supra*, 341 U.S. at 377, 71 S.Ct. at 788.

<sup>42</sup> In both *Kilbourn* and *Dombrowski* monetary damages were sought and officers of the House and Senate were held not to share the absolute immunity accorded Members. In the instant case Appellants seek, not money damages, but extraordinary coercive equitable relief

*sua sponte* the bar of the Clause; however, we need not decide that point.

Having in mind the breadth accorded the Clause in *Kilbourn*, *Tenney* and *Dombrowski* and the "prophylactic purposes of the clause," *United States v. Johnson*, *supra*, 383 U.S. at 182, 86 S.Ct. 749, it would seem, although we need not decide, that, however characterized, the Clause would operate as a bar to the maintenance of this suit.<sup>52</sup>

#### PART IV

##### THREE JUDGE COURT

[5] In their complaint in the District Court, Appellants applied for the convening of a three-judge court pursuant to 28 U.S.C. § 2282 (1964).<sup>53</sup> The District Court denied the application on the ground that a resolution of one House, such as House Resolution 278, excluding Appellant Powell from the House was not an "Act of Congress" within the meaning of the statute. *Powell v. McCormack*, 266 F.Supp. 354, 365 (D.D.C. 1967). Cf. *Krebs v. Ashbrook*, 275 F.Supp. 111, 118 (D.D.C. 1967).

The District Court's conclusion is amply supported by the plain meaning of "Act of Congress" as used in the statute and by the legislative history and purpose of section 2282. The decided cases demonstrate that

[t]he legislative history of § 2282 and of its complement, § 2281, requiring three judges to hear injunctive suits directed against federal and state legislation, respectively, indicates that these sections were enacted to prevent a federal judge from being able to paralyze totally the single operation

against employees of the House directly contrary to commands of the House itself.

<sup>52</sup> Section 2282 provides: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

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of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order.

*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154, 83 S.Ct. 554, 560, 9 L.Ed.2d 644 (1963) (footnote omitted). See *Zemel v. Rusk*, 381 U.S. 1, 7 n. 4, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); *Phillips v. United States*, 312 U.S. 246, 248-261, 61 S.Ct. 480, 85 L.Ed. 800 (1941). The legislative purpose is not served by construing the statute to cover the resolution in this case since the statute is to be construed narrowly. *Bailey v. Patterson*, 369 U.S. 31, 33, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962). House Resolution 278 is a resolution of one House only and relates to the organization and internal governing of the House of Representatives. It creates no broad statutory scheme which would be frustrated by injunctive relief, and it does not contain the attributes of the usual "Act of Congress" which involves the House of Representatives, the Senate, and the President.<sup>64</sup>

## CONCLUSION

Our disposition of this appeal on the ground that the claims are nonjusticiable because of the inappropriateness of the subject matter for judicial consideration, makes it unnecessary to reach the claims on the merits. Nevertheless, some mention of the conflicting views is appropriate.

Debate on the scope and meaning of Article I, sections 2 and 5 began at Philadelphia and has engaged the attention of legal writers, including Members of both Houses, ever since. As with the debates over other issues arising under the Constitution, this debate has not

64. Although there are no direct holdings in point, prior case law supports the District Court's conclusion. In *Krebs v. Ashbrook*, 275 F.Supp. 111 (D.D.C. 1967), Rule XI of the House of Representatives, the charter of the House Un-American Activities Committee, was held not to be an "Act of Congress" within the meaning of the statute. *Contra Stamler v. Willis*, 871 F.2d 418 (7th Cir. 1960).

Since we predicate our holding on the absence of an Act of Congress as required

been and possibly never will be judicially resolved. To vest in the members of a legislative body the powers intimated in the literal language of section 5 "to be the Judge" of matters as significant as the exclusion and expulsion of members plainly involves risks. Professor Chafee parades some of the horrendous possibilities which from time to time have been suggested:

If it [Congress] can add crime or disloyalty acts as bars, it can add profiteering as well. \* \* \* A majority \* \* \* can raise the minimum age to fifty \* \* \* bar men of Jewish race, \* \* \* require that members must be already enrolled in either the Republican or the Democratic Party, or recognize only a single party entitled to nominate candidates. There is no line to be drawn, once the legislature is allowed to cross the constitutional limits. It can turn our democracy into an oligarchy by imposing high property qualifications, or into a dictatorship of the proletariat by declaring ineligible all persons deriving income from rents and invested capital.

## Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 255 (1942).

But Professor Chafee acknowledges that there is much to be said for the view that requirements other than those of section 2 must be embraced in the less precise language of section 5 that each House is to be "Judge" of the qualifications of its Members. He concludes by saying that neither of the extreme views, i. e., no exclusion power except for section 2 reasons, or unrestricted exclusion powers, is sound and that the actual practice and usage has long taken an intermediate ground.

by the statute, we are not required to reach the alternative grounds suggested by Appellees, that even assuming that House Resolution 278 is an Act of Congress, a single district judge may dismiss the action for lack of federal jurisdiction. See *Lion Mfg. Co. v. Kennedy*, 117 U.S. App.D.C. 307, 830 F.2d 833 (1964); cf. *Reed Enterprises v. Corcoran*, 122 U.S. App.D.C. 387, 854 F.2d 519 (1965).

As to elected persons satisfying all the requirements in the Constitution, we are not forced to choose between giving the House absolute power to unseat whomever it dislikes, and giving the voters absolute power to seat whomever they elect. A third alternative has been adopted, fairly close to the second view. The constitutional qualifications ordinarily suffice; but Congress has rather cautiously imposed some additional tests by statute,<sup>59</sup> and the House of Representatives or the Senate has probably added a very few more qualifications by established usage (a sort of legislative common law) to cover certain obvious cases of unfitness.

*Id.* at 257.

Great reliance is placed by Appellants on the views of Professor Charles Warren, another constitutional writer. Professor Warren views section 2 as fixing the only qualifications for membership in the House. Referring to the Convention's refusal to adopt "the proposal to give Congress power to establish qualifications in general [or adopt] \* \* \* the proposal for a property qualification," he concludes:

Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the

59. Professor Chafee's reference to a "statute" is not followed by any citation. It may be that he had reference to a statute enacted in the Civil War period prescribing an oath of past loyalty, Act of July 2, 1862, ch. 128, 12 Stat. 502, or to a statute which forever renders a Senator, Representative, department head, or other officer of the government incapable of holding office under the United States if such person receives compensation for services in any matter in which the government is a party, Act of June 11, 1864, ch. 110, 13 Stat. 123; *see Burton v. United States*, 202 U.S. 344, 26 S.Ct. 688, 50 L.Ed. 1057 (1900).

59a. *E.g.*, Z. CHAFEE, *supra*, at 241-00; C. WARREN, *supra*, at 412-20; Wechsler, *supra*, at 8. Background historical material is set forth in 1 BLACKSTONE'S COMMENTARIES \*102-163, \*175-77; M. CLARKE, *supra*, at 174-205, 235-62; THE

Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship, and residence. For certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress. As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius est exclusio alterius* would seem to apply.

C. WARREN, THE MAKING OF THE CONSTITUTION 421 (1937) (footnote omitted).

The protagonists for the conflicting views on the scope of exclusion powers of the House draw on the various aspects of history, custom and usage which support their respective positions.<sup>60</sup> Most of this, of course, is addressed to what are the merits of the claims asserted by Appellants. Reference to these unresolved constitutional questions is made in order to indicate their scope and nature and to underscore what it is that we do not decide.

Conflicts between our co-equal federal branches are not merely unseemly but often destructive of important values.

FEDERALIST NO. 60, at 409 (Conde ed. 1931) (Hamilton); J. GREENE, THE QUEST FOR POWER: THE LOWER HOUSE OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 171-204 (1963); C. WITTKO, *supra*, at 55-74, 90-171. The relevant English cases, including the famous case of John Wilkes, are found in GLENVILLE, REPORTS OF CERTAIN CASES DETERMINED AND ADJUDGED IN PARLIAMENT (1770).

The instances in which the House of Representatives considered exclusions or expulsions are found in 1 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 381-601 (1907); 2 A. HINDS, *supra*, at 705-800; 6 C. CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 50-63 (1935). See HUPMAN, SENATE ELECTION, EXPULSION AND CENSURE CASES, 8 Doc. No. 71, 87th Cong., 2d Sess., (1902); T. H. REMICK, *supra*, at 116-332.

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In the interpretation of provisions which are pregnant with such conflicts the unavailability of a remedy and the consequences of any unresolved confrontation between coordinate branches weigh heavily in pointing to a conclusion either that no jurisdiction was intended or that if jurisdiction exists it should not be exercised.

The checks and balances we boast of can check and balance just so far. The Framers had hard choices in many areas. To allow, for example, total immunity for speech, debate and votes in the Congress risked irreparable injury to innocent persons if false or scurrilous charges were made on the floor of a Chamber; to allow the Executive exclusive power of foreign relations risked unwise policies which might lead to war; to tolerate the essential supremacy of constitutional interpretation in a Supreme Court meant the risk of unwise decisions by a transient majority. But that is the way our system is constructed. Under stress what some may think are weaknesses turn out to be strengths and the wisdom of Framers in dividing the spheres of delegated power becomes clear.

That each branch may occasionally make errors for which there may be no effective remedy is one of the prices we pay for this independence, this separateness, of each co-equal branch and for the desired supremacy of each within its own assigned sphere. When the focus is on the particular acts of one branch, it is not difficult to conjure the parade of horrors which can flow from unreviewable power. Inevitably, in a case with large consequences and a paucity of legal precedents, advocates tend to raise the spectre of hypothetical situations which would be permitted by the result they oppose. Our history shows scant evidence that such dire predictions eventuate and the occasional departures in each branch have been thought more tolerable than any alternatives that would give any one branch domination over another. That courts encounter some problems for which they can supply no solution is not invariably an occasion for

regret or concern; this is an essential limitation in a system of divided powers. That courts cannot compel the acts Appellants would have us order in this case recedes into relative insignificance alongside the blow to representative government were judges either so rash or so sure of their infallibility as to think they should command an elected co-equal branch in these circumstances.

We should resist the temptation to speculate whether and under what circumstances courts might find claims to a seat in Congress which would be justiciable. We do well to heed the admonition of Mr. Justice Miller, uttered nearly a century ago, that judges confine themselves to the case at hand:

It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate.

*Killbourn v. Thompson, supra 103 U.S. at 204-205, 26 L.Ed. 877.*

The judgment appealed from is  
Affirmed.

McGOWAN, Circuit Judge (concurring separately):

[4,5] My colleagues and I reach a common result, that is to say, (1) a three-judge court was not required for the reasons stated by Judge Burger, and (2) we do not think it either necessary or appropriate to direct the District Court to reinstate the complaint and to determine af-

ter trial whether the particular relief sought should be given. Because this second determination involves considerations peculiarly committed to judicial discretion, it is not surprising that, although our identification and weighing of relevant factors presents some overlap, each of us has preferred to characterize in his own words the route he has travelled.<sup>1</sup>

This record demonstrates to me that, from the beginning, Representative Powell's view of the Constitution has explicitly and continuously been that, so long as he possesses the requisite qualifications of age, citizenship, and inhabitancy, his right to serve in the House is solely a matter between him and his constituents, not his colleagues. If the voters of his district do not like his conduct in office, they can turn him out at the next election; or, if that conduct be thought violative of the criminal laws, the proper authorities can seek indictments. But, so his reasoning proceeds, for his colleagues to make that conduct the occasion for severance of their association together in the House would be, without observance of the amending process, to add further qualification requirements to the three now stated in the Constitution.

Thus it was that, although the Select Committee expressly informed him that the scope of its inquiry included both (1) his qualifications in terms of age, citizenship, and inhabitancy, and (2) alleged misconduct in office warranting expulsion or other punishment, he persist-

ently refused to answer any questions or supply any information except with respect to (1). Somewhat belatedly, he sought to fortify his legal position by asserting that the Committee could, at most, take up (2) only after he had been seated, even though he was at the moment of that claim continuing to receive full pay and other allowances and emoluments. But there is no reason to think that, had the Committee deferred the second aspect of its inquiry until after seating, his basic constitutional position would have been abandoned.

1. For example, the allegedly exclusive power of the House to pass upon the fitness of a member, and the claimed reach of the Speech and Debate Clause, have played no part whatever in my vote. I do not profess to know what their precise constitutional meaning is, nor do I say that they are wholly without relevance to a discretionary declination of jurisdiction. I simply have not found it necessary to take them into account in my determination.

2. It is argued that the misconduct cannot be assumed because Powell was denied procedural due process by his colleagues in the investigation of his activities. But

In the context of the kind of misconduct in office involved here,<sup>2</sup> I regard that position as untenable. In saying this, I distinguish very sharply between conduct abusing the privileges of House membership, on the one hand, and status or speech, on the other. If the House were to withhold recognition of a member because of his race, or religion, or political or philosophical views, there would indeed have been an addition to qualifications without benefit of constitutional amendment. But the allegations in the complaint which suggest that this is such a case are so purely conclusory in character as, under elemental pleading concepts, not to require a hearing on the merits.

Appellant Powell's cause of action for a judicially compelled seating thus boils down, in my view, to the narrow issue of whether a member found by his colleagues, after notice and opportunity for hearing, to have engaged in official mis-

no one can read the record of the Select Committee's relationships with Powell without concluding that there was no serious purpose upon Powell's part to participate in the ascertainment of the facts. This was unquestionably due to his fundamental constitutional theory that he was accountable for his conduct only to his constituents. One cannot escape the impression that any procedural problems would have been resolved satisfactorily if there had been willingness to accept the relevance of the alleged misconduct to his continuance in the House. Against this background, I see no need to reinstate the complaint solely to pursue the procedural issues.

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Cite as 385 F.2d 517 (1967)

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conduct must, because of the accidents of timing, be formally admitted before he can be either investigated or expelled. The sponsor of the motion to exclude stated on the floor that he was proceeding on the theory that the power to expel included the power to exclude, provided a  $\frac{2}{3}$  vote was forthcoming. It was.<sup>3</sup> Therefore, success for Mr. Powell on the merits would mean that the District Court must admonish the House that it is form, not substance, that should govern in great affairs, and accordingly command the House members to act out a charade.

[1-3] Our already overtaxed courts arguably have more pressing work to do than this, including the hearing and determination of serious and substantial claims of deprivations of civil rights. The only question really presented by this complaint is whether the House must go through the formality of seating a member before it expels him for official misconduct. Unlike the District Court, I am prepared to say that even such a narrow issue confers subject-matter jurisdiction in the familiar sense of (a) a claim arising under the Constitution, (b) a case or controversy, and (c) a statute conferring jurisdiction. But the Supreme

3. It is true that the Speaker, after inquiry to the Parliamentarian, announced that the motion would carry on a majority vote. All this suggests to me is that, in this instance, Representative Curtis was a better parliamentarian than the Parliamentarian. In any event, the result conformed to the more exacting standard; and for me to guess whether the result would have been different if the Speaker's ruling had been different would be to engage in the speculation Judge Burger deplores (fn. 40).

As to Judge Burger's implication that I have gotten into the merits, I note only that he, having decided that the words of the Constitution vest in the House the power to judge a member's fitness, concludes that jurisdiction may be declined to review its exercise in this instance. I, having read the text of the Constitution as declaring a power in the House to expel a member for misconduct in office by a  $\frac{2}{3}$  vote, conclude that jurisdiction may be declined to pursue the narrower question of whether the Constitution re-

Court in *Baker v. Carr* was at pains to make clear that the *existence* of jurisdiction does not invariably require its *exercise*. The question is one of whether, under all the circumstances and with a wise regard for the nature and capabilities of judicial power and for the respect it must always command, the court is bound to hear and determine a complaint on its merits.<sup>4</sup>

[2] The challenged action by the House in this case reflects in substance an equation by it of its power to expel for legislative misconduct by a  $\frac{2}{3}$  vote with a power to deny seating for the same reason and by the same vote. That action was rooted in the judgment of the House as to what was necessary or appropriate for it to do to assure the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government. That is a judgment which, on this record, presents no impelling occasion for judicial scrutiny.

#### **LEVENTHAL, Circuit Judge:**

[1-3, 5] I concur in the result. Judge Burger's opinion presents the background

quibus that the House must first seat before it expels. It would appear that each of us has, preliminarily to concluding whether jurisdiction must be exercised, gone no further in deciding questions of "textual commitment" than is contemplated by the majority opinion in *Baker v. Carr*.

4. The factors that are relevant to this kind of a determination obviously include the nature of the relief sought—in this case, injunction, mandamus, and declaratory judgment. All have traditionally been regarded as resting peculiarly in the discretion of the court and as subject to denial, even after hearing on the merits, for reasons unrelated to the merits. The potential embarrassments and confusions, both within the House and between it and the judicial and executive branches, inevitable upon their grant in this case are worthy of sober remark. These and like matters are legitimately the setting in which are to be considered the urgencies, in terms of simple justice, of the bringing to bear of judicial power.

of this case in detail. I agree with some aspects of his opinion—particularly the conclusions in Part I and Part IV. As to other aspects, I am either in disagreement or find it unnecessary to define my position. It would unduly protract and delay our disposition for me to make a point by point analysis. Accordingly I confine myself at this time to a relatively sparse, almost topic-sentence, statement of my approach, as follows:

1. The complaint on its face presents a matter within the subject-matter jurisdiction of the District Court. It alleges a claim arising under the Constitution, there is a case or controversy, and there exists a Federal statute giving district courts jurisdiction to consider such a case, namely, 28 U.S.C. § 1331. The fact that this is a novel law suit does not negative jurisdiction. *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

2. I do not feel required to decide appellants' contention that the case lacks justiciability, a concept that I think was developed in *Baker v. Carr* as defining the kind of case or issue that is inherently inappropriate for determination by any court.

For example, I am not prepared to say at this juncture that a complainant charging an unconstitutional exclusion from Congress avowedly put on racial or religious grounds cannot obtain a declaratory judgment or other relief. Nor do I consider whether appellant Powell may have available other judicial remedies.

1. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 881 (1967); *Public Affairs Associates, Inc. v. Rickover*, 300 U.S. 111, 82 S.Ct. 880, 7 L.Ed.2d 604 (1962).

2. *Tenney v. Brandhove*, 341 U.S. 367, 370, 71 S.Ct. 783, 85 L.Ed. 1010 (1951), quoted in *Dombrowski v. Eastland*, 387 U.S. 82, 84, 85, 87 S.Ct. 1425, 18 L.Ed.2d 877 (1967), confirms the principle inherent in separation of powers that such action is not subject to judicial scrutiny or cognizance.

Compare the rule establishing immunity from suit of judges of courts of general jurisdiction, considered a fundamental re-

quirement of an independent judiciary. *Bradley v. Fisher*, 13 Wall. (80 U.S.) 336, 361, 20 L.Ed. 646 (1871), holds that such judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." The Court also stated (pp. 361-362, 20 L.Ed. 646): "Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no expense is permissible." In *Pierson v. Ray*, 386 U.S. 547, 564, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) the Court referred with approval

Plaintiffs were seeking remedies—mandamus; equity decree; declaratory judgment—each of which is not necessarily automatically available to one asserting (and even establishing) the underlying right. In an action seeking such remedies a court has discretion in deciding whether, when and how far to consider the merits.<sup>1</sup>

4. For present purposes I assume appellants are correct in their assertion that Article I, Section 6, Cl. 1 of the Constitution is exclusive in stating conditions of eligibility for Congressmen. But that does not mean that appellant Powell was immune from exclusion on grounds that would justify expulsion under Article I, Section 5, Cl. 2.

The record before us shows that the exclusion by the House of appellant Powell was by a vote of 307 to 116, on a motion put forward by its sponsor, Congressman Thomas Curtis of Missouri, on the ground that Mr. Powell's conduct was such as to warrant his expulsion under Article I, Section 5, Cl. 2 of the Constitution if he were seated, and that he should therefore be excluded at the outset.

Certainly members of the House, who cannot be questioned in court for action taken within a "sphere of legitimate legislative activity,"<sup>2</sup> can, without being

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subject to court disapproval, expel a member they find to have mis-used travel credit cards, and kept on his payroll a person (his wife) who resided neither in his District nor in the District of Columbia. The fact that the House is not a court, with power to enter a judgment of conviction for violation of laws, does not preclude it from concluding that the pertinent acts were committed by the Congressman, as a part of an ultimate determination of lack of fitness for service in the House, a determination entrusted to the House by Article 1, Section 5, Clause 2 of the Constitution.

5. Appellant Powell seems to have been of the view that whatever grounds the House may have had to expel him once he was seated, they could not be used as grounds to exclude him without seating him.

On this point I think that in a case like Powell's where the record (including reports of legislative committees) provides abundant indication that there was at least a substantial question of misconduct in Congressional office, the view of Congressman Curtis was permissible under the Constitution, and appellants' contention to the contrary must be rejected.

As to the interim period, I am at least reassured by the provision in H.R. Res. 1 of the 90th Congress, 1st Sess., adopted after debate in which Mr. Powell participated, that pending the investigation and report by the Select Committee and House action thereon Mr. Powell was to receive the pay, allowances and emoluments authorized for Members of the House, though he was not to be sworn in or occupy a seat in the House.

As to the right of the other appellants to be represented during the interim period, they stand on no higher ground

to Bradley v. Fisher, and referred to the historic immunities of judges and legislators as "equally well established."

8. See *Berry v. United States ex rel. Cunningham*, 279 U.S. 597, 616, 49 S.Ct. 452, 450, 78 L.Ed. 867 (1929): "The temporary deprivation of equal representation which results from the refusal of the

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than the claim of appellant Powell to be seated.<sup>3</sup>

Appellants say in rebuttal, *inter alia*, that the theory advanced by Congressman Curtis is not available to appellees since the House did not accept the need for a  $\frac{2}{3}$  vote, which Mr. Curtis recognized as essential. The Speaker announced, on a parliamentary inquiry, that only a majority vote was required for exclusion of appellant Powell.

This contention is not without force. But assuming, *arguendo*, that the procedure used to exclude Powell may have been improper that does not mean he is entitled to maintain an action for discretionary relief of a nature that brings a court close to confrontation with members of the coordinate legislative branch of government. Thus, a court may decline to entertain an action based on such a procedural defect unless it appears not only that the defect may have been prejudicial but also that it probably was prejudicial, at least where as here the relief sought is extraordinary.

6. The fact that the House voted exclusion by a  $\frac{2}{3}$  vote is not irrelevant, even assuming the majority ground rule was improper for it at least generates a substantial doubt that a court declaration would provide Powell his seat--even assuming as I think we should, that the House would respect the court's declaratory judgment. Compare *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966). The House could immediately exclude on the same ground, by the same vote.

True, the House could do this, by hypothesis, only if the "ground rule" were that a  $\frac{2}{3}$  vote was necessary. But it does not appear that appellant Powell ever staked his position on the need for a  $\frac{2}{3}$  ground rule.

Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the state of its 'equal suffrage' in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion."

7. It is significant that appellant Powell, though duly re-elected in April 1967, has not availed himself of the legislative remedy available with this re-election to assert his claim to represent his district.

On the argument for stay Powell's counsel indicated that at least one reason, and apparently a major reason, why appellant Powell did not invoke that legislative remedy is that it would not maintain his seniority and chairmanship. Perhaps so, but a court would be going to the extreme edge of its authority if it were to declare his status as a Congressman. It cannot reasonably be asked to provide such extraordinary relief to enable complainant to obtain perquisites, however important, that are essentially a matter for legislative determination, and certainly are not assured by any constitutional clause. A court has a duty, in the sound exercise of discretion, to consider litigation seeking relief that raises problems of confrontation with a coordinate branch with an approach that will, wherever possible, confine relief narrowly.

8. If Powell had acquiesced in the premise that there was authority to exclude, but only by a  $\frac{2}{3}$  vote and  $\frac{2}{3}$  ground rule, there would likely have been a very different kind of legislative situation. He could not consistently have stood on the position that the House and its Select Committee were acting beyond the proper sphere of authority by considering matters other than age, citizenship and residence. He may have been unwilling to wage battle even on a  $\frac{2}{3}$  ground rule after a hearing that admittedly was warranted in inquiring into various financial and salary arrangements. The premise of permissible exclusion would have undercut the position that permitted him to defer as a matter of principle any explanation of those arrangements.

9. The various objections lodged by appellant Powell to the procedure of the House Committee must all be viewed in

the light of his then position that the Committee's scope was restricted to the three issues of age, citizenship and residence. It cannot be assumed that procedural differences would have loomed as large, or been unmanageable, if appellant Powell had accepted what I think was a valid premise of the House and its Committee. That premise—which I uphold by a ruling on the merits on this issue—is that the Constitution gives the House legislative "jurisdiction," even prior to seating a member-designate, to make inquiry as to whether he has committed acts justifying punishment or expulsion of a member.

10. My approach may not hang tidily on the pegs of jurisprudence thus far called to my attention. It makes sense to me, however, and labels and concepts can emerge in due course.

What seems to have received most discussion in recent years is the concept of justiciability as a requirement in addition to subject-matter jurisdiction. As I read them the discussions of justiciability and non-justiciability have emerged primarily in terms of whether the issue is of a kind that lies within any province of any court at any time. I refrain from accepting absolutes about the case before us—to lay it down flatly either that no court may consider the issue and rule differently from the House, or that there may not be a state of facts that would properly call upon the District Court to grant declaratory and perhaps other relief. There are recent decisions indicating that when there is a determination of both subject-matter jurisdiction and justiciability for the issues, the courts are required to decide the issues and to vindicate the applicant's constitutional rights—to refrain from sidestepping this duty merely because the framing of judicial relief presents large difficulties,<sup>4</sup> and to take cognizance of a case seeking declaratory relief even where an injunction cannot properly be obtained.<sup>5</sup> By strict logic the same approach should

4. *Weber v. Sanders*, 376 U.S. 1, 84 S.Ct. 520, 11 L.Ed.2d 481 (1964).

5. *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 891, 19 L.Ed.2d 444 (1967).

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Cite as 300 F.2d 611 (1964)

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apply when there is a hypothesis of justiciability or at least a disinclination to enter a ruling of non-justiciability. Yet there have been instances when the courts have bypassed crucial jurisdictional issues and disposed of cases on the merits.<sup>6</sup> I think the spirit of those cases also justifies the course I follow—of deciding the merits on one key point and yet refraining, in the exercise of discretion, a full adjudication on the merits.

The key point, to me, is that Congressman Powell erred in his assumption that his satisfaction of the Constitutional requirements (of residence, citizenship and age) meant that he had to be seated, and that grounds justifying expulsion could only be applied to those who had already been seated. My ruling on the merits of this Constitutional issue leads to the conclusion that the House had legislative jurisdiction to consider and appraise the activities and fitness of appellant Powell at the time he presented his credentials. It is not a full adjudication of the merits of the claim of appellant Powell that he was wronged. It does not necessarily mean either that the House acted properly when it failed to heed the ground rule of a  $\frac{2}{3}$  vote put forward by Congressman Curtis as the assumption of his motion to exclude, or that a court

considering a different prayer for relief would be disabled from saying so upon a full consideration of Powell's case on its merits.

The case before us presents problems of confrontation with a coordinate branch and of molding relief. These are considerations that lead a court in some instances to find non-justiciability of the issue for any court.<sup>7</sup> They may also properly be invoked, I think, as backdrop and perspective for a ruling to decline to provide a full adjudication on the merits, even assuming justiciability. My reasoning is that the confrontations would likely have evolved in a quite different way if appellant Powell had recognized a power to exclude on grounds of misconduct (albeit on  $\frac{2}{3}$  vote) and had conducted himself on this premise from the start. Hence I do not think it mandatory for a court to consider and determine the constitutional issue as he has chosen to frame it, from an erroneous premise; and specifically, I think it proper to refrain from a full determination of the merits in a case where petitioner is seeking an extraordinary remedy yet has failed to invoke to the fullest extent the remedies and procedures available within the legislative branch.

**6.** See, e. g., *Secretary of Agriculture v. Central Ring Ref. Co.*, 338 U.S. 604, 610-620, 70 S.Ct. 403, 94 L.Ed. 381 (1950); *Ex parte Bakelite Corp.*, 270 U.S. 438, 448, 49 S.Ct. 411, 78 L.Ed. 789 (1929).



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# United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,426

EUGENE R. FRAZIER,  
Appellant

v.

UNITED STATES OF AMERICA,  
Appellee

Appeal from the United States District Court  
for the District of Columbia

Decided March 14, 1969

*Mr. Ira S. Siegler* (appointed by this court) for appellant.

*Mr. Joel M. Finkelstein*, Assistant United States Attorney, with whom *Messrs. David G. Bress*, United States Attorney, and *Frank Q. Nebeker*, Assistant United States Attorney, were on the brief, for appellee.

Before **BAZELON**, *Chief Judge*, and **BURGER** and **ROBINSON**,  
*Circuit Judges*.

**ROBINSON**, *Circuit Judge*: This is an appeal<sup>1</sup> from a conviction for the armed robbery<sup>2</sup> of the Meridian Market on August 24, 1966. The Government's proof against appellant consisted of in-court identifications by the proprietor and

<sup>1</sup> Heard together with No. 21,427, *Bryson v. United States*, now pending before this court, which is an appeal from a conviction for the same offense.

<sup>2</sup>D.C. Code § 22-2901 (1967 ed.), since amended (Supp. I 1968).

an employee of the market, and an oral confession by appellant while detained by the police after his arrest. Appellant offered no evidence in his own behalf. He now argues, as he did at trial, that the presiding judge should have excluded both the confession and the identifications, and thus left the Government with a case no better than his defense.

Both confessions and identifications made while an accused is in police custody without benefit of counsel are constitutionally suspect.<sup>3</sup> Appellant's contentions on this appeal thus not atypically invoke doctrinal considerations that would have a vitiating effect on each prong of the Government's presentation unless exempted by special conditions. Accordingly, we must examine closely the circumstances surrounding appellant's confession and identifications in order to determine whether they pass the strict tests for admissibility which have been judicially prescribed.

## I

Appellant was arrested at 4:15 p.m. on September 7, 1966, pursuant to a warrant issued in connection with a robbery at Mike's Carry Out, and was taken to a precinct station. Upon arrival at about 4:30 p.m., the arresting officer immediately telephoned Detective Sergeant Robert T. Keahon, of the Robbery Squad, who instructed him to book appellant and bring him directly to the Robbery Squad office at police headquarters. At a pretrial hearing, held to pass upon the admissibility of the confession, Keahon testified that all arrestees brought to a precinct station are subsequently conveyed to headquarters for processing, that is, fingerprinting, photographing and completion of the "line-up sheet." In addition, Keahon stated that he was personally in possession of appellant's arrest warrant, "was

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<sup>3</sup> As to confessions, *Miranda v. Arizona*, 384 U.S. 436 (1966); see also *Escobedo v. Illinois*, 378 U.S. 478 (1964). As to identifications, *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967).

familiar with the case, and . . . was going to handle the case. . . ."

The arresting officer called in a police wagon from the streets and, when it arrived, drove appellant through closing hour traffic to police headquarters, and presented him to Keahon at 5:20 p.m. Keahon ascertained that appellant had been advised of his rights by the arresting officer, and read to him from a form which gave the *Miranda*<sup>4</sup> warnings in some detail. Appellant said he understood the contents of the form, did not want a lawyer, and would obtain one the next morning if necessary. He then signed a statement to the effect that he knew his rights and did not desire the assistance of counsel.

Keahon then "started talking to him about the Mike's Carry Out," the offense for which he had been arrested, but before he could utter more than a few words, appellant exclaimed, "I don't care, I want to clear Ted. Teddy didn't do it. . . . Teddy didn't shoot that woman in the High's store or rob her. I did." "Teddy," it developed, was one Theodore Moore, who had been arrested for a robbery at a High's Market. With that, appellant proceeded to confess, without prompting, to a series of other recent crimes, the fourth of which was the Meridian Market holdup for which he was convicted in this case. Keahon testified that he asked appellant no questions whatever about that affair except to identify the market appellant was admitting he had robbed.

The Meridian Market confession was made at 5:45 p.m. When appellant finished confessing to various other offenses, Keahon brought in witnesses to identify him.<sup>5</sup> Formal processing was completed at about 7:30 p.m., and appellant was taken before the United States Commissioner on the following morning.

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<sup>4</sup>*Miranda v. Arizona*, *supra* note 3, 384 U.S. at 467-73.

<sup>5</sup>This aspect of the case is discussed *infra*, pt. IV.

## II

Appellant contends that his confession was inadmissible under *Mallory v. United States*<sup>6</sup> because it was obtained during a period of unnecessary delay in his presentment before a judicial officer. The Government denies a *Mallory* violation and argues that, even if there was one, the confession is admissible under Title III of the so-called District of Columbia Crime Bill.<sup>7</sup> We think the record raises a substantial question as to whether appellant's transfer from the precinct station to police headquarters was an unnecessary delay in terms of contemporary judicial construction of Rule 5(a) of the Federal Rules of Criminal Procedure.<sup>8</sup> We do not, however, reach that question, or the sensitive issues concerning the applicability<sup>9</sup> and constitutionality of Title III which lurk behind it, because the case is properly resolvable on another basis.

Appellant attacks his confession on *Miranda*<sup>10</sup> as well as *Mallory* grounds, alleging that he did not effectively waive

<sup>6</sup>354 U.S. 449 (1957).

<sup>7</sup>81 Stat. 734, 735-36 (1967). Title III in pertinent part provides: "Sec. 301(a) Any person arrested in the District of Columbia may be questioned with respect to any matter for a period not to exceed three hours immediately following his arrest. Such person shall be advised of and accorded his rights under applicable law respecting any such interrogation. . . .

"(b) Any statement, admission, or confession made by an arrested person within three hours immediately following his arrest shall not be excluded from evidence in the courts of the District of Columbia solely because of delay in presentment."

<sup>8</sup>"An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. . . ." F.R.Crim.P. 5(a).

<sup>9</sup>The question is whether the statute operates retroactively to require admission of a confession obtained prior to its enactment in the course of an unnecessary delay in presenting an accused before a judicial officer.

<sup>10</sup>*Miranda v. Arizona*, *supra* note 3.

his Fifth Amendment privilege against self-incrimination. Our decisions have recognized the importance of inquiry as to whether the accused was effectively apprised of his rights when the admissibility of a confession under *Mallory* is at stake.<sup>11</sup> And as we recently observed in *Naples v. United States*,<sup>12</sup> which involved a pre-*Miranda* confession, the evolution in our understanding of *Mallory* has

"paralleled the visible movement by the Supreme Court towards the application of Fifth and Sixth Amendment considerations to the pre-arrainment period. That movement culminated, of course, in *Miranda*, in the shadow of which Rule 5(a) now resides and which has probably made academic problems of the kind we confront on this record."<sup>13</sup>

Now we must consider directly the effect on *Mallory* of a *Miranda* that has come of age.

Although not explicitly premised on constitutional grounds, *Mallory* has been ultimately concerned with effectuation of Fifth and Sixth Amendment protections against the dangers of involuntary self-incrimination in stationhouses and with the other evils inherent in police interrogation of an accused in secret.<sup>14</sup> [T]he delay [in presentment before a magistrate]," *Mallory* admonished, "must not be of a nature to give opportunity for the extraction of a confession."<sup>15</sup> Its

<sup>11</sup>See *Naples v. United States*, 127 U.S.App.D.C. 249, 258, 382 F.2d 465, 474 (1967), and cases cited in n. 10. In *Alston v. United States*, 121 U.S.App.D.C. 66, 67-68, 348 F.2d 72, 73-74 (1965), Judge McGowan, in his separate opinion, deemed the fact that appellant "was not, prior to his interrogation, informed of his right to remain silent or of the fact that such answers as he chose to give might be used against him" at trial a "decisive consideration" in his conclusion that *Mallory* required barring of the confession.

<sup>12</sup>Supra note 11.

<sup>13</sup>127 U.S.App.D.C. at 258, 382 F.2d at 474.

<sup>14</sup>*Spriggs v. United States*, 118 U.S.App.D.C. 248, 251, 335 F.2d 283, 286 (1964).

<sup>15</sup>354 U.S. at 455.

parent opinion, *McNabb v. United States*,<sup>16</sup> rested on the proposition that

"[l]egislation [comparable to Rule 5(a)] . . . , requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime."<sup>17</sup>

*Mallory* itself has stood guard against not only the "third degree," but also "the pressures in a Police Station upon prisoners under secret interrogation without counsel, relative or friend."<sup>18</sup> These, of course, are precisely the concerns of *Miranda*.

The *Mallory* solution for these iniquities was enforcement by an exclusionary rule of the requirement that the accused be brought "before a judicial officer as quickly as possible so that he may be advised of his rights. . . ."<sup>19</sup> But this

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<sup>16</sup> 318 U.S. 332 (1943).

<sup>17</sup> *Id.* at 343-44.

<sup>18</sup> *Spriggs v. United States*, *supra* note 14, 118 U.S.App.D.C. at 250, 335 F.2d at 285.

<sup>19</sup> 354 U.S. at 454. *Mallory* and its progeny have also voiced concern at the possibility that police may interrogate, or otherwise use a delay in presentation before a magistrate, to obtain probable cause to support the arrest. Whenever it appears that an arrest was made without probable cause, a question may arise independently of *Mallory* as to whether evidence subsequently obtained in violation of Rule 5(a) must be excluded as fruit of the illegal arrest. See *Adams v. United States*, No. 20,547 (D.C. Cir., June 21, 1968); *Bynum v. United States*, 104 U.S.App.D.C. 368, 262 F.2d 465 (1958). *Mallory*, however, which applies regardless of the legality of the arrest, and which has been read to exclude only testimonial evidence, see cases cited in *Adams*, *supra*, at 5 n. 4, is ill-suited for more than incidental impact on that problem.

remedy was at best imperfect because some delay in presentation is unavoidable and, as *Mallory* concedes, additional delays for some purposes may be justifiable.<sup>20</sup> Such postponements are, of course, as susceptible to abuses as any others, and experience has exemplified the difficulty inherent in ascertaining either the real purpose of a challenged delay or the actual nature of interrogations carried out behind closed stationhouse doors.<sup>21</sup>

In *Miranda*, the Supreme Court eschewed this uncertain detour through Rule 5(a) and attacked the problem of custodial interrogation directly. It held that the accused is entitled to the assistance of counsel before he is questioned and, in effect, that any confession he makes while in exclusive police custody prior to arraignment is presumptively inadmissible under the Fifth and Sixth Amendments. Such confessions can stand if, but only if, the accused affirmatively and understandingly waives his rights, and the Government bears "a heavy burden" in attempting to show such a waiver.<sup>22</sup>

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<sup>20</sup> 354 U.S. at 455. See also *Alston v. United States*, *supra* note 11, 121 U.S.App.D.C. at 68, 348 F.2d at 74 (opinion of Judge McGowan).

<sup>21</sup> Compare the majority with the dissenting opinions in, e.g., *Coor v. United States*, 119 U.S.App.D.C. 259, 340 F.2d 784 (1964), cert. denied 382 U.S. 1013 (1966); *Muschette v. United States*, 116 U.S. App.D.C. 239, 322 F.2d 989 (1963), vacated on other grounds 378 U.S. 569 (1964); *Heideman v. United States*, 104 U.S.App.D.C. 128, 259 F.2d 943, cert. denied 359 U.S. 959 (1958). This case itself is illustrative of the difficulty: the police practice of processing at headquarters persons arrested at the precinct may or may not be essential to efficient police administration; if it is essential, it nonetheless presents obvious opportunities for improper interrogation.

<sup>22</sup> After the warnings have been given "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . . This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458 (1938), and we re-assert these standards as applied to incustody interrogation." *Miranda v. Arizona*, *supra* note 3, 384 U.S. at 475.

Thus, absent convincing evidence of waiver, no confession may be admitted, regardless of the dispatch with which the accused is presented before a magistrate. Conversely, should the Government carry its burden, we think it follows that the confession is not inadmissible solely on the ground that the accused was not taken before a magistrate at the earliest possible moment. A valid *Miranda* waiver is necessarily, for the duration of the waiver,<sup>23</sup> also a waiver of an immediate judicial warning of constitutional rights.<sup>24</sup> And what *Miranda*, as a constitutional interpretation, leaves an accused at liberty to yield, he may, we believe, forego equally under *Mallory*.<sup>25</sup> Provided the exacting standards for waiver are met, the overriding purpose of *Mallory* has been served.<sup>26</sup>

<sup>23</sup> A valid waiver ceases to be effective whenever the accused indicates in any manner that he wishes to remain silent or that he wants an attorney. *Miranda v. Arizona*, *supra* note 3, 384 U.S. at 473-74.

<sup>24</sup> *Miranda* implicitly assumes that it is possible for the police to convey to the accused sufficient understanding of his rights to enable him to make an intelligent waiver. A police warning, to be effective, must be given with proper solicitude for actual understanding. Moreover, a waiver made in the coercive atmosphere of police custody is less likely to be voluntary than one made before a commissioner. Thus the Government carries such a weighty burden of proving waiver in cases involving confessions to the police. But irrespective of who gives the warnings or takes the confessions, the ultimate question is whether the waiver is voluntary in the full sense of the word. If an accused did not understand what a magistrate told him, an ensuing confession would not be rendered admissible because he had been advised of his rights by a judicial officer. Similarly, under *Miranda*, a waiver may be valid even though made on the basis of police warnings.

<sup>25</sup> We do not conclude, however, that in waiving his right to remain silent, the accused also impliedly waives his right to complain of a prior violation of Rule 5(a). Rather, we construe *Mallory* not to require exclusion of an otherwise admissible confession because of a brief delay in obtaining a *Miranda* waiver.

<sup>26</sup> Rule 5(a) also confers upon the accused a prompt opportunity to persuade a magistrate, at a preliminary hearing under Rule 5(c), that there is no probable cause for holding him. While, of course, that policy remains in force, see *Adams v. United States*, *supra* note 19, at 10, *Mallory* has enforced it only coincidentally, since it has no

By no means is this to say that unjustified delay in compliance with Rule 5(a) has no bearing on the admissibility of a confession forthcoming during a period of such delay. As *Miranda* made clear,

"[w]hatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling

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effect if no incriminating evidence is obtained as a result of the delay, and since it has been read not to apply where the unnecessary delay in presentment to a magistrate occurs *after* a confession, *Coor v. United States*, *supra* note 21, 119 U.S.App.D.C. at 260, 349 F.2d at 785; *Bailey v. United States*, 117 U.S.App.D.C. 241, 328 F.2d 542, cert. denied 377 U.S. 972 (1964); *Lockley v. United States*, 106 U.S. App.D.C. 163, 270 F.2d 915 (1959); *Porter v. United States*, 103 U.S.App.D.C. 385, 258 F.2d 685, 692 (1958), cert. denied 360 U.S. 906 (1959); and see *United States v. Mitchell*, 322 U.S. 65, 70-71 (1944).

If probable cause is found, Rule 5(a) still serves to promote early consideration of an accused's admission to bail. This function of the rule has taken on added importance with the enactment of the Bail Reform Act, 80 Stat. 214 (1966), 18 U.S.C. § 3146 *et seq.* But for the same reason that *Mallory* has little relevance to the goal of assuring expeditious determination of the existence of probable cause, it is not a significant antidote to the problem of delays in bail hearings.

Rule 5(a) also serves to provide early warning by a magistrate of the right to counsel, which may be important in protecting an accused's interest at a line-up. See *Williams v. United States*, No. 21,269-70 (D.C. Cir., Dec. 20, 1968). Thus, identification evidence obtained in the absence of counsel may be excluded independently of the rules of *United States v. Wade*, *Gilbert v. California*, and *Stovall v. Denno*, all *supra* note 3, if it is obtained during an "unnecessary delay" in presentment. If the right to counsel has been validly waived under *Miranda*, however, this issue will not arise. Moreover, even in the absence of a waiver, if counsel was in fact present at the challenged confrontation, and if the resulting identification is otherwise admissible, *Mallory* does not require its exclusion because of a violation of Rule 5(a). *Williams v. United States*, *supra*, at 9 n. 9.

influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege."<sup>27</sup>

Thus, the greater the tardiness in presentment prior to a confession, the heavier the Government's already "heavy burden" of showing effective waiver. Certainly some conceivable delays are so long that no subsequent confession could be deemed the product of voluntary waiver. And nothing in *Miranda* affects the admissibility *rel non* of evidence of any sort obtained during detention following an illegal arrest.<sup>28</sup>

### III

Thus the vital question here is whether appellant voluntarily and understandingly waived his *Miranda* rights. If he did not, his confession was inadmissible under *Miranda*. If he did, the confession was admissible even if the purpose inspiring his transfer to police headquarters was interrogation for the production of evidence.<sup>29</sup>

The record discloses that appellant objected when, as he began his string of confessions, Sergeant Keahon started to take notes on his confession. How strenuously he objected does not appear, but it is noteworthy that Keahon stopped writing at that point. He testified entirely from memory to the details of the confession, which was made a year before the trial began, explaining that

"at the beginning of his admission, I started to write notes, and he stopped me and said: Don't write anything down. I will tell you about this but I don't want you to write anything down."<sup>30</sup>

<sup>27</sup> 384 U.S. at 476.

<sup>28</sup> See note 19, *supra*.

<sup>29</sup> Cf. *Naples v. United States*, *supra* note 11.

<sup>30</sup> We cannot agree with our dissenting colleague (*infra* p. 24) that "[t]he record raises the possibility that the only statements put into evidence were those made *prior* in time to Appellant's alleged equivocations." The confession at issue was the fourth in a series made by

The strong implication is that appellant thought his confession could not be used against him so long as nothing was committed to writing. If, as his avowed motive for confessing suggests, he was brooding over a guilty conscience while the warnings were being given, he might well have failed to absorb their message. Or he may simply have been laboring under the common misapprehension that the police could not use in court anything he said unless they were able to introduce a written statement. Whatever the reason, the evidence raises a serious question as to whether he intelligently waived his right to remain silent.<sup>31</sup>

Appellant was given the *Miranda* warnings in their entirety. He signed what purported to be an express waiver. If there were no other evidence in the record, the Government would have discharged its burden, and no further inquiry would be necessary. But while “[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement

appellant to Sergeant Keahon, who testified that appellant put a stop to note-taking “[a]t the beginning of his admission,” when he was narrating the first robbery in the series. If Sergeant Keahon was not admonished about note-taking until after the challenged confession was given, we must disbelieve his explanation as to why he had no notes concerning it.

<sup>31</sup>The thrust of *Miranda* is that in order to permit “a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights. . . .” 384 U.S. at 467 (emphasis added). Specifically included among the warnings the Court found essential to an *adequate* appraisal is notice of the fact that “anything said can and will be used against the individual in court.” *Id.* at 469. This warning is needed in order to make him aware of the consequences of foregoing his privilege not to speak. “It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.” *Id.* And as this explanation suggests, a warning is not *effective* if it is not understood. Thus, contrary to the thesis of the dissent, incriminating statements may be involuntary, and thus “compelled” within the meaning of the Fifth Amendment, even where the police are not at fault. Cf. note 24, *supra*. See *Proter v. United States*, No. 21,569 (D.C. Cir., Oct. 10, 1968) at 2-3.

could constitute a waiver,"<sup>32</sup> *Miranda* teaches that in many circumstances it does not.<sup>33</sup> Here, Sergeant Keahon's testimony suggests powerfully that the waiver was not understandingly made; in addition, the hour appellant spent in custody before the ceremonial "waiver" casts doubt on whether it was voluntarily made. Since the Government offered no evidence to dispel these doubts, we cannot say on this record that it carried its "heavy burden . . . to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination. . . ."<sup>34</sup>

The Government argues, however, that because the question was not raised below, appellant should not be allowed to present it here. We disagree. Appellant's counsel<sup>35</sup> was initially confronted with the signed waiver and what appeared to be a spontaneous confession. It is scarcely surprising that he prepared a *Mallory*, not a *Miranda*, argument. The evidence connoting that appellant did not understandingly waive his rights did not develop until the direct examination of Sergeant Keahon. Defense counsel then made an apparent attempt to raise the issue in a general way, but the matter was lost in the *Mallory* argument he was pursuing. We do not demand more of appellants as a condition to litigation of issues fundamental in the criminal process.

Nonetheless, because the Government had no clear warning that it would need to produce more evidence, we are reluctant to reverse for a new trial. Appellant's ban on note-taking inveighs against intelligent waiver, but this inference might be overcome, for example, if Sergeant Keahon admonished him that even an oral confession would be used against him; and appellant replied that he knew that but still did not want anything written down. Absent some

<sup>32</sup> *Miranda v. Arizona*, *supra* note 3, 384 U.S. at 475 (emphasis added).

<sup>33</sup> *Id.* at 475-76.

<sup>34</sup> *Miranda v. Arizona*, *supra* note 3, 384 U.S. at 475.

<sup>35</sup> Not his counsel on this appeal.

additional evidence, comparable in quality, of understanding waiver, however, his confession cannot stand. Accordingly, we shall remand this case to the District Court for an evidentiary hearing and findings of fact on the validity of appellant's purported waiver.<sup>36</sup>

#### IV

Appellant also contends that the trial judge erred in permitting two eyewitnesses to the Meridian Market robbery to identify him at the trial as a participant. His argument is that these in-court identifications were products of prior extrajudicial identifications made in circumstances so unnecessarily suggestive and promotive of faulty recognition as to impinge on due process of law.<sup>37</sup> We deferred our disposition of this case to enable evaluation of appellant's claim in the light of the recent *Clemons*<sup>38</sup> decision by the full court.

One, but only one, of the pretrial episodes complained of falls within the area of constitutional condemnation. More than a month after appellant's arrest, Louis I. Reznick, the owner of the market, and William Simpson, an employee, both of whom were present when the holdup occurred, viewed appellant while confined in a cellblock. Appellant was the only person they were shown, and both witnesses knew at the time that appellant had confessed. As the Government now itself characterizes the incident, this single-suspect cellblock confrontation was "indeed sugges-

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<sup>36</sup> Appellant, of course, may wish to testify at that hearing. See *Simmons v. United States*, 390 U.S. 377, 389-94 (1968); *Bailey v. United States*, \_\_\_ U.S.App.D.C. \_\_\_, 389 F.2d 305 (1967).

<sup>37</sup> See *Stovall v. Denno*, *supra* note 3, 388 U.S. at 302; *Simmons v. United States*, *supra* note 36, 390 U.S. at 384; *Wright v. United States*, No. 20,153 (D.C. Cir., Jan. 31, 1968) at 5-9. Since the pretrial identifications occurred before the decisions in *United States v. Wade* and *Gilbert v. California*, both *supra* note 3, the fact that appellant was then unrepresented by counsel does not establish a constitutional violation. *Stovall v. Denno*, *supra* note 3, 390 U.S. at 300.

<sup>38</sup> *Clemons v. United States*, No. 19,846 (D.C. Cir. *en banc* Dec. 6, 1968).

tive"; so much so, we hasten to add, as to render it offensive to due process.<sup>39</sup>

The Government, however, did not rely upon the out-of-court identifications at the trial.<sup>40</sup> The question, then, is whether the in-court identifications had a source sufficiently independent of the cellblock exhibition as to be free from its taint.<sup>41</sup> The trial court found that there was no taint, and we deem the evidence adequate to support that finding.<sup>42</sup>

Reznick and Simpson each testified at trial that they remembered appellant from impressions received at the time of the robbery. The offense was perpetrated by two men during daylight hours over a period of several minutes during which both Reznick and Simpson had excellent opportunities to scrutinize the two robbers. Afterwards, they gave the police detailed joint descriptions of the culprits, one of which depicted appellant reasonably well. In addition, Reznick selected appellant's photograph out of "a box of pictures" given him by the police shortly after appellant's arrest. This evidence, we hold, was sufficient to support the finding that Reznick's identification was not tainted by the cellblock confrontation.<sup>43</sup>

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<sup>39</sup> *Id.* at 16, 25, 32-33.

<sup>40</sup> The jury did hear a reference to the cellblock confrontation during the direct examination of Reznick. However, even if Reznick's reference amounted to an unintentional introduction into evidence of the out-of-court episode, there was no error if this identification, like its in-court sequel, had an "independent source." *Clemons v. United States*, *supra* note 38, at 30.

<sup>41</sup> *United States v. Wade*, *supra* note 3, 388 U.S. at 240; *Gilbert v. California*, *supra* note 3, 388 U.S. at 272; *Clemons v. United States*, *supra* note 38, at 9; *Wright v. United States*, *supra* note 36, at 9.

<sup>42</sup> In *Clemons v. United States*, *supra* note 38, at 8, 18, we emphasized the importance of the trial court's considered judgment on this question in the absence of further enlightenment by the Supreme Court. See also *id.*, opinion of Judge Leventhal at 37.

<sup>43</sup> The reliability of Reznick's in-court identification is additionally supported by appellant's concession that Simpson had correctly iden-

As to Simpson, who made no prior photographic identification, the proof on independent source for his in-court identification included a very significant event. On the night of appellant's arrest, Simpson was brought to police headquarters to identify him. According to the uncontradicted testimony of Detective Keahon,

"when Mr. Simpson walked into the office, he saw Frazier and he said: There's the man that approached me in the back and stated, this is a hold-up. And at the same time the Defendant Frazier shook his head; and I asked him what did he mean by shaking his head; and he said: Yes, that is the man that was behind the meat counter."

Ordinarily, an identification arising out of so suggestive a confrontation would itself be constitutionally dubious.<sup>44</sup> Here, however, not only did Simpson identify appellant, but appellant also identified Simpson. There can be no doubt on the record that by "the man that was behind the meat counter," appellant referred to Simpson's presence there at the time of the robbery. At this juncture, his urge to confess was so strong that he even acted out one of the other holdups to which he had confessed in order to convince hesitant eyewitnesses to that crime that he had indeed been the perpetrator. His statement, however, is relevant here, not because it is evidence of guilt and thus, indirectly, of the reliability of Simpson's identification, but rather because it tends directly to confirm the existence of an independent source for the challenged identification. And, with this, there could hardly be any "substantial likelihood of irreparable mistaken identification."<sup>45</sup>

We remand the case to the District Court for proceedings consistent with this opinion.

*Remanded.*

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tified appellant as a participant in the Meridian Market robbery. See the text *infra* at note 45.

<sup>44</sup> Compare *Clemons v. United States*, *supra* note 38; *Wright v. United States*, *supra* note 37, at 3, 5.

<sup>45</sup> *Simmons v. United States*, *supra* note 36, 390 U.S. at 384; *Clemons v. United States*, *supra* note 38, at 34.

BURGER, *Circuit Judge*, concurring in part and dissenting in part: I agree that the identification testimony was properly admitted under the principles recently set forth by this court in *Clemons v. United States*, No. 19,486 (D.C. Cir., Dec. 6, 1968) (*en banc*), but I do not agree with those parts of the majority opinion relating to the inadmissibility of statements which Appellant made to the police.

## (1)

The sole issue separating me from the majority is whether *Miranda v. Arizona*, 384 U.S. 436 (1966) required Appellant's statements to be excluded from the evidence. In answering this question affirmatively the majority leans heavily on *Mallory v. United States*, 354 U.S. 449 (1957), the standing of which has been drawn into serious doubt by recent Congressional enactments.<sup>1</sup> The majority's cognizance<sup>2</sup> of the message that this series of legislation bears for *Mallory* and their apparent agreement with the lower court's finding that *Mallory* was not violated here,<sup>3</sup> belies *Mallory*'s true significance to the issues at hand. Moreover it is unsound to treat *Mallory* and *Miranda* as closely related; the former is a quantitative test of time delay, the latter is a qualitative test of the circumstances of the interrogation.<sup>4</sup>

<sup>1</sup>Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197 (1968); District of Columbia Crime Bill, 81 Stat. 734 (1967).

<sup>2</sup>See majority opinion at notes 7-9 and accompanying text. The majority mentions only the District of Columbia Bill, but the Omnibus Act is also relevant. Its Title II substantially incorporates Title III of the District of Columbia Crime Bill. See generally, Note, *Title II of the Omnibus Crime Control Act: A Study in Constitutional Conflict*, 57 GEO. L.J. 438 (1968). And see *Bell v. Maryland*, 378 U.S. 226 (1964), dealing with the question of legislative retroactivity.

<sup>3</sup>In *Mallory* the exclusion of confessions rested on supervisory powers, not on the Constitution. *Mallory v. United States*, 354 U.S. 449 (1957); see *McNabb v. United States*, 318 U.S. 332, 340 (1943).

<sup>4</sup>Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO L.J. 449, 451 (1961). In any event, *Mallory* has never been interpreted as requiring the police to terminate an inter-

Of more concern is the majority's expansion of *Miranda* into a *per se* exclusionary rule, thereby transcending the Fifth Amendment requirement that only those statements elicited through *compulsion* be excluded from evidence. Indeed, *Miranda* itself cannot be read as going beyond the language of the Fifth Amendment.<sup>5</sup> Any lingering doubts on this score were resolved by a recent exposition on the subject by the Supreme Court. In discussing the scope of *Miranda* the Court pertinently noted in *Hoffa v. United States*, 385 U.S. 293, 303-04 (1966), that, "since at least as long ago as 1807, when Chief Justice Marshall first gave attention to the matter in the trial of Aaron Burr, all have agreed that a necessary element of compulsory self-incrimination is *some kind of compulsion*". (Emphasis added) (footnote omitted)

In *Miranda* the Supreme Court held that certain warnings must be given to a suspect before "custodial interrogation" could be conducted. The underlying assumption was that these warnings were necessary to prevent the subversion of trial rights at unsupervised pretrial confrontations between an accused and the State. Whereas pre-*Miranda* cases had alternately invoked the Fifth and Sixth Amendments<sup>6</sup>

view for purposes of arraignment when a suspect wants to make a confession of guilt. In *Fuller v. United States*, \_\_\_\_ U.S. App. D.C. \_\_\_\_, \_\_\_\_ & n. 13, \_\_\_\_ F.2d \_\_\_\_, \_\_\_\_ & n. 13 (1967), reheard en banc on other issues *Fuller v. United States*, No. 19,532 (D.C. Cir., decided September 26, 1968), Judge Leventhal noted: "Rule 5(a) did not require that the detectives break off the interview and try to arraign appellant rather than allow him to make an immediate elaboration of the mere assertion of guilt". (Citing *Walton v. United States*, 334 F.2d 343, 347 (10th Cir. 1964), cert. denied *sub nom. Comley v. United States*, 379 U.S. 991 (1965).)

<sup>5</sup>The *Miranda* Court expressly disclaimed any intention to traverse beyond the strictures of the Constitution. At the outset of its opinion the Court stated, "We start here . . . with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings". 384 U.S. at 442.

<sup>6</sup>Compare *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964) and *Massiah v. United States*, 377 U.S. 201 (1964), with *Ashcraft v.*

*Miranda* made clear that the Fifth Amendment was the central value at stake. The articulation of a stringent waiver requirement was merely a device through which the Court sought to ensure that Fifth Amendment guarantees were not unduly impaired at pretrial interrogations. The guidelines set forth in *Miranda* were means servicing constitutionally prescribed ends; as artifices of implementation they are subordinate and only incidental to the rights they were designed to secure. By postulating a waiver concept the Court did not intend to eclipse the threshold inquiries into the presence of compulsion and the quality of police conduct attending the making of inculpatory statements. This is the background of controlling legal principles on which this case ought to be decided. I do not agree that they give rise to a plausible claim of improper police tactics amounting to coercion requiring reversal or remand.

## (2)

Frazier was presented to Officer Keahon at headquarters at 5:20 P.M. Their meeting was prefaced by Keahon's reading the *Miranda* warnings to him from PD-47 (a form card which all police officers carry and which had previously been read to Frazier by Officer Sandy upon his arrest). He repeated these warnings to Frazier when he read PD-54, a form which advised him of his Fifth and Sixth Amendment rights<sup>7</sup> and contained a statement of an intention to waive

Tennessee, 322 U.S. 143 (1944) and Brown v. Mississippi, 297 U.S. 278 (1936).

<sup>7</sup>The warning reads as follows:

You are under arrest. Before we ask you any questions, you must understand what your rights are. You have the right to remain silent. You are not required to say anything to us at any time or to answer any questions. Anything you say can be used against you in Court. You have the right to talk to a lawyer for advise [sic] before we question you and to have him with you during questioning. If you cannot afford a lawyer and want one, a lawyer will be provided for you. If you want to answer questions now without a lawyer, you will still have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.

his right to remain silent and his right to counsel. Thereafter, at 5:30 P.M., Frazier himself read this form, orally stated that he understood its meaning,<sup>8</sup> and signed the waiver.

Officer Keahon testified that he then read the arrest warrant relating to the robbery of Mike's Carry Out Shop and started to question Frazier on that robbery. But, after Keahon had spoken but a few words, Frazier blurted out his desire to clear a third person who had been arrested for the robbery and shooting at a High's Store. Within minutes Frazier, by way of exculpating others, admitted to his involvement in the robberies at the High's Store, at Mike's Carry Out Shop, at the Dodge Market, and at the Meridian Market—the last robbery being the one for which he was convicted in this case. During this discourse Frazier objected to Officer Keahon's taking written notes. Keahon testified: "At the beginning of his admission, I started to write notes, and he stopped me and said: 'Don't write anything down. I will tell you about this but I don't want you to write anything down.'" [Tr. 72.]

The admission of the Meridian Market robbery was unsolicited and appears to have been volunteered. Officer Keahon testified that he did not ask Frazier whether he participated in the Meridian Market robbery and that the only questions asked in relation to that robbery during the initial confession were for the purpose of corroborating the identification of the market. Thus it seems that the confession was totally spontaneous and voluntary.

Following the statements Frazier was retained in the robbery squad office for nearly two hours, where he was quizzed in detail about the four robberies, reiterated his confessions, was displayed to several witnesses, and reenacted several of the robberies. Thereafter he was placed in

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<sup>8</sup>Officer Keahon testified as follows: "He [Frazier] stated that he did understand the form and that he did not want a lawyer. . . . He stated 'If I need a lawyer, I will get one in the morning.'" [Tr. 63-64.]

a cell for the night because a Commissioner was not available and was presented the following morning.

(3)

The record demonstrates entirely reasonable police activity satisfying the deterrent purposes underlying the *Miranda* rule. There is not a scintilla of evidence suggesting that what had been forthcoming from Appellant's lips was the result of unreasonable or improper police conduct. The fact that Appellant may not have desired the statement to be transcribed does not compel the conclusion that he was being subjected to the kind of police activity found unconscionable in *Miranda*. The most that can be said from Appellant's statements is that he may have *unintentionally* incriminated himself. The Fifth Amendment, however, serves neither to discourage nor to prohibit self-incrimination, it militates only against *compulsory* self-incrimination. The record does not even remotely suggest that Appellant was being compelled to incriminate himself, no less compelled to utter any words at all. There is not the slightest indication that Appellant was unaware of his rights or labored under a misbelief that his failure to speak could be used against him as evidence of guilt. There is no intimation that the environment would have neither permitted nor honored a non-waiver.

In fact, no issue is even purportedly raised as to Appellant's willingness to make the statements that were eventually used against him. Indeed, evidence of his volition may be inferred from his voluntary participation later that evening in a series of identification procedures. In view of the obvious spontaneity surrounding its making, the statement could plainly have been used as a threshold oral confession.<sup>9</sup>

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<sup>9</sup>E.g., *United States v. Mitchell*, 322 U.S. 65 (1944); *Bailey v. United States*, 117 U.S. App. D.C. 241, 328 F.2d 542 (1964) (Miller, J.); *Jackson v. United States*, 114 U.S. App. D.C. 181, 313 F.2d 572 (1962) (Edgerton, J.); *Metoyer v. United States*, 102 U.S. App. D.C. 62, 250 F.2d 30 (1957) (Burger, J.).

In this regard it also bears noting that the "plus factors" so frequently contributing to a rejection of a confession are not present in this case. Frazier was repeatedly told of his right to counsel and his right to remain silent; he confessed immediately and without prior denials; he never repudiated his confession and he did not make any allegations of coercive threats or physical abuses.<sup>10</sup>

By equating Frazier's insistence that the police not write notes with a desire not to incriminate himself, the majority engages in sheer speculation of Appellant's thought processes which places a premium on the capacity of judges to probe Appellant's mind. This approach bears an unfortunate resemblance to the sophistry engaged in by the courts which labored under the albatross of *Betts v. Brady*.<sup>11</sup> Indeed, the rule requiring courts to peer through kaleidoscopes in search of constitutional violations inevitably deteriorated into measuring the constitutional right in terms of the suspect's need—and invariably a horribly guilty suspect at that. Although this theory received currency during the era of "special circumstances", twenty years of inconsistent application which produced no judicially manageable standards eventually persuaded the Supreme Court in *Miranda*<sup>12</sup> to

<sup>10</sup>Compare, e.g., *Greenwell v. United States*, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964) (allegations of coercion); *Spriggs v. United States*, 118 U.S. App. D.C. 248, 335 F.2d 283 (1963) (prior denials; repudiation of the confession).

<sup>11</sup>316 U.S. 455 (1942), in which the "special circumstances" doctrine was evolved to determine the necessity for counsel in non-capital offenses.

<sup>12</sup>By the time of *Miranda*, *Betts* had already been overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963), holding the right to counsel universally applicable at trial in felony cases without regard to "special circumstances". In *Cicenia v. Lagay*, 357 U.S. 504 (1958), and *Crooker v. California*, 357 U.S. 433 (1958), the *Betts* analysis had been directly transposed on the determination of the admissibility of a confession. Both of these cases were distinguished and partially overruled in *Escobedo v. Illinois*, 378 U.S. 478, 491-92 (1964), and were completely overruled in *Miranda*, *supra* at 479.

turn to an essentially *objective*<sup>13</sup> mode of analysis.

Since the underlying purpose of *Miranda* was to curb police improprieties, the use of objective criterion provided

n.8. Of special interest is the discussion and rejection in *Miranda* of the "special circumstances" into which the rule of *Betts* necessitated an inquiry. *Id.* at 468-69 & n. 38.

<sup>13</sup> Analogously, in the arrest area a suspect's testimony of his understanding of the events

would not be decisive but would be material. Compare *United States v. McKethan*, 247 F. Supp. 324, 328-29 (D.D.C. 1965), *aff'd by order* (D.C. Cir. No. 20059, 1966), where Judge Young-dahl states "the test must be not what the defendant himself . . . thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes, . . . a reasonable man, interpreting these words [of the detective] and the acts accompanying them. . . ." *McKethan* has recently been cited with approval in *Hicks v. United States*, \_\_\_\_ U.S. App. D.C. \_\_\_, \_\_\_\_ F.2d \_\_\_\_ (No. 20240, July 7, 1967).

*Fuller v. United States*, \_\_\_\_ U.S. App. D.C. \_\_\_, \_\_\_\_ n.11, \_\_\_\_ F.2d \_\_\_, \_\_\_\_ n.11 (1967) (Leventhal, J.), reheard en banc on other issues *Fuller v. United States*, No. 19,532 (D.C. Cir., decided September 26, 1968).

As Judge Bazelon's dissent in *Hall v. United States*, No. 20,711 (D.C. Cir., decided February 24, 1969) indicates, he too would subscribe to "reasonableness" of police conduct as the touchstone of exclusionary rules. Judge Bazelon said there, echoing a multitude of judicial holdings

It is not searches and seizures as such which the Fourth Amendment enjoins, but only "unreasonable searches and seizures," and the reasonableness of police conduct under the Fourth Amendment is ordinarily gauged by what the police reasonably and in good faith believed to be the facts at the time of their action. Thus, an arrest made on probable cause is not invalidated because the police were in fact mistaken in their good faith reasonable belief. \* \* \*

I fail to see how admission of the fruits of such police conduct could sully the integrity of the judicial process. Here was no shocking affront to the dignity of a citizen, cf. *Rochin v. California*, 342 U.S. 165 (1952), no police "contempt for law," no "flagrant disregard" of prescribed procedures, no "willful disobedience of (the) . . . Constitution . . . ." (slip op. at 6, 9)

Although the *Hall* case involved the Fourth Amendment everything said in the dissent relates equally to the exclusion of reliable evidence under the Fifth Amendment; see *Boyd v. United States*, 116 U.S. 616, 630 (1886), where the Court noted that "the Fourth and Fifth

courts with a more workable method of evaluating the reasonableness of police conduct. The unhappy theory holding the police accountable for environmental and personality factors unavoidably unique to each suspect and frequently beyond the pale of police perception came to rest in the shadow of an exclusionary rule grounded in deterrence. Indeed, the Supreme Court in *Johnson v. New Jersey*<sup>14</sup> confirmed the essentially deterrent underpinnings of *Miranda* and thereby placed its imprimatur on an interpretation focusing on the reasonableness of police conduct instead of the vagaries of human nature.

*Miranda* did not set down a *per se* proscription against pretrial questioning; it was addressed primarily to abusive and unwarranted tactics designed to subvert constitutional rights. Even if Frazier unwittingly incriminated himself, the police should not be held accountable in the absence of some evidence of deceit or misconduct on their part. Here, of course, there is no such evidence. Indeed, the majority clothes Appellant's remarks with a significance bearing no relationship to the record or to ordinary human experience. Throughout the majority opinion is circumspect avoidance of any discussion relating to coercion or improper police

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Amendments run almost into each other." Compare Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967).

Just as reasonableness has been the guidepost for protecting privacy, it also serves as the basis for determining the existence of compulsion. In assessing the legality of an arrest the question is framed in terms of whether the police officer had probable cause to believe a crime had been committed; similarly, in determining the admissibility of a confession, the question is whether there was sufficient reason for the police to believe that the suspect had consented to being questioned. In both instances the judicially declared objective of the rules is to prevent the police from reaping the benefit of official misconduct. Here Appellant is unable even to allege any police misconduct, hence the underlying predicate of the exclusionary rule is totally absent. In such circumstances there can be no justification for suppressing the evidence.

<sup>14</sup> 384 U.S. 719 (1966), holding *Miranda* not retroactive.

conduct. To the extent Appellant's utterances may be construed as indicating a misunderstanding of the consequences of his making incriminatory statements the majority has failed to supply a nexus between this and the presence of improper police conduct amounting to coercion.

I have difficulty perceiving the basis for the majority's argument that it was unreasonable for the police to proceed with questions *after* Frazier made an apparently valid waiver. Although this waiver was not irrevocable,<sup>15</sup> there is nothing to show that Frazier indicated "in any manner, at any time prior to or during questioning, that he wish[ed] to remain silent" or that he wanted an attorney. *Miranda v. Arizona*, *supra* at 473-74.

Having complied with the postulates of *Miranda*, it was the absolute duty of the police as law enforcement agents to investigate promptly the circumstances of the crime and the suspect's possible participation. I am somewhat at a loss to know what more the Government could or should have done to comply with the directives of *Miranda*. Even if Frazier did not understand the privilege against self-incrimination, the majority's approach is unrealistic and goes beyond the mandates of any decided cases. It seemingly expects the police to detect indications of misunderstanding and lack of knowledge which are so subtle that not even judges would recognize the problem.

The seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances is giving rise to myriad rules, sub-rules, variations and exceptions which even the most alert and sophisticated lawyers and judges are taxed to follow. Each time judges add nuances to these "rules" we make it less likely that any police officer will be able to follow the guidelines we lay down. We are approaching the predicament of the centipede on the flypaper—each time one leg is placed to give support for relief of a leg already "stuck", another becomes captive

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<sup>15</sup> *Miranda v. Arizona, supra* at 444-45.

and soon all are securely immobilized. Like the hapless centipede on the flypaper, our efforts to extricate ourselves from this self-imposed dilemma will, if we keep it up, soon have all of us immobilized. We are well on our way to forbidding *any* utterance of an accused to be used against him unless it is made in open court. Guilt or innocence becomes irrelevant in the criminal trial as we flounder in a morass of artificial rules poorly conceived and often impossible of application.

The record raises the possibility that the only statements put into evidence were those made *prior* in time to Appellants alleged equivocations.<sup>16</sup> Police who act reasonably on facts presently in their possession should not be ascribed a taint by virtue of subsequent utterances of a suspect which might be said to exhibit qualities forbidden by *Miranda*. The use of such a relating-back theory does violence to *Miranda*<sup>17</sup> and brings us beyond the point of diminishing return in enforcing an exclusionary rule grounded in deter-

<sup>16</sup> Although the majority argues that the record unambiguously demonstrates the contrary, *see note 30 of majority opinion*, it is unnecessary to resolve their speculation since the precise moment of these equivocations is not crucial either to the majority's or to my theory of the case. The majority neither claims nor are they able to demonstrate how the precise moment of equivocal utterance is relevant for determining the breadth of Appellant's understanding of his rights. Similarly, since the police would have been acting well within the bounds of reason by questioning the suspect *after* he had equivocated, *a fortiori* it would have been proper for them to question him before. That the moment of equivocal utterance is totally unrelated to determining the *reasonableness* of police conduct is further indicated by the majority's careful abstention from any discussion of the one issue on which this case turns.

<sup>17</sup> Cf., e.g., cases cited in note 9, *supra*. In these cases the Court held that "unnecessary delay" occurring *after* a confession does not retroactively infect the confession. *See also Bayer v. United States*, 331 U.S. 532 (1947).

rence of proscribed police conduct.<sup>18</sup> The Constitution does not prohibit, and surely the majority holding will not help, deter the police from continuing to question a suspect once there has been—as there was here—an apparent waiver of rights; but the majority holding will baffle policemen—as it will many judges.

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<sup>18</sup>Cf. *Thornton v. United States*, \_\_\_ U.S. App. D.C. \_\_\_, \_\_\_, 368 F.2d 822, 827-28 (1966), holding that an unconstitutional seizure is not a proper ground for collateral attack; Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389-90 (1964). See also the dissenting opinion of Judge Bazelon in *Hall v. United States*, No. 20,711 (D.C. Cir., decided February 24, 1969) where he states: "Even if a search that was reasonable *when made* can be retroactively invalidated under the Fourth Amendment, such a search does not taint either its fruits, or, through them, the judicial process." (Slip. op. at p.9) (emphasis added).