

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

MONDAY, NOVEMBER 8, 1971

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

The committee met, pursuant to recess, at 10:30 a.m., in the Caucus Room, Old Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Hart, Kennedy, Bayh, Burdick, Tunney, Hruska, Fong, Scott, Thurmond, and Mathias.

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

The CHAIRMAN. The committee will come to order.

Now the Chair cannot tell from those who filed requests to testify whether they are for the nominee, Mr. Powell, or against him. I am placing Mr. Holloman at the end there and I want all those who want to testify against the nominee to give him their names.

If they are not present we can make arrangements.

Mr. Powell, I have read the FBI files on you; it was a full field investigation. I certainly think you are highly qualified and I am going to vote to confirm you.

Senator Ervin?

Senator ERVIN. Mr. Powell, I have known you by reputation for a long time. I know you are reputed to be one of the very finest lawyers in America; and from everything I have heard about you I think that you will do what Chief Justice John Marshall declared in the *Marbury v. Madison* case is the duty of a Supreme Court Justice, and that is to accept the Constitution as the rule for the Government of our official action as a member of the Court and for that reason it will afford me pleasure to vote for you. I have no reservations.

### TESTIMONY OF LEWIS F. POWELL, JR., NOMINEE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Mr. POWELL. Thank you very much, Senator.

The CHAIRMAN. Senator Bayh?

Senator BAYH. Mr. Powell, let me publicly extend my congratulations to you for the confidence that the President has placed in you. I have had a chance to work with you during your tenure as president of the bar association and I have certainly felt that that experience has been a fine one for me.

If I may, may I ask you just a general question to start, relative to what you feel the proper role of the Senate is in this experience that we are sharing here.

Do you feel that the Senate can in good conscience, perhaps ought to in good conscience, explore not only the legal competence and the moral integrity of a prospective Justice but should also explore what the individual feels from a philosophical standpoint?

Mr. POWELL. I know of no limits on what the Senate should explore, Senator Bayh.

Senator BAYH. I am sure you are aware of the concern that I have. I am sure as a leader of the bar of many years you probably experienced this concern before I did, as a relative neophyte lawyer, over the importance of maintaining the quality of judges, not only from the standpoint of legal competence but also from the standpoint of public acceptance. May I ask you some questions relative to your own personal financial background?

Mr. POWELL. Of course.

Senator BAYH. You submitted to the chairman, as I recall, a financial statement covering yourself, your wife, and your son. You are familiar with that statement, I trust?

Mr. POWELL. I am.

Senator BAYH. To the best of your knowledge, does this represent an accurate picture of your complete financial holdings?

Mr. POWELL. That statement listed all of the securities which either I, my wife, or my son owned. That statement does not include certain cash which I have; it does not include life insurance; it does not include any tangible personal property and I may say for the benefit of my wife, who is in the room, she claims all of it except my guns. [Laughter.]

Senator BAYH. Do you keep those locked up and away from her? [Laughter.]

Mr. POWELL. That hadn't occurred to me yet.

Senator BAYH. Knowing her and knowing you, I don't suppose that is much of a problem to either one of you.

Let me explore, if I may, some of the legal problems that may be created by this.

First of all, let me compliment you on the success that you have evidenced during your practice by being able to accumulate such a substantial portfolio. I think this speaks well of your business and your legal competence.

It does raise, as you know, certain questions to those of us who are concerned about how a judge—I am not sure immunizes is a good word, but let me use it—immunizes himself from possible temptation. Neither you nor most judges would succumb to such temptation but from the standpoint of appearance and propriety, what are your thoughts as to what you can do or should do or are prepared to do relative to this significant stock portfolio so that it might not give the appearance of impropriety in certain cases that you may be called to sit upon?

Mr. POWELL. Senator Bayh, I agree that that is a troublesome problem. In the relatively limited time available, I have tried to acquaint myself with what has been done by certain other members of the Court. Also, I have read the preliminary draft of the proposed

new canons of judicial ethics and I have had my partners do some research. I would recognize as the binding principle, to which I will attempt to adhere, both to the letter and the spirit, the canons of judicial ethics. I recognize they are not legally binding on the members of the judiciary but I think increasingly they will be so regarded. I am aware also of 28 U.S.C.A. 455, and obviously I would comply with that.

Senator BAYH. 455, of course, uses the specific test of a "substantial interest"?

Mr. POWELL. That is correct.

Senator BAYH. Would you care to give us your impression, Mr. Powell, of how you feel the canons of ethics interpret substantial interest?

Mr. POWELL. They interpret it very narrowly. The proposed new canons, I think, use the phrase "any interest."

Senator BAYH. And you feel this would be the personal test you would subject yourself to?

Mr. POWELL. Yes. I would say this, to amplify that response, Senator Bayh: Obviously I have some problems. The canon, as I read it, imposes a duty on a judge as promptly as he reasonably can to dispose of securities which are in companies which are likely to come before the Court. Obviously, one would have to do some speculating as to the latter part of that standard. There is a further condition that his obligation is to dispose of them where he can do so without substantial loss.

The principal holding which I have, and which my family also has, including not only my wife and son but my two sisters and a brother, is a holding that came to us through gifts from my father many years ago. We could not sell that holding without very substantial tax adjustments.

Senator BAYH. Could you give us the name?

Mr. POWELL. It is Sperry & Hutchinson.

Senator BAYH. The S. & H.?

Mr. POWELL. The S. & H. Green Stamp Co.; that is right. My father's family furniture manufacturing company was merged into the Sperry & Hutchinson Co. a couple of years ago, so that the family has substantial or comparatively large holdings in that company.

Senator BAYH. How do you insulate those from your holdings or do you feel it is necessary?

Mr. POWELL. I would certainly have to disqualify myself if a case came to Court involving that company.

Senator BAYH. There has been some question—I think I heard you speculate, this speculation at least has been attributed to you—relative to a blind trust for your holdings. Would you care to share your thoughts with the committee ultimately as to how that would meet the problem that confronts you?

Mr. POWELL. I would be happy to do so.

I was first informed this was a technique that might be helpful and that had been used by others. My investigation through lawyers in my office is not yet complete; and yet I would say as of now I think a blind trust would probably be of little assistance. It may be a duty, in fact the new canons suggest there is a duty, on a judge to

ascertain what he does hold. If that affirmative duty exists, a blind trust would be a bit awkward.

**Senator BAYH.** I would suppose that a blind trust might work for some of your holdings, perhaps most of them. The one that you referred to where you would have significant tax liability just wouldn't be disposed of by a blind trust—it would be the sort of thing that would be ever present as a reminder?

**Mr. POWELL.** However you made it, I think, in a situation such as you have described, you would have that problem.

**Senator BAYH.** You feel that the canons of ethics, 28 U.S.C.A. 455, should be construed in the strictest sense as far as you are concerned?

**Mr. POWELL.** I certainly do.

**Senator BAYH.** Could you give the committee the benefit of your thoughts relative to the emphasis that the Court as of this date has placed on avoiding the appearance of impropriety? They brought in the appearance of impropriety in the *Commonwealth Coatings* case as well as specific interests or specific impropriety. The Court in that 1968 case held that a judge had a responsibility to avoid the appearance of impropriety as well as impropriety. I don't ask you to deal with trying to second guess the Court, but to give us your opinion as to—perhaps I should put it this way: Give us your opinion as to the significance that the appearance of impropriety should play as a judge interprets the substantial interest clause and the canons of ethics.

**Mr. POWELL.** I would agree that the appearance of impropriety certainly merits serious consideration. It is quite important for the public to have confidence in the members of the Court that they have no interest other than to do justice under law.

**Senator BAYH.** There are a number of other questions—

**Mr. POWELL.** Senator Bayh, I would just like to add one comment to be sure that I have answered your inquiry completely.

I would endeavor promptly to limit my list of investments so as properly to comply with the letter and spirit of the canons. There are some investments I would certainly wish to retain; I mentioned one of the major ones. There are several others that are involved in corporations which I have represented over many years. If they should be involved in litigation in court—certainly for the foreseeable future—I would not take part in it.

**Senator BAYH.** Could you broaden the previous discussion we have had in which we have dealt with ownership or interest in a party. The substantial interest test at least in *Commonwealth Coatings* has been interpreted to mean there must be an interest in the specific party, but the party that has been related to the party which the judge has an interest in. Could you give us your thoughts relative to how you, as a judge, feel you should look at cases that come before you in which you have served as counsel?

**Mr. POWELL.** Well, most certainly I would not take any part in those cases, Senator Bayh. There are all sorts of situations that I have thought about and, of course, you have—

**Senator BAYH.** Could you give us a broader thought on this?

**Mr. POWELL.** Well, how far does one go over the years with respect to old clients of one's firm? I think that raises a host of questions. As you know, having practiced law with distinction yourself, you have all

sorts of clients. We have had hundreds of clients; some come back year after year; others we never see again. Some are retained, most are not. So I think the specific answer would have to be made in relation to the specific factual situation. I certainly can assure you that my own effort and every inclination would be to lean over backward in this respect to avoid the appearance of impropriety; and yet, I suppose every judge has to bear in mind if he leans over backward too far when it is not really justified, he imposes additional burdens on other members of the court.

Senator BAYH. I have introduced a measure, and Senator Hollings from South Carolina has introduced a measure, which we hope this committee will be able to look upon with favor, that would deal with giving the Federal judiciary, particularly at a lower level, the opportunity to lessen this burden of the obligation to sit so that we deal with the appearance of impropriety to a greater degree than we have in the past.

Mr. Chairman, I want to yield temporarily back to my senior colleagues on some questions they may have, but I would like to pursue one other question in this ethical field as long as we are there.

Let me say for the record I am sure it is not necessary for you, for your information, but I don't ask these questions because I have doubt about your ability to meet them head on; I am confident from what I know of you that you would, but I just want the record to be clear and I want you to have a chance to express your feelings on them.

We have dealt with the need to remove oneself, to keep oneself, because of relationship with a party, and financial, pecuniary interests, or the need to be careful, as careful as one can, with what one owns as a judge, so that he not be in a position of having to excuse himself. What obligation do you feel a judge has to meet the tests of the new canons of ethics relative to past opinions that he may have expressed? Is that as important a thing to consider, as well as interests in the party or appearance of impropriety so far as client-lawyer relationship with a prospective party is concerned?

Mr. POWELL. I believe one of the provisions of section 2, or article 2 rather, of the proposed new canons says in substance the judge should not serve in a case with respect to which he has formed a fixed opinion or has a fixed view as to the issue involved; and I would certainly accept that as a sound rule.

Senator BAYH. We had rather detailed discussion with the other nominee, Mr. Rehnquist, relative to his feelings in the whole area of the right to privacy, and the inherent right of the Federal Government to become involved in snooping and this type of thing. So that I might get your thoughts on where you feel this might enter, if at all, as you look at some of the cases, prospective cases, could you give us your thoughts relative to what rights you feel the Federal Government has in the area of so-called fourth amendment rights, wiretapping, and surveillance or the broader rights of the right of privacy which have been protected in the rather broad ground of the first, fourth, and, perhaps, in the fifth amendment? Could you give us your thoughts in those areas?

Mr. POWELL. It covers a lot of ground, doesn't it?

Senator BAYH. You don't need to confine yourself to 25 words or less. [Laughter.]

Mr. POWELL. I will address first of all the broader question of what you described as the right of privacy, and I may say that my views, perhaps, have changed dramatically over the past two and a half weeks. I now think the right of privacy would be a very fine thing. [Laughter.]

Senator BAYH. I have shared that concern for 17 years.

Mr. POWELL. I am sure you have. Seriously, I once read the *Griswold* case; I suppose you have reference to it?

Senator BAYH. Yes, sir.

Mr. POWELL. I have not read it recently. I remember, of course, as every law student does, there was no specific provision of the Constitution that spelled out a right of privacy; the right was inferred from a collection of other rights. I suppose the correct posture for me to take at this moment is that I would certainly view any such case with an open mind and attempt to reach a decision based on the facts and the law and the Constitution.

I would say, not as a prospective judge but generally as a citizen, that I think all Americans have the right not to have their privacy unduly intruded upon; there is no question about that.

Do you wish me to move on into the wiretapping area which you mentioned?

Senator BAYH. If you would, please.

Mr. POWELL. I wrote a letter to you, Senator Bayh, when I received a request through the Justice Department for copies of talks that I had made, and knowing of your interest in this particular area, I sent you copies of the only talks of which I have any recollection that I have made relating to electronic surveillance. I would like to say for the benefit of the committee that as a civilian lawyer without any criminal trial experience, my first interest in the criminal law arose when I was president-elect of the American Bar Association, and I was trying to plan a program for my year as president; and I ended up with three programs which seemed to me to be fairly significant. One was the initiation of the criminal justice project of the American Bar Association with which I am sure all members of this committee are familiar.

I had to do some study in connection with that. I will pass over that project for a moment and move to the President's Crime Commission—President Johnson's Commission on Law Enforcement and the Administration of Justice. I was assigned to two subcommittees of that Commission: One was the Subcommittee on the Courts; the other was the Subcommittee on Organized Crime. That was my first, literally my first, insight and information as to what organized crime in this country really is doing to our people.

It was there for the first time that I became interested with the problem of whether or not electronic surveillance was needed by law enforcement and whether adequate safeguards could be imposed by legislation which would protect the public against the intrusion that this form of surveillance makes possible.

A majority of the President's Commission, including myself, found that the law was then in a very chaotic state. You are all familiar with it: I will not review it, but under the *Olmstead* case, wiretapping was not deemed to be a violation of the fourth amendment and yet under the Communications Act of 1934, the fruits of the surveillance

were not admissible in court. So we had the worst of all worlds, with uncontrolled wiretapping allowed but the fruits of it not being available for use even in proper criminal proceedings.

So the principal thrust of the Crime Commission's report was that Federal legislation was urgently needed.

It was needed, we thought, for two reasons: First, to outlaw all unauthorized wiretapping, and that was done in unequivocal language in the Omnibus Crime Act of 1968.

The second principal recommendation of the Commission was that a court-controlled system of wiretapping be established by the Congress to deal with cases of major crime, directed primarily against organized crime. That recommendation may have had some influence on the Congress in the enactment of title III of the act of 1968.

At that point, my interest in the subject, except from a purely academic way, ended until the ABA criminal justice project decided to put out standards in this area, standards primarily to guide the States; and so, as I am sure you know, Senator Bayh, the ABA house of delegates last February did adopt standards with respect to electronic surveillance, and I served on the ABA Criminal Justice Committee; I supported those standards.

I have made, as I recall, three talks in which I mentioned this subject, and I think I sent all of those to you.

Senator BAYH. You mentioned the concern you have over organized crime. Every member of this committee shares that concern. You mentioned the effort that we made in the 1968 act in which wiretapping is permitted with certain protections, particularly the securing of a court order. You mentioned outlawing of all unauthorized taps. Could you give us your thoughts relative to whether, as you look at the need to balance the security of our society and deal with organized crime against the concern over the invasion of our individual rights, specifically now we are talking about fourth amendment rights, whether it would not be a fair test to subject all wiretapping, to have the one who is going to use the wiretap to get a court order?

Mr. POWELL. I think you are now moving, if I understand your question, into the areas of national security and domestic subversion. The ABA standards did incorporate provisions with respect to national security cases but did not require a prior court order. This involves action by a foreign power in espionage or comparable situations. The ABA standards did not address the far more troublesome area of internal security surveillance.

I have never studied that. I alluded to it in two of the talks which I sent to you. I understand that at least one case is either on the docket or on its way to the Court, and I doubt whether I should go beyond what I have said on that topic.

Senator BAYH. Let me just read the ABA final draft and the tentative draft and ask you if you would care to comment further than you already have.

The final draft dealing with this specific point says, and I am sure you are familiar with this, but just to refresh your memory to have it in the record, let me read it: "The special committee rejected any reading of the fourth amendment that would invariably require compliance with a court order system before surveillance in interest in national security could be termed constitutionally reasonable."

The tentative draft has the following language:

The Committee considered and rejected language which would have recognized a comparable residuary power in the President not subject to prior judicial review to deal with purely domestic subversive groups. This is not, of course, to say that there may not be domestic threats to the national security. It is to say, however, that there is a valid distinction in how each ought to be treated insofar as these techniques are concerned.

Would you care to comment further on those thoughts expressed by the ABA committee?

Mr. POWELL. I think they accord with my recollection, Senator Bayh, and I was on that committee.

Senator BAYH. I want to try to raise this question so we can get a little more depth into your concern over this matter of how you might respond to my concern without putting you in an untenable position relative to a case which might very well be before you.

What circumstances do you feel might justify the use of electronic surveillance?

Mr. POWELL. You mean beyond organized crime?

Senator BAYH. Yes; let's say beyond that.

Mr. POWELL. Senator, I hesitate, really, to try to get into factual situations. I realize the line, and I think I have said this, between what is a purely foreign security problem and a purely domestic security problem may be very difficult to draw in some cases. I would think in most cases it would not be difficult to draw. I think one would have to examine the facts very carefully. I think we would all feel far more optimistic about moving with confidence where you are dealing with foreign agents of a potential enemy than you would where you are dealing with Americans, particularly if all that they are doing independently of any foreign government of any kind is to express hostile opinions.

I think these are the extremes, and I would rather not try to describe any factual situation. I have no idea, for example, what the actual facts are in the case before the Court. I think I read a couple of the lower court decisions once. I have not read the Sixth Circuit Court of Appeals' opinion.

Senator BAYH. What is the test that you feel would be required for a tap to be placed under the 1968 act?

Mr. POWELL. Well, the statute outlines a number of requirements that must be met. I am sure I cannot recall them all.

There is the requirement of showing probable cause, and of showing that the necessary evidence to convict the suspected criminal cannot be obtained in any other way. There must be a limitation on the time, which cannot exceed 30 days. If there should be a desire to extend that time, there must be a new application to the court and a fresh showing of the continued or new probable cause; and again the results of the tap have to be reported.

There are some other requirements, but these are the essential ones, as I recall them.

Senator BAYH. First of all, let me just say I think the Government has an obligation to protect itself from those who obviously by design have as their motive, their intention, to destroy the ability of this Government to function. I think this goes far beyond the right of self-expression and this type of thing. I am trying to express concern and to

get your opinion relative to how you balance off this, on the one hand, versus the fact that it is possible to envision the chief law enforcement officials in this country—and I just take a hypothetical question—being motivated by politics so that criticism per se in essence becomes subversiveness. I think we must protect ourselves from this possibility.

You mentioned probable cause. Would it be unreasonable for a judge or for a Senator to suggest that this requirement be applied to "domestic subversives"?

Mr. POWELL. As I recall, some of the discussion we had on the Criminal Justice Committee tried to deal with this problem and that was considered. It was also considered whether or not perhaps other standards could not be prescribed by law.

The situation is obviously different from organized crime. As you say, I don't think anybody would support uncontrolled surveillance against citizens because they criticized the Government. On the other hand, as you move closer and closer to cooperation and coordination with agents of an alien power who are trying to act in a hostile way to our Government, you can see that prescribing standards becomes extremely difficult.

Senator BAYH. All right. Then you brought in a criterion there that might not exist. If I might just be specific. If you have "domestic insurgents" or subversives cooperating with a pattern with their national agents, that is one thing. I suppose it is fair to say that in your judgment that would be—would meet the criterion which would give the President the power without court sanction to go in to tap?

Mr. POWELL. In view of the possibility of this matter coming before the Court, I think I had better stand where I already stand, which is in support of the American Bar Association's standards, which I must say I think would meet the situation that you described.

Senator BAYH. Let's take that in cooperation and concert with international agents. How does that differ from normal criminal activities? Why could not the protections and safeguards of the 1968 act be applied there?

Mr. POWELL. Well, this was obviously one of the problems that caused the ABA committee to decide that it did not have enough information, really, to deal with the problem. In other words, I don't think—I speak only for myself; I have no idea what sort of information is available to the responsible people in government concerning possible acts of violence, for example, against a government building. It may be contemplated solely by Americans, not agents of a foreign power.

Senator BAYH. I would think that any attorney general or any chief law enforcement official of a community would have not only the right but the responsibility to keep the building from being blown up if he knew this were about to happen. But can you give me your thoughts relative to why this could not be done by first going to a Federal judge and going through the confidential procedure for putting a tap on under the 1968 act?

Mr. POWELL. I would certainly say this: If I were in the Congress of the United States I would address that problem very seriously. In other words, I would see if you could not devise standards that would be compatible both with the public interest and public protection, and with whatever necessities may exist with respect to responsible law

enforcement people; and I think in the talk that I made to the Richmond Bar Association I suggested, when I put this problem aside in a paragraph just in the interest of clarity, that this may be an area in which legislation is necessary.

Senator BAYH. Well, I concur that Congress would fulfill its responsibility if the law could be more definitive. But it has not. Congress has not followed the advice and thus we find ourselves in a position where there is no law. Thus a final determination, I suppose, is going to be made by those who sit on the high bench and this it is a very delicate thing to ask questions about; but it is an important thing for some of us to know before a man is placed on that Court. So could you give us your thoughts, which might be more generally relative to circumstances that might exist, factors in your mind which argue favorably in allowing a wiretap or against allowing a wiretap when we are talking about citizens of this country who have no close link or visible link or any link with foreign agents?

Mr. POWELL. Senator, I think I can say that I understand your concern and I think if I were sitting where you were I would be asking the same questions.

The only hesitation I have is in resorting to speculation, and it would be speculating to a large extent because I have not studied how this problem might be dealt with. I would certainly undertake a study of it and I would think that many, if not most, of the safeguards that are in the act of 1968 could be applied. I would not wish to identify those that couldn't be—I may be getting into areas that could possibly embarrass me if I should be confirmed to the Court.

Senator BAYH. As much as I would like for you to be more definitive, I don't want you to be if you are going to get across that line, and I know your sincerity and I know how your interests are. Let me pursue it from a little different angle. If you as a judge would make a determination that the information necessary to protect society, whether it is a Federal building or the President or Mr. Kissinger or whoever it might be, that steps could be taken—that the information could have been acquired by using the safeguards of the 1968 act, and yet they were not used, would you tend to believe that this was a breach of the constitutional rights of the individuals involved?

Mr. POWELL. Conceivably that may be the very issue before the Court. I don't know enough about it to know. I can only say that I share, believe me, I share deeply the concerns that you have expressed and that I know are in your mind, and I think every American shares deep concern at the thought of any monitoring by electronic surveillance or otherwise of what people think on political, social, or economic issues. But when you move into the area of threatening to commit a crime or conspiring to commit a crime, that seems to me to come very close to the provisions of title III.

Senator BAYH. Let me try another time to be less specific. Instead of asking you about a hypothetical situation, which may be the case in the sixth circuit decision or others, do you feel that as a judge one of the factors you should consider in ruling on the constitutionality of a given act by a government agency or agent would be whether the same information could have been acquired by using the protection, secured by court order, to a tap rather than an Executive order to tap? Is that one factor you should consider in the deliberative process?

Mr. POWELL. I would certainly consider all law and facts that seemed to me to be relevant.

Senator BAYH. Is that relevant?

Mr. POWELL. I would think it would be relevant, and I would certainly consider the entire case in light of the Bill of Rights and the restrictions in the Constitution of the United States for the benefit of the people of our country.

Senator BAYH. But one thing you would consider is whether the country could be secure, the community or the person involved be protected, that protection could be provided, by means other than an arbitrary Executive tap? That would be one factor you would consider in your deliberations?

Mr. POWELL. I would consider that and all other relevant facts and circumstances under the law.

Senator BAYH. Do you anticipate that the Court will have difficulty in trying to distinguish between domestic insurgents or domestic agents and international agents?

Mr. POWELL. Senator, I wish you wouldn't ask me that question. I don't think I ought to speculate as to just what the Supreme Court might do, whether or not I am on it.

Senator BAYH. Would you, in your own mind, have difficulty, if you studied this for the ABA, differentiating between type of subversives?

Mr. POWELL. I think the record is pretty clear on that, what the ABA did.

Mr. BAYH. How about Mr. Lewis Powell?

Mr. POWELL. I was a member of the committee and voted for the action that prevailed, and I suppose that—

Senator BAYH. But do you feel—getting back to the initial line of questioning, which was the reason I opened this, realizing that some of my colleagues have questions in another area and I may have too if they don't ask them first—do you feel that because of the very strong position you have taken as a member of this ABA committee and because of some very strong positions you have taken in that FBI Journal article and some other statements, that you might be confronted already?

Mr. POWELL. I might be what?

Senator BAYH. You might already be confronted with the need to excuse yourself, minus these questions which you are handling very delicately and I think appropriately. But is it conceivable that you have already expressed such strong views in this area that you might be compelled to excuse yourself in a case that came before you on the subject matter?

Mr. POWELL. I would reserve final judgment until I were confronted with the problem, but I would say without any hesitation as I think my Richmond Bar talk demonstrated, I have no fixed view on the delicate area that you have been discussing. I do have a fixed view on the other two areas, and am on record, at least I had a fixed view when those reports were submitted. I have not studied either one in depth since then, but at that time I certainly agreed with the Crime Commission Report and the ABA position. But on the third issue, domestic subversion, I have no fixed view. I have not studied it with that care. I can see all sorts of problems that you have outlined.

Senator BAYH. May I read just one quote from an article attributed to you entitled "Civil Liberties Repression: Fact or Fiction? Law-

"Abiding Citizens Have Nothing to Fear" under your byline, which appeared in the Richmond Times-Dispatch on August 1 of this year, which reads as follows:

There may have been a time when a valid distinction existed between external and internal threats. But such a distinction is now largely meaningless. The radical left, strongly led and with a growing base of support, is plotting violence and revolution.

Now, that may or may not be true. If they are, we have to deal with it. But first of all perhaps I should ask does the question from this article reflect your present views and aren't those views rather strong in the area? Aren't you rather specific in an area where you said you had not made up your mind already?

Mr. POWELL. The article was one that I wrote for the Richmond Times-Dispatch and it was picked up by the FBI Journal and more recently by the New York Times. I actually wrote the article, and I think this may be of interest in light of your line of questioning, not to address this subject specifically but to address the issue of repression; and if I may digress for a moment because this does seem to me to be important, I have four children. I have two who are in college, one in law school, a daughter at UCLA, and a son who is a sophomore at Washington and Lee. I spend a good deal of time with the young and one of the things that distresses me most is the widely prevailing view among the young that America is a repressive society. Now, I can understand how a good many of them would have that impression and certainly acts of repression exist in this country; they have always existed. And I am afraid they always will; but it seems to me, though, they are episodic and not the result of any systematized point of view on the part of anybody, and on balance I have the deep conviction that America is the freest of all lands. I have a deep conviction that the Bill of Rights is revered not only by the citizens but by the courts and the legislative and executive bodies of our country.

As a lawyer I am satisfied that criminal justice, with all of its faults, and heaven knows there are many, criminal justice nevertheless is commendable, on the whole, in the United States of America, and that most people, once they get to a court of record—I am not talking at the moment about problems we are all familiar with in the courts where the misdemeanors are tried, but at the felony level—I firmly believe, and I cited, I believe, Judge Traynor, former chief justice of California, for the view that one is more likely to have a fair trial in the United States than in almost any other country in the world, as long as the safeguards of a fair trial exist and as long as free speech and free press exist, the right to assemble exists in this country, I do not believe our society is repressive. I think it is terribly unfortunate for the young of our people to think that it is. That is not to say that they shouldn't fight to eliminate whatever examples of repression or unfairness or injustice exist and there are plenty of them, but to turn against the structure of our whole free society seems to me a disaster.

I wrote the article with that point in mind. I was not writing a law review article. I think the language you read—I think the language was accurate—was addressed primarily to this hazy area where internal security and national security, where internal dissidents are cooperating or working affirmatively with, or are very sympathetic to countries, other powers, that may be enemies of the United States.

This is a very difficult area. Drawing that line, as I have said, is very perplexing.

But to come back to your question, I do not consider it was a fixed view considering the circumstances under which it was expressed, the brevity of expression—I was not writing a law review article. And yet I would add one other point, Senator, just to be absolutely clear: If I should go on the Court, and this Sixth Circuit case comes up after I come on the Court, I will be very conscious of the fact that I have written a few things, very few, really, in this area; and it may well be that I will disqualify myself. At the moment I would rather not say positively that I will or I won't.

Senator BAYH. Well, I asked the question not to go to the specifics of the rightness or wrongness of your allegations here but there are a number of people, perhaps older people, who are concerned about our being a repressive society.

I don't have any youngsters in college. I have talked to a lot of good people who are, and I found one of the things that was impossible to do is to stereotype the so-called younger generation. Some of the loud voices don't necessarily represent the masses.

You said that you would consider this. This is quite frankly a hazy area, and that is why I am asking the question. If it were written in the law, if we had cases on point, I would not be bothering with it.

Mr. POWELL. I understand.

Senator BAYH. This is a hazy area. Congress has not enacted and the Court has not ruled, and as one who is concerned with the propriety or impropriety or the appearance of impropriety, I think it is important that prospective nominees look hard at what they said so far as the responsibility they may have at a future date relative to a case that comes before them where what they have written and what they said prejudged the circumstances.

Mr. POWELL. I will not be insensitive to that, Senator Bayh, I can assure you.

Senator BAYH. I will ask, Mr. Chairman, that two or three paragraphs of this quotation be put in the record because although the area is hazy and this is not a law review article, let me say that the wording is rather specific. Perhaps in fairness to you, Mr. Powell, rather than taking two or three paragraphs, I ought to ask unanimous consent to put in the whole article.

Mr. POWELL. I would prefer that, Senator Bayh.

(The material referred to follows:)

[From the Richmond Times-Dispatch, Sunday, August 1, 1971]

#### CIVIL LIBERTIES REPRESSION: FACT OR FICTION?—"LAW-ABIDING CITIZENS HAVE NOTHING TO FEAR"

(By Lewis F. Powell Jr.)

(Lewis F. Powell Jr., a Richmond lawyer who has closely followed developments in the exploding field of "civil liberties," is a former president of the American Bar Association. He has also served as chairman of the State Board of Education, chairman of the Richmond School Board and member of the 15-man Blue Ribbon Defense Panel named by President Nixon to study the Defense Department.)

At a time when slogans often substitute for rational thought, it is fashionable to charge that "repression" of civil liberties is widespread. This charge—directed primarily against law enforcement—is standard leftist propaganda. It is also made and widely believed on the campus, in the arts and theater, in the pulpit, and

among some of the media. Many persons genuinely concerned about civil liberties thus join in promoting or accepting the propaganda of the radical left.

A recent syndicated article, by AP writer Bernard Gavzer, cited several such persons. According to Prof. Charles Reich of Yale, American "is at the brink of . . . a police state". Prof. Allan Dershowitz of Harvard decries the "contraction of our civil liberties."

The charge of repression is not a rifle shot at occasional aberrations. Rather, it is a sweeping shotgun blast at "the system," which is condemned as systematically repressive of those accused of crime, of minorities and of the right to dissent.

Examples ritualistically cited are the "plot" against Black Panthers, the indictment of the Berrigans, the forthcoming trial of Angela Davis and the mass arrests during the Washington Mayday riots.

The purpose of this article is to examine, necessarily in general terms, the basis for the charge of repression. Is it fact or fiction?

There are, of course, some instances of repressive action. Officials are sometimes overzealous; police do employ unlawful means or excess force; and injustices do occur even in the courts. Such miscarriages occur in every society. The real test is whether these are episodic departures from the norm, or whether they are as charged part of a system of countenanced repression.

The evidence is clear that the charge is a false one. America is not a repressive society. The Bill of Rights is widely revered and zealously safeguarded by the courts. There is in fact no significant threat to individual freedom in this country by law enforcement.

Solicitor General Griswold, former dean of the Harvard Law School and member of the Civil Rights Commission, recently addressed this issue in a talk at the University of Virginia. He stated that there is greater freedom and less repression in America than in any other country.

So much for the general framework of the debate about alleged repression. What are the specific charges?

The attack has focused on wiretapping. There seems almost to be a conspiracy to confuse the public. The impression studiously cultivated is of massive eavesdropping and snooping by the FBI and law enforcement agencies. The right of privacy, cherished by all, is said to be widely threatened.

Some politicians have joined in the chorus of unsubstantiated charges. Little effort is made to delineate the purposes or the actual extent of electronic surveillance.

The facts, in summary, are as follows: The Department of Justice employs wiretapping in two types of situations: (i) against criminal conduct such as murder, kidnapping, extortion, and narcotics offenses; and (ii) in national security cases.

Wiretapping against crime was expressly authorized by Congress in 1968. But the rights of suspects are carefully safeguarded. There must be a prior court order, issued only upon a showing of probable cause. The place and duration are strictly controlled. Ultimate disclosure of the taps is required. There are heavy penalties for unauthorized surveillance. Any official or FBI agent who employs a wiretap without a court order in a criminal case is subject to imprisonment and fine.

During 1969 and 1970, such federal wiretaps were employed in only 309 cases. More than 900 arrests resulted, with some 500 persons being indicted including several top leaders of organized crime.

The government also employs wiretaps in counterintelligence activities involving national defense and internal security. The 1968 Act left this delicate area to the inherent power of the president.

Civil libertarians oppose the use of wiretapping in all cases, including its use against organized crime and foreign espionage. Since the 1968 Act, however, the attack has focused on its use in internal security cases and some courts have distinguished these from foreign threats. The issue will be before the Supreme Court at the next term.

There can be legitimate concern whether a president should have this power with respect to internal "enemies." There is, at least in theory, the potential for abuse. This possibility must be balanced against the general public interest in preventing violence (e.g. bombing of Capitol) and organized attempts to overthrow the government.

One of the current myths is that the Department of Justice is usurping new powers. The truth is that wiretapping, as the most effective detection means, has been used against espionage and subversion for at least three decades under six presidents.

There may have been a time when a valid distinction existed between external and internal threats. But such a distinction is now largely meaningless. The

radical left, strongly led and with a growing base of support, is plotting violence and revolution. Its leaders visit and collaborate with foreign Communist enemies. Freedom can be lost as irrevocably from revolution as from foreign attack.

The question is often asked why, if prior court authorization to wiretap is required in ordinary criminal cases, it should not also be required in national security cases. In simplest terms the answer given by government is the need for secrecy.

Foreign powers, notably the Communist ones, conduct massive espionage and subversive operations against America. They are now aided by leftist radical organizations and their sympathizers in this country. Court-authorized wiretapping requires a prior showing of probable cause and the ultimate disclosure of sources. Public disclosure of this sensitive information would seriously handicap our counter-espionage and counter-subversive operations.

As Atty. Gen. John Mitchell has stated, prohibition of electronic surveillance would leave America as the "only nation in the world" unable to engage effectively in a wide area of counter-intelligence activities necessary to national security.

Apparently as a part of a mindless campaign against the FBI, several nationally known political leaders have asserted their wires were tapped or that they were otherwise subject to surveillance. These charges received the widest publicity from the news media.

The fact is that not one of these politicians has been able to prove his case. The Justice Department has branded the charges as false.

The outcry against wiretapping is a tempest in a teapot. There are 210 million Americans. There are only a few hundred wiretaps annually, and these are directed against people who prey on their fellow citizens or who seek to subvert our democratic form of government. Law-abiding citizens have nothing to fear.

In the general assault on law enforcement, charges of police repression have become a reflexive response by many civil libertarians as well as by radicals.

Examples are legion. Young people are being incited not to respect law officers but to regard them as "pigs". Black Panther literature, in the vilest language, urges the young to assault the police.

The New York Times and the Washington Post reported, as established fact, that 28 Panthers had been gunned down by police since January 1968. Ralph Abernathy attributed the death of Panther leaders to a "calculated design of genocide". Julian Bond charged that Panthers are being "decimated by police assassination arranged by the federal police apparatus." Even Whitney Young referred to "nearly 30 Panthers murdered by law enforcement officials."

These charges, upon investigation (by the New Yorker magazine, among others), turned out to be erroneous. The fact are that two—possibly four at most—Panthers may have been shot by police without clear justification. Many of the 28 Panthers were killed by other Panthers. There is no evidence whatever of a genocide conspiracy.

But the truth rarely overtakes falsehood—especially when the latter is disseminated by prestigious newspapers. Millions of young Americans, especially blacks, now believe these false charges. There is little wonder that assaults on police are steadily increasing.

The latest outcry against law enforcement was provoked by the mass arrests in Washington on May 3. Some 20,000 demonstrators, pursuant to carefully laid plans, sought to bring the federal government to a halt.

This was unlike prior demonstrations in Washington, as the avowed purpose of this one was to shut down the government. The mob attempted to block main traffic arteries during the early morning rush hours. Violence and property destruction were not insignificant. Some 39 policemen were injured. Indeed, Deputy Atty. Gen. Kleindienst has revealed that the leaders of this attack held prior consultations with North Vietnamese officials in Stockholm.

Yet, because thousands were arrested, the American Civil Liberties Union and other predictable voices cried repression and brutality. The vast majority of those arrested were released, as evidence adequate to convict a particular individual is almost impossible to obtain in a faceless mob.

The alternative to making mass arrests was to surrender the government to insurrectionaries. This would have set a precedent of incalculable danger. It also would have allowed a mob to deprive thousands of law-abiding Washington citizens of their rights to use the streets and to have access to their offices and homes.

Those who charge repression say that dissent is suppressed and free speech denied. Despite the wide credence given this assertion, it is sheer nonsense. There is no more open society in the world than America. No other press is as free.

No other country accords its writers and artists such untrammeled freedom. No Solzhenitsyns are persecuted in America.

What other government would allow the Chicago Seven, while out on bail, to preach revolution across the land, vastly enriching themselves in the process?

What other country would tolerate in wartime the crescendo of criticism of government policy? Indeed, what other country would allow its citizens—including some political leaders—to negotiate privately with the North Vietnamese enemy?

Supreme Court decisions sanctify First Amendment freedoms. There is no prior restraint of any publication, except possibly in flagrant breaches of national security. There is virtually no recourse for libel, slander or even incitement to revolution.

The public, including the young, are subjected to filth and obscenities—openly published and exhibited.

The only abridgement of free speech in this country is not by government. Rather, it comes from the radical left—and their bemused supporters—who do not tolerate in others the rights they insist upon for themselves.

Prof. Herbert Marcuse of California, Marxist idol of the New Left, freely denounces "capitalist repression" and openly encourages revolution. At the same time he advocates denial of free speech to those who disagree with his "progressive" views.

It is common practice, especially on the campus, for leftists to shout down with obscenities any moderate or conservative speaker or physically to deny such speaker the rostrum.

A recurring theme in the repression syndrome is that Black Panthers and other dissidents cannot receive a fair trial.

The speciousness of this view has been demonstrated recently by acquittals in the New Haven and New York Panther cases—the very ones with respect to which the charge of repression was made by nationally known educators and ministers.

The rights of accused persons—without regard to race or belief—are more carefully safeguarded in America than in any other country. Under our system the accused is presumed to be innocent; the burden of proof lies on the state; guilt must be proved beyond reasonable doubt; public jury trial is guaranteed; and a guilty verdict must be unanimous.

In Recent Years, dramatic decisions of the Supreme Court have further strengthened the rights of accused persons and correspondingly limited the powers of law enforcement. There are no constitutional decisions in other countries comparable to those rendered in the cases of Escobedo and Miranda.

Rather than "repressive criminal justice," our system subordinates the safety of society to the rights of persons accused of crime. The need is for greater protection—not of criminals but of law-abiding citizens.

A corollary to the "fair trial" slander is the charge that radicals are farmed and tried for political reasons. This is the world-wide Communist line with respect to Angela Davis. Many Americans repeat this charge against their own country, while raising no voice against the standard practice of political and secret trials in Communist countries.

The radical left, with wide support from the customary camp followers, also is propagandizing the case of the Berrigans.

The guilt or innocence of these people remains to be determined by juries of their peers in public trials. But the crimes charged are hardly "political." In the Davis case a judge and three others were brutally murdered. The Berrigans, one of whom stands convicted of destroying draft records, are charged with plots to bomb and kidnap.

Some trials in our country have been politicized—but not by government. A new technique, recently condemned by Chief Justice Warren Burger, has been developed by the Kunstlers and others who wish to discredit and destroy our system. Such counsel and defendants deliberately seek to turn courtrooms into Roman spectacles—disrupting the trial, shouting obscenities and threatening violence. It is they—not the system—who demean justice.

The answer to all of this was recently given by former California Chief Justice Roger J. Traynor, who said: "It is irresponsible to echo such demagogic nonsense as the proposition that one group or another in this country cannot get a fair trial. . . . No country in the world has done more to insure fair trials."

America has its full share of problems. But significant or systematic government repression of civil liberties is not one of them.

The radical left—expert in such matters—knows the charge of repression is false. It is a cover for leftist-inspired violence and repression. It is also a propaganda line designed to undermine confidence in our free institutions, to brainwash the youth and ultimately to overthrow our democratic system.

It is unfortunate that so many nonradical Americans are taken in by this leftist line. They unwittingly weaken the very institutions of freedom they wish to sustain. They may hasten the day when the heel of repression is a reality—not from the sources now recklessly defamed but from whatever tyranny follows the overthrow of representative government. This is the greatest danger to human liberty in America.

**Senator BAYH.** Let me just explore that a bit, because you talk about the concern for individual rights, free speech.

Are you of the opinion that certain types of governmental activity can have a chilling effect on the exercise of these rights? In other words, would you give the committee your thoughts on this question: although we have a right to free speech, the right to exercise it, does the presence of governmental agents, the presence of people taking pictures, the presence of a tail on you, following you wherever you go, might this not inhibit one's use of these individual rights?

**Mr. POWELL.** I can certainly say I don't want anybody tailing me, Senator Bayh. I think it is a little difficult to say, to describe the circumstances under which taking pictures would have inhibiting effect. There are a certain number of people who enjoy having their pictures taken. I would prefer not to, and it would chill me, I can tell you that.

**Senator BAYH.** Well, we are talking about a delicate balance here. You recognize that in speaking for the Justice Department, some high representatives of that branch of our Government have said that all that is necessary to protect these rights is to have self-discipline. Do you feel that self-discipline is enough to protect our right of free speech, our right to petition, and the others inculcated in the Bill of Rights and the 14th amendment?

**Mr. POWELL.** Well, I certainly don't wish to comment on anything that—

**Senator BAYH.** I don't ask you to do that.

**Mr. POWELL** (continuing). On what the Justice Department says. No; I would not trust any government to self-discipline, Senator Bayh. I think the purpose of the Bill of Rights was to assure there are limitations on what the Government can do.

**Senator BAYH.** The whole Bill of Rights was so designed, was it not? From the beginning of this Government our Founding Fathers had had rather sad experience with self-discipline and they put that Bill of Rights in there to try to provide some discipline other than self-discipline?

**Mr. POWELL.** I come from the State that produced Mason, Jefferson, Madison. I think Mason wrote the first Declaration of Rights that went into a constitution in Virginia—well, in this country, perhaps was the model from which our Bill of Rights was drawn. I think it was Madison who led the fight to have the Bill of Rights incorporated into the Constitution for the reasons you have stated.

**Senator BAYH.** You mentioned the picture-taking incidents. If you had a peaceful assembly in a public place, and there were those present who were criticizing public officials or public policy peacefully, and agents or representatives of law enforcement agencies were present taking pictures around, you don't feel that would have a

chilling effect? This is not the kind that you keep for your scrapbook, you know. [Laughter.]

Mr. POWELL. It is a little hard for me to answer that, Senator. I would think the facts and circumstances would have to be examined carefully. I don't know whether any law is applicable to this or not. I am sure there is no specific constitutional provision as to taking pictures, but I think one can conceive of circumstances where there are no laws and there certainly should be.

Senator BAYH. If there are no laws and there is a court sitting to try to determine whether a person's individual privacy was violated, it should consider whether this was a reasonable tool to be used by the governmental agencies?

Mr. POWELL. I am tempted to say yes, but the honest truth is that I have never considered this area. I have had the general feeling, and I have had one or two clients ask me about harassment by other individuals, not government, for example—telephone calls in the middle of the night, people constantly observing what someone else does. The laws in our State were woefully inadequate. I have not thought, although I must confess I have never studied it carefully, that there was any constitutional provision that would prevent a private citizen from doing this. I just have not studied this, Senator Bayh. But it is a practice that obviously is distasteful to the public, I would think, carried to the extremes that you indicated.

Senator BAYH. Let me just ask one more general question and then I want to yield back to my colleagues so they can ask some questions.

Talking about the right of privacy rather than dealing with a specific factual situation, which perhaps you should not give us your opinion about—and, for the record, this is not just the present administration because this practice started earlier—talking about protecting the rights of individual citizens, we discovered, under the able leadership of our distinguished colleague from North Carolina, the chairman of the subcommittee of which I am proud to be a member, that the U.S. Army had embarked upon a massive spying effort in which some 7 million dossiers were compiled of average individual citizens, in which pictures were taken of anyone who carried a sign or made a speech protesting governmental policy; and we found Sunday school classes, young adult classes, that had been infiltrated by the Army; we found one peace rally in Colorado at which, I think, there were 119 people involved and about 50 of them were governmental agents—are these factors that should be taken into consideration by a judge in his deliberations to see whether a person's constitutional rights had been violated, whether that type of continuous activity was not the kind that the Supreme Court has talked about earlier when they discussed the chilling effect of the invasion of privacy?

Mr. POWELL. I would certainly not favor the type of activity you have described. I read about it in the press. To the extent it exists, I think it is extremely unfortunate; and if a case arose involving those facts, I would certainly think that the Court would have to consider them.

Senator BAYH. Thank you, Mr. Powell.

Mr. Chairman, I will yield back.

The CHAIRMAN. Senator Tunney?

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

Mr. Powell, when President Nixon announced your nomination, he indicated that he felt that you would be a strict constructionist and a judicial conservative.

What do those terms mean to you?

Mr. POWELL. Senator, the only think I have written out in preparation for this hearing is a partial answer to your question. I read in the press that this question had been asked others.

I would say by way of preface that obviously I am not speaking for the President of the United States. I am trying to sort out my own views. As a lawyer, it rarely occurs to me to think, in fact, it has never occurred to me until recently to think of judicial philosophy. I do have a view as to the role of the Court and I will address that in a moment. I would think that one's philosophy, whether it be with respect to social or economic problems or political problems, whether he is conservative, liberal, or moderate, to use the current terminology, does not necessarily relate to his concept of the role of the Court as a judicial institution. So, if I may, with the permission of the chairman, I would like to read what I wrote out in very simple terms indicating my own concept of the role of the Court.

My thoughts about the role of the Court, expressed as simply as I can, may be summarized as follows:

(1) I believe in the doctrine of separation of powers. The courts must ever be mindful not to encroach upon the areas of the responsibilities of the legislative and executive branches.

(2) I believe in the Federal system, and that both State and Federal courts must respect and preserve it according to the Constitution.

(3) Having studied under then Professor Frankfurter, I believe in the importance of judicial restraint, especially at the Supreme Court level. This means as a general rule, but certainly not in all cases, avoiding a decision on constitutional grounds where other grounds are available.

(4) As a lawyer I have a deep respect for precedent. I know the importance of continuity and reasonable predictability of the law. This is not to say that every decision is immutable but there is normally a strong presumption in favor of established precedent.

(5) Cases should be decided on the basis of the law and facts before the Court. In deciding each case, the judge must make a conscious and determined effort to put aside his own political and economic views and his own predilections and to the extent possible to put aside whatever subtle influences may exist from his own background and experience.

And, finally, although all the three branches of Government are duty bound to protect our liberties, the Court, as the final authority, has the greatest responsibility to uphold the rule of law and to protect and safeguard the liberties guaranteed all of our people by the Bill of Rights and the 14th amendment.

Senator TUNNEY. Thank you very much, Mr. Powell, for that statement. I think that it is one which any person who studied the Constitution could basically agree with.

I am curious about its application, however, to some specific areas. You talked about a strong presumption in favor of judicial precedent. On the other hand, I noted in an article or, rather an interview that you gave in Dunn's Review in September 1968, you answered a

question to this effect: "We have witnessed in recent years an unprecedented concern for the rights of accused persons. In many areas this was overdue but the net effect of court decisions over the past decade has been adverse to law enforcement." Now, in a number of areas the decisions were made by the Supreme Court with a 5 to 4 majority. Do you feel that there is a strong presumption in favor of judicial precedent where you have a 5 to 4 majority of the Court?

Mr. POWELL. I feel that that presumption exists with respect to all precedents. I think the lawyers would also add that generally the longer a case has existed, the more frequently it has been cited and relied upon, the stronger the presumption against overruling it inevitably becomes.

I think, also, if a case is decided by a divided Court and is a recent decision, the presumption perhaps is less vigorous than if it had been decided earlier by a unanimous Court. Just, for example, nobody would suggest today that *Brown* against *Board of Education*, unanimously decided in 1954, is not the law of the land.

Senator TUNNEY. Mr. Powell, I have had an opportunity to read a number of things that you have written, and I would like to quote from some of your speeches and get your comments on what each means, because most of them were rather brief statements of principle, and I think perhaps you could elaborate on them.

You indicated again in this Dunn's Review, "Crime in the Streets Interview," in 1968, and I quote:

"I do think the mass media have considerable responsibility for the spirit of lawlessness and violence that prevails in our country."

Mr. POWELL. Do you wish a comment on that?

Senator TUNNEY. If you could, comment on that.

Mr. POWELL. I have not read that interview since the time I gave it, but if that is all I said, it may have been what I was thinking about was this: I have been deeply interested in education, and one of the things that has impressed itself very deeply on my consciousness in the education world is the impact of television, not only with respect to children in my home but on the basis of studies that have been made in the school systems. Television does have a profound effect on the young. With all due respect to our friends who arrange some of the television programs, there has, in my judgment, over a period of time—I think there has been improvement recently, by the way—but there has been, over a period of time, it would seem to me, far too much emphasis on violence, and violence is one of the scourges of our society; and it has concerned me deeply to see this emphasis on violence, viewed daily by millions of young children. I think that is what I had in mind.

Senator TUNNEY. Were you suggesting a possible censorship of mass media?

Mr. POWELL. No, indeed.

Senator TUNNEY. What are your views on censorship of the mass media or the press?

Mr. POWELL. I believe deeply in the first amendment, and I certainly do not approve of any censorship. I don't think anything I have ever written suggested that.

Senator TUNNEY. Mr. Powell, I would like to ask you just a few questions with regard to civil rights.

Do you feel that the black man has achieved equality in our society under the law?

Mr. POWELL. I do feel that legislation enacted by the Congress and for the most part by the States—and I speak of my State of Virginia, which has just adopted a new constitution; I served on the commission which wrote it—I think under the law our black citizens have achieved equality, I think, by law, perhaps, to a greater extent than in any other country with which I have familiarity.

The question which remains quite clearly is whether, (1) in the implementation of the law at all levels and (2) in the hearts and minds of men, the desired equality has been attained, and I would answer, I think, both of those negatively at this point.

Senator TUNNEY. When President Nixon accepted the nomination to the Presidency in Miami in 1968, he said:

Let those who have the responsibility of enforcing our law and our judges who have the responsibility to interpret them be dedicated to the great principles of civil rights.

I wonder if you could tell the committee in your own personal record what you have done to advance that dedication to those principles?

Mr. POWELL. I had not written out anything, Senator Tunney, but I did take some notes to try to refresh my recollection. This is not a direct response as to civil rights but it may give you and other members of the committee, Mr. Chairman, some flavor of my extracurricular activities over a fairly long life. This may be an inappropriate comment, but I had a mother and father who had a deep conviction that all human beings were equal and that no one was better than anyone else; and I inherited that and have never departed from it.

I have tried in addition to being active, very active practicing law and very active in the profession, to engage in outside activities which seem to me to be useful in my community and State.

I was an early volunteer in legal aid work in the city of Richmond and went on the board of the Family Services Society which administered under the Community Chest most of the social work for both black and white. I became president of the Family Services Society fairly early in my career.

The criminal justice project of the American Bar Association, which I mentioned earlier, was only one area in which I devoted much of my attention when I was president of the bar association.

The second area related to providing legal services to the poor and this meant primarily for the blacks, and I think some of the statements that have been filed here and to which I will not allude in any detail, document the role that I played in that critical point in our history.

I have referred to the criminal justice project—there are 16 volumes of that and I think if any of you gentlemen have had an opportunity to review them you will be impressed, as I am, by the fact that they are designed to make meaningful the inscription on the front of the Supreme Court Building: "Equal Justice Under Law."

I have spent a good deal of time in education, and some of the statements I think were filed here have alluded to what was done and some of the things I didn't do, some of the things that, perhaps, I tried to do. I am sure that many would view in a different light

my service on the school board in the city of Richmond but we kept the schools open and we tried to be fair to all concerned.

I have served as an officer and on the board of the American Bar Foundation, and if anyone has examined a list of the studies that we have made and the publications that the American Bar Foundation has produced during my tenure over the past 2 years as president, I think he will find a fairly genuine concern for the areas about which you asked me.

There are articles that I have written that may possibly be relevant in this area. I have had a special interest in the jury trial and its preservation and the avoiding of any impairment of it because it is so fundamental to our system. I did an article in the Washington and Lee Law Review on Jury Trials. I did a study, in fact took a leading role in trying to assure fair trial on the very thorny problem of fair trial—free press. Some of the gentlemen in the media are familiar with that and they didn't always agree with me, but I realize a balance had to be drawn and I think real progress has been made in that respect.

I was a participant and a planner of the Conference on Legal Services that was held here in Washington jointly sponsored by the Justice Department and the OEO, at which the entire thrust of the 3-day conference was to assure more adequate legal services for the people who needed them most. For the most part they were our black brothers.

Senator TUNNEY. I have had the opportunity to read materials that have been made available to the committee concerning your record on civil rights, and I felt it was important that you have an opportunity to express yourself today. I think that your record has demonstrated that you are very deeply concerned about giving equal opportunities to all Americans.

I would like to ask just one or two more questions.

Senator HART. Mr. Chairman, if the Senator would permit me to ask just one question in pursuit of this——

Senator TUNNEY. I yield.

Mr. POWELL. Senator Hart.

Senator HART. Have you at any time in the last 10 years in writing or speech voiced opposition to a public accommodation law or ordinance?

Mr. POWELL. No.

Senator TUNNEY. Mr. Powell, do you believe that philosophy is a factor to be considered in confirmation of the Senate of a Supreme Court nominee, or do you feel that evaluation of personal philosophy by the Senate has the effect of politicizing the Court more than it should be politicized?

Mr. POWELL. Has the effect of what, sir?

Senator TUNNEY. Politicizing the Court?

Mr. POWELL. As I said, earlier, I would not consider any inquiry off limits. There may be some inquiries that I think would be inappropriate for me to respond to, but I certainly have no objection to any questions that you or other members of the committee may care to ask me about philosophy. I may not be able to field them very well, but I will do the best I can.

Senator TUNNEY. One last question on that score: With regard to the Constitution, and it gets back to the question of strict constructionism, do you believe that the Constitution is a living document,

and one in which a judge is going to be called upon to make philosophic evaluations based on a 20th century context rather than an 18th century context?

I am thinking particularly of the due process clause; and I am thinking specifically of one example where the Justices were called upon to make a determination of due process without any legal precedents, to my knowledge; that is, the *Billy Sol Estes* case, where television was allowed in the courtroom.

Now, do you feel that under those circumstances that a Justice has to rely exclusively upon historical precedent, or do you feel the Justice can take a look at the world around him and apply a standard of fairness based on what he sees in the modern context?

Mr. POWELL. I think we would all agree that one must start from the language of the Constitution itself, endeavoring to ascertain the meaning of the language. I think we all recognize, as you imply, that certain language in the Constitution, such as the due process clause, the equal protection clause, the commerce clause, for example, in itself affords little in the way of specific guidelines merely as language.

Of course, there is a vast body of history with respect to due process, say, which certainly goes back to 1215, to Magna Carta, and all the English meaning that has been read into it over the years.

But it seems to me that what is really important with respect to the great freedom clauses—those you have mentioned—are the spirit and intent of the Bill of Rights, and obviously they have to be considered in the light of the case before the court.

Senator TUNNEY. Thank you, Mr. Chairman. I yield back. I would like to reserve time after other members of the committee have had an opportunity to question the witness.

The CHAIRMAN. Senator Fong?

Senator FONG. Thank you, Mr. Chairman.

Mr. Powell, I want to join my colleagues in congratulating you on your nomination as Associate Justice of the Supreme Court.

You are a man of considerable holdings, Mr. Powell. I presume so far as holdings in real estate, you shouldn't have any trouble while acting as an Associate Justice, but you have quite a few holdings in various companies. How do you propose to handle your ownership in or stocks in these various companies?

Mr. POWELL. Senator, I think you were perhaps not in the room when Senator Bayh asked me that question. I am happy to answer it again.

Senator FONG. I should like for you to do so.

Mr. POWELL. Right. The shortest answer I can give, and I will elaborate to whatever extent you wish, is that I will endeavor to the best of my ability to comply with the canons of judicial ethics and with the relevant statute which is 28 U.S.C.A. 555. The canons, which are now undergoing revision, provide in substance on this point that a judge should dispose of securities, where he can do so without substantial loss, in companies which are likely to come before the Court.

As I said to Senator Bayh in considerable detail, I have given this a good deal of consideration. He recognizes it as a real problem for me. I have read several articles that have been written on it,

one by Professor Davis, a second that appeared in the Duke Law Review, "Law and Contemporary Problems."

I would endeavor to try to minimize my problem by selling off securities where I can do so without the type of loss referred to in the canons.

Senator FONG. In other words, you will reduce your holdings in these various corporations to holdings in a few companies?

Mr. POWELL. That will be my objective.

Senator FONG. Yes.

Mr. POWELL. I will have some problems, as I stated to Senator Bayh.

Senator FONG. I can understand.

Mr. POWELL. There are several companies which for one reason or another I will not be able certainly in the foreseeable future to get out of.

Senator FONG. Of course, if you have holdings in just a few companies, you could remember such holdings in these particular companies. If you have holdings in a lot of companies, there may come a time when you will forget that you have a particular holding?

Mr. POWELL. That is right, and I can assure you that I will take whatever safeguards or steps may be appropriate or necessary so that I will know which companies I do have holdings in.

Senator FONG. In other words, you will then be able to remember in which companies you have holdings. Then, if cases arise involving those companies, you will disqualify yourself, is that correct?

Mr. POWELL. Yes.

Senator FONG. I heard your remark this morning that within the last 2½ weeks, your views on the right of privacy have dramatically changed. Is that a serious statement, or was that made in jest?

Mr. POWELL. From a personal point of view, it was quite serious. I would hate to have to live in the spotlight that certainly descended on my family the night the President made this announcement. But that is not a lawyer's judgment. I think any human being would have reacted to it the same way. So, from the viewpoint of deciding legal issues, I think that was a statement made in jest.

Senator FONG. Do you feel that your views on the right of privacy have changed because of the questioning and because of the various articles that have appeared in the paper, or because this committee has given it such a thrust——

Mr. POWELL. Oh, no; I don't object at all to this committee performing its duty. I was talking about people stopping me on the street and people wanting to interview my wife and my daughter and coming into our home for conferences. We were delighted to see them all, but I had never seen quite so many before. [Laughter.]

Senator FONG. I see.

Have you changed in your thinking relative to the right of privacy within the past few weeks now that you have been nominated for the Supreme Court? It is one thing to be nominated to the Supreme Court and another to be a private lawyer.

Mr. POWELL. Well, it certainly has changed my life and I would agree with you, my views have changed to that extent.

Senator FONG. I see. I have not read your article in the Richmond Times-Dispatch in August, but I understand that you stated that

"The outcry against wiretapping is a tempest in a teapot." Did you make that statement?

Mr. POWELL. I think I did, sir.

Senator FONG. Could you give us the thrust of that article which appeared in the Richmond Times-Dispatch relative to wiretapping?

Mr. POWELL. Yes, Senator Fong. And, again, as I previously said to Senator Bayh, this was written for the newspaper, directed primarily to the issue whether or not America has a repressive society, and my view was that the number of wiretaps as reported to the officer who administers the court system for the U.S. courts, and I have seen those reports each year, suggests that a relatively limited use has been made of the act of 1968?

Senator FONG. I believe in that Times-Dispatch article you did state that there were only 309 wiretaps from 1969 to 1970; is that correct?

Mr. POWELL. That is what I said, and I think that refers to the Federal cases.

Senator FONG. Yes, Federal wiretaps.

Mr. POWELL. Right. And I believe, Senator, that I have since seen a report that indicated that for last year there were 597, both State and Federal.

Senator FONG. Now, isn't it a fact as stated by Attorney General Mitchell that each wiretap averaged 1,498 intercepts, or separate telephone conversations? If that is true, then actually there were 462,882 separate telephone conversations in the 309 cases?

Mr. POWELL. I have not seen those figures but I am sure you have it correct, if they are available.

Senator FONG. As I pointed out when Mr. Rehnquist was before this committee last week, I was one of four Senators who voted against final passage of the omnibus crime bill primarily because I thought that the wiretap provisions went too far.

As early as May 1968, when the omnibus crime bill was under consideration, I voiced my strongly held opinion that wiretapping and electronic surveillance were enormously dangerous practices presenting an extraordinary threat to our individual liberties. Wiretapping not only picks up the conversation of the person whose telephone is tapped but also all the innocent people who happen to call or be called on that telephone or whose name is mentioned on that telephone. An unending and unknown force is put into effect when a telephone is tapped. This is true even of court-authorized wiretaps. Even more dangerous, I believe, are taps and bugging and surveillance without court order.

In 1968, I stated that:

In a democratic society privacy of communication is absolutely essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.

I pointed out that—

When we open this door of privacy to the government . . . when the door is widely agape . . . it is only a short step to allowing the government to rifle our mails and search our homes. A nation which countenances these practices," I said, "soon ceases to be free."

As early as May 1968, I pointed out that I was fearful that if wiretapping and eavesdropping practices were allowed on a widespread scale, we would soon become a nation in fear—a police state.

As the hearings this year before the Constitutional Rights Subcommittee clearly indicated, whether based upon fact or fancy, we are coming very close to being a nation in fear, all the way from Congressmen, to mayors, to soldiers, to students voicing their fears that they were under surveillance. I am, therefore, particularly interested in hearing from you directly as to your position in regard to wiretapping and electronic surveillance, in general as it relates to the fourth amendment, if you have any philosophical and legal reasons for such position.

**Mr. POWELL.** I have previously stated, Senator Fong, that my first opportunity to study this subject came when I was a member of the President's Crime Commission. I was appointed to the Subcommittee on Organized Crime, and it became fairly obvious to us, certainly to me, that unless the Government had the authority to wiretap subject to court order in a strictly controlled system, that there would be little hope, if any, of ever coming to grips with organized crime in this country.

**Senator FONG.** I agree with you we should have court authorized wiretapping on organized crime and in crimes dealing with the national security, but when we go further than that, I think we are really stepping onto very, very dangerous ground. For example, we allow wiretapping in anything that amounts to a felony. As long as it is not a misdemeanor, the prosecutor can go in and ask for authorization to wiretap. How do you feel about that?

**Mr. POWELL.** I think the category that certainly the Crime Commission was concerned with was primarily organized crime, but it is a little difficult just to say organized crime and nothing else. Organized crime itself engages in criminal activity that covers a fairly broad spectrum of crimes running from murder to extortion, to arson, to kidnaping, and the like. So that I suppose that when the bill was drafted—I had nothing whatever to do with that—that it was deemed necessary to include a spectrum of the major felonies, and the American Bar Association Committee felt the same way when it recommended standards for State legislatures.

**Senator FONG.** In some States, gambling is more than a misdemeanor.

**Mr. POWELL.** Well, perhaps the term "gambling" needs to be defined. I am not—I don't know the answer to that. But our study of organized crime, to my surprise, indicated that gambling is the principal activity of organized crime in the final analysis, and that of the profits that range fantastically from \$5, \$6, possibly \$7 billion a year, from illegal and illicit activity, profits that come primarily from the poor and uneducated people of our country, most of those profits come from gambling.

I see the problem that worries you but the other side of that problem is also very worrisome if we are ever going to bring organized crime within the law. This is what prompted us in the deliberations of the Crime Commission. As I said, I started out without having any preconceived notions whatever.

**Senator FONG.** Do you feel that there should be wiretapping such as we have at the present time, when we find some of our people are

in constant fear, that their phones have been tapped. That fear is present whether it is well-founded or not. Is it good for such fear to be so widespread? People fear they have been tapped, followed, and bugged. Do you think this is good for the country?

Mr. POWELL. I believe that the Congress was wise in putting, as I recall, a 7-year time limitation on title III; and I believe, Senator McClellan has either introduced a resolution or requested that a study be made before the 7 years expire, addressed primarily to the concerns that you have mentioned, Senator, and I agree that these concerns do exist, and I think the Congress should watch this situation with the diligence which apparently you are.

Senator FONG. I thank you for that answer, Mr. Powell.

Mr. Powell, the fifth amendment reads in pertinent part that:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. \*\*\*

Despite this I understand that in your dissent to President Johnson's National Crime Commission report, you not only opposed the *Miranda* decision of 1966 but you also opposed several Supreme Court decisions protecting the constitutional right against self-incrimination. It is my understanding that you suggested a constitutional amendment to overcome a 1965 ruling that a prosecutor may not comment on the refusal of a defendant to take the witness stand in a State court. Did you feel that way?

Mr. POWELL. There were seven members of the President's Crime Commission who did recommend that unless there could be legislative relief that consideration should be given to a constitutional amendment which would have the effect of overruling the case—I think it was *Griffin* against *California*—where, by a divided Court, the constitution of California which permitted comment on the failure of an accused to take the stand was held unconstitutional under that amendment.

Senator FONG. Do you still feel that the prosecutor should have a right of comment in a case where the defendant does not take the stand?

Mr. POWELL. That was my opinion at that time, Senator. I have not given it mature consideration since. The *Griffin* case is now—this was 1964—7 years old so it has become a precedent that I think is generally followed.

Senator FONG. As I understand, your criminal trial practice has been very limited; is that correct?

Mr. POWELL. It has been nonexistent, Senator.

Senator FONG. You have not practiced criminal law at all?

Mr. POWELL. No, sir.

Senator FONG. That makes it difficult for you to comment.

Mr. POWELL. It is very difficult.

Senator FONG. I see.

Our system of justice is really based on the premise that a man is innocent until proven guilty. If you say that the prosecution may comment on the defendant's not testifying, are you not really shifting the burden of proof to the accused to prove himself innocent rather than requiring the State to prove his guilt beyond a reasonable doubt?

Mr. POWELL. Well, that argument is a very persuasive one. I think the argument that one deals with at the time, and again I am drawing

on a rather ancient memory, is that the language in the fifth amendment says no one shall be compelled to give testimony against himself in a criminal case, and it didn't seem to me that there was compulsion involved in the circumstances you described.

**Senator FONG.** I am studying, Mr. Powell, several reforms of our Federal grand jury proceedings so as to assure greater legal protection to persons subpoenaed to testify as "witnesses on behalf of the Government" with a view to introducing remedial legislation.

Without considering any specific legislative proposal, would you care to express your views on the practice of subpoenaing a witness to testify before a grand jury on behalf of the Government, when the Government has already produced evidence to that grand jury upon which an indictment is sought against this so-called "witness on behalf of the Government"?

Is not the Government really asking a person to testify against himself in violation of the fifth amendment? In other words, where a grand jury has already been given evidence upon which they are going to indict this man, if they call him under subpoena and say, "You come here and be a witness for the Government," isn't that really tricking him?

**Mr. POWELL.** Senator, I think perhaps I am not qualified to comment. I have never been before a grand jury in my life. I am not really familiar with the procedure you described. In fact, I never heard of it before.

**Senator FONG.** Well, do you think it is fair to subpoena a person before a grand jury as a witness for the Government after the prosecutor has presented evidence to that very grand jury sufficient to warrant an indictment of that person without his testimony and then ask him a lot of questions?

**Mr. POWELL.** I wouldn't want to express a legal opinion, but I would say it is very unfriendly. [Laughter.]

**Senator FONG.** You say it is unfriendly. I will withdraw the question.

**Mr. POWELL.** Thank you very much.

**Senator FONG.** The wiretapping provisions were designed to secure evidence so that you can indict an individual. Don't you think once an indictment has been obtained that we should stop there. We shouldn't keep on hounding a person until the day of trial. After a while he reaches the point where he feels he can't even talk to his attorney on the telephone.

**Mr. POWELL.** Well, he certainly ought not to have his conversations with his lawyer wiretapped. Is that being done?

**Senator FONG.** Many attorneys tell me they fear that their wires have been tapped. They can't even talk to their clients. A client calls them up and his attorney says, "I am afraid our wire has been tapped." The client too feels he has been tapped. So, neither one can communicate with the other except by personal contact.

**Mr. POWELL.** Well, I did not know there was wiretapping after a man had been brought to trial.

**Senator FONG.** After indictment.

**Mr. POWELL.** After indictment? Pretrial?

**Senator FONG.** Yes, sir. Evidence has been collected by wiretap to indict him. Do you think that one surveillance should stop there or

do you think that the Government should have the right to continue to wiretap until the date of trial?

Mr. POWELL. Is this with respect to—well, perhaps I shouldn't inquire. I really don't have a basis for a judgment, Senator. I was wondering whether, though, it did apply to the same crime on which the indictment was based or some other crime?

Senator FONG. The same crime. Do you think it is unfair? It is unfriendly; isn't it?

Mr. POWELL. It is unfriendly. I am not familiar with the practice.

Senator FONG. Thank you, Mr. Powell.

Mr. POWELL. Thank you, sir.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Mr. Chairman, I have no questions to ask.

I would just like to take this opportunity to say a few words in behalf of Mr. Powell.

Lewis F. Powell, Jr., is eminently suited and qualified to serve as an Associate Justice of the Supreme Court. He is widely regarded as one of the Nation's most respected and admired lawyers. He has served with distinction as president of the American Bar Association, president of the American College of Trial Lawyers, and president of the American Bar Foundation.

As president of the American Bar Association in 1964 and 1965, Mr. Powell took an active role in spearheading an ABA program of compiling a set of standards for criminal justice. He also was largely responsible for the American Bar Association's endorsement of the OEO legal services program in February 1965.

Mr. Powell is universally regarded by the local community and the people of his State and it appears that no individual or groups are opposed to him from his State.

Throughout his distinguished legal career Lewis Powell has continually exhibited his ability to grasp legal issues and to analyze legal problems. His outstanding academic achievements show he is intellectually capable of upholding the high tradition upon which the Supreme Court was founded and that he will be a credit to the Court.

For these reasons I heartily endorse the nomination of Lewis F. Powell, Jr., to serve as an Associate Justice of the Supreme Court of the United States.

I thank you, Mr. Chairman.

The CHAIRMAN. Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman.

I would like to join with other members of the committee in welcoming Mr. Powell here and offering him congratulations.

Mr. Powell, through the years you have gained a reputation which follows very appropriately in the footsteps of famous Virginians named to the committee, men as George Mason, James Madison, and Thomas Jefferson. As one of those who has very strongly defended the right to dissent, as protected by the first amendment, how do you feel about nonviolent demonstrations as a means to dissent?

Mr. POWELL. I think I have said many times, Senator Mathias, that I share the view you expressed with respect to the sacredness of the right to dissent. I have also said that it seems to me that certain types of demonstrations create a problem that you do not find with certain other types of expression; and I have expressed concern over

the types of demonstrations that are very difficult to control and that get out of hand and that lead to violence, and violence breeds reaction and the reaction sometimes is repressive.

I think that, in a few sentences, sums up my view. I obviously believe in the right peacefully—peaceably I guess it is, to assemble.

I would add this general observation, that the democratic processes in this country seem to me to be basically very sound; and I sometimes wonder if one tries to project himself into the future what historians will say if the massive street demonstration becomes too much of a substitute for the type of rational discussion where there can be a free exchange of views on a rational basis in a different type forum. That is a broad concern.

I would say in fairness that the great majority of the demonstrations in the country, it seems to me, have been orderly and well conducted and well managed. There have been some notable exceptions.

Senator MATHIAS. Do you find it difficult to reconcile the concept that the right to dissent is one of the cherished civil liberties protected by the Constitution with the fact that you say we may have to qualify this, this right, if you are not to expose yourself to the dangers that you have outlined, the danger of repression?

Mr. POWELL. I am afraid I didn't quite follow you, Senator.

Senator MATHIAS. I think we agree that the right to dissent is a basic civil liberty——

Mr. POWELL. Yes.

Senator MATHIAS. Of the United States? You have commented that dissent, even nonviolent dissent, which gets out of hand, may become repressive in itself. At some point then it implies that you would qualify the right of dissent, even nonviolent dissent, and I wondered if you had any difficulty reconciling that with your basic concept of the civil liberty that is involved?

Mr. POWELL. I think what I intended to say was that the line between a peaceful demonstration and one that becomes not peaceful sometimes is difficult to draw. Demonstrations have been known to get out of hand. When they do get out of hand, then government must act; and so the consequences may be varied and somewhat unattractive. If they get out of hand they impair the rights of innocent people. If they get out of hand they also provoke action that sometimes may be overreaction, but I do not—I certainly do not express any reservation whatever as to the right peacefully to demonstrate.

Senator MATHIAS. The difficult line it would seem would be the line that must be drawn by executive officials, policemen, and ultimately by courts as to where you make this qualification, where you come to the dividing line——

Mr. POWELL. Yes.

Senator MATHIAS (continuing). As to what is in fact a nonviolent demonstration of dissent and what has within it the seeds of a greater danger?

Mr. POWELL. Yes.

Senator MATHIAS. One of the most important matters facing the organized American bar in the last several years has been that of affording legal services to not only the indigents but also to those citizens who have limited means. I wonder if you would outline for the committee what your position has been on this subject?

Mr. POWELL. I share the view you express, especially as of today, as contrasted perhaps with the midsixties when the bar moved very vigorously to try to broaden, as indeed the Congress did, the availability of legal services for the poor. The problem today with respect to the people who are not properly classified as the poor, but who have incomes above the poverty level but not large enough to enable them readily to hire counsel, is quite acute. Toward the end of my term as president of the American Bar Association I appointed a committee under the chairmanship of William McAlpin of St. Louis, I drew the resolution that specified the authority and powers of the committee, and it was directed to examine this whole problem including the question whether group legal services is an answer; and that committee has produced several reports.

The American Bar Foundation has made an elaborate study. Nobody has yet found satisfactory answers that are broad enough to deal with the problem, but I certainly concur in your judgment that it is one of the more serious problems confronting the organized bar.

Senator MATHIAS. Would you feel that it is a function of the profession to provide this representation or does it become a function of government?

Mr. POWELL. I would hope that the profession can find reasonable solutions. I doubt that you will ever find a solution that assures that every citizen can find a lawyer when he wants him at a price which he can afford to pay. But there have been forward movements with respect to group legal services. There is currently some experimentation with respect to insurance to provide coverage comparable in a sense to Blue Cross; there has been some activity, particularly in the larger cities, with neighborhood legal offices and, of course, the old technique of lawyer referral is a system which I think almost every bar continues to utilize in this respect.

Senator MATHIAS. As a member of the President's Commission on Law Enforcement and Administration of Justice, you joined with several others in the minority statement which criticized the approach taken by the Supreme Court in *Miranda* and in the *Escobido* cases, and you later, writing for the FBI Law Enforcement Bulletin in October of this year, in effect, reaffirmed that judgment. You said, and I am quoting from the FBI Journal: "In recent years dramatic decisions of the Supreme Court have further strengthened the rights of accused persons and correspondingly limited the powers of law enforcement. There are no constitutional decisions in other countries comparable to those rendered in the cases of *Escobido* and *Miranda*."

Now, I am wondering if, No. 1, you think these cases should be overruled?

Mr. POWELL. I would think perhaps, Senator Mathias, it would be unwise for me to answer that question directly. I will certainly say that as of the time the supplemental statement was written for the Crime Commission Report that I thought the minority opinions were the sounder opinions. Those decisions, as I recall, were 5 to 4. I was concerned with the impact of those decisions on two separate but obviously related issues. One was the right of the law enforcement people to do on-the-scene interrogation primarily before they got back to the stationhouse and, second, was the impact of those decisions on voluntary confessions.

Now, the previous—on the first point as to on-the-scene interrogation, it seemed very difficult to me then, and perhaps it still is, although it is really not my field—I did ride in police cars in Richmond when I was on the Commission; and it is pretty awkward, really, when you are on the scene and a crime has been committed and you have one suspect or one fellow who you know was involved and not to be able to interrogate him to try to put your hands on who his confederates were; so it is a very real problem.

The other problem relating to confessions is a more philosophical one. Most of the convictions in the criminal courts of our country are on pleas of guilty, and most of the pleas of guilty resulted—our Commission studies disclosed—from admission of guilt, and it seemed at the time those decisions were decided, at least the minority of judges so thought, that the requirement that everyone be advised immediately of his right to counsel and that he understand clearly that he had that right then and there, would result in eliminating to a large extent the type of admissions that had been relied on so largely in the criminal justice system over the years.

I personally then preferred the English system which is based on whether or not the confessions are voluntary in fact, and that was the rule in the United States until those decisions.

Now, I have not made any recent thorough study. I am aware that there are some analyses that have been made. I think there was one made by the Yale Law Journal that indicates that some of the fears that I had with respect to on-the-scene interrogation, for example, have not materialized in fact, but I personally have not seen the data.

Senator MATHIAS. What I take you to be saying is that you feel that whatever safeguards are provided by the rules in those cases are inappropriate at this particular point in the criminal process?

Mr. POWELL. I would rather put it this way: We said in our supplemental statement that we recognized that the Court had very difficult issues to decide. Indeed on the facts in Escobedo, I think, the Court decided the case, plainly correctly, but our concern was with respect to the scope of the opinion rather than with the precise decision.

We thought that it was one of those very close constitutional issues and there was no criticism whatever of the majority. We recognized it had a perfectly clear line of argument to support its decision. I just happened to have the view that the minority opinion was the sounder one.

Senator MATHIAS. In the next line in this same article, you used the phrase, I think you quoted before, that "The need is for greater protection—not of criminals but of law-abiding citizens."

Would you say that increasing protection for law-abiding citizens is necessarily at the expense of the other?

Mr. POWELL. No, not necessarily, and I would like to make it perfectly clear that I don't think I have ever criticized the Court for deciding these historic cases. In fact, in my talks to the New York State Bar Association and to the fourth circuit judicial conference, I emphasized the fact that probably most of the decisions of the so-called Warren court in the criminal justice area will be regarded as landmarks in the law. The two you mentioned were two that were exceptions from the broad sweep of my judgment on that line of decisions.

I would make the general observation, Senator Mathias, and here I speak primarily as a citizen, not being in the criminal law myself,

that these cases have contributed to the delay that is now one of the more serious problems in the system. We all know, all of us who are lawyers know, that the criminal process now drags out in our country far too long either for the good of society or for the good of the person accused of crime; and I would think that the first priority in terms of all who have responsibility—the Congress and the courts and the organized bar—is to address the problem of delay in courts. It is in the civil system also, but in the criminal system about which we are now talking it has reached the point that causes real concern.

Senator MATHIAS. I certainly agree with you and that is why I joined with the other members of the committee here in sponsoring the Speedy Justice Act which—

Mr. POWELL. Yes.

Senator MATHIAS (continuing). Implements that concept.

Would you go so far in providing greater protection for citizens as to support some compensation of victims of crime? Would that be one of the steps that the Government might take?

Mr. POWELL. I think the English have moved into that area and it has interested me; and I think I have suggested that it certainly merited serious study. It is a great tragedy to be a victim of crime and have no resources with which to compensate one's self. What it would cost in view of the magnitude of crime in our country, I have no idea; but this is a tragic void in our system.

Senator MATHIAS. At least it is an area which you feel might be usefully reviewed and surveyed?

Mr. POWELL. I certainly do.

Senator MATHIAS. Turning, if we might, to your own backyard, I understand that when a part of Chesterfield County was annexed by the city of Richmond, that you favored that annexation. I am also told that one of the effects of the annexation was to dilute the voting power of the black community within the city of Richmond since it annexed areas that are primarily white and the city council of Richmond is elected at large and not by wards or districts. I am wondering if you would comment on the role which you took in supporting that annexation?

Mr. POWELL. I will be happy to do so.

My only connection with this entire subject, apart from being a citizen in the community, is this: The mayor of the city of Richmond and the city attorney had arranged a conference with the Attorney General to discuss the Attorney General's role under the Voting Rights Act of 1965 with respect to the annexation.

For the benefit of members of the committee who may not be aware of it, the city of Richmond had annexed a portion of the adjacent county of Chesterfield and, under Virginia law, a city is separate and apart from all counties. In other words, it is not a part of any county. It has its own tax structure and the county has a separate tax structure.

Senator MATHIAS. One of the anomalies that Maryland and Virginia share.

Mr. POWELL. Do they have—

Senator MATHIAS. The city of Baltimore is in no county.

Mr. POWELL. Well, you understand this part of the problem.

The mayor asked me if I would accompany him to the conference because of my having served as chairman of the Commission which

wrote the council-manager form of government for the city of Richmond; and when we wrote that new charter for the city we abolished the ward system which had been an inequity in our city, as I viewed it, for many years; and we went to elections at large.

There had been periodic discussions of going back to some form of ward system without regard to this annexation phase.

I had also, when asked for my opinion, opposed going back to a ward system. A ward system in a city as small as Richmond seems to me to be undesirable. In any event I went with the mayor to see the Attorney General and I gave the Attorney General a memorandum which I think has been filed with this committee; and in that memorandum I argued that the annexation was in the best interests of all of the citizens of the community, and I feel that way deeply.

It undoubtedly had the effect of diluting the black vote, but every annexation, certainly in States which have the population mix that Virginia has, would have that effect.

I was in the preceding annexation case in the city of Richmond as counsel for Henrico County and I had some familiarity with annexation law and with the reasons why annexations are allowed in the State of Virginia; and I can assure this committee that those reasons had nothing whatever to do with race. They were economic, and if the city of Richmond is compelled to stay within its present boundaries, it will result, in the long run, in my judgment, in a disastrous situation for all of the people who are forced to live there.

Senator MATHIAS. One final question, Mr. Chairman.

It seems to me that the general public—what we might call law-abiding citizens—has the greatest interest of all in the reduction of the rate of recidivism and, therefore, in the kind of a criminal process which results in speedy trials, better prisoner rehabilitation, and a more effective penal system which is corrective and not just a period of storage. Would you agree? Would you say that this great mass of citizens—these law-abiding citizens—have themselves an interest in an enlightened criminal system, and in the safeguards which are provided by such a criminal system?

Mr. POWELL. I certainly subscribe to that.

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

Senator McCLELLAN (presiding). Thank you.

Mr. Powell, I wish to congratulate you upon receiving this nomination and also strongly to commend the President for making the nomination.

I find that after examining every bit of available information about you, there is no room for doubt about your qualifications. You appear to be eminently qualified, and you are so regarded by members of the bar throughout the country.

I was especially pleased to receive two letters from leading members of the bar in my State, one from Mr. Edward L. Wright, a past president of the American Bar Association, and one from Mr. Courtney C. Crouch, a past president of the Arkansas Bar Association, both of whom know and worked with you in the American Bar Association.

I would like to insert these letters in the record if they have not already been—one hasn't because I received it this morning.

Mr. Wright, in his letter to me of November 2, stated:

I have known Lewis F. Powell, Jr., intimately for many years and have worked extremely closely with him in many American Bar Association matters. He is a truly great man, whether measured by his impeccable character, his outstanding intellect, or his unselfish activities in the genuine public interest. In my opinion he will become one of the outstanding and recognized jurists of all times to sit on the Supreme Court of the United States.

I thought you would be interested to know what your friend and associate, Mr. Wright of Arkansas, said.

(The letter referred to appears in the hearing on November 4, 1971.)

Senator McCLELLAN. I now quote from a letter I received this morning from Mr. Courtney C. Crouch, a past president of the Arkansas Bar Association. I believe he was president at the time you served as president of the American Bar Association. He says:

I first became acquainted with Mr. Powell in 1964 as our paths crossed when he was President of the American Bar Association and I was President Elect of the Arkansas Bar Association, and since that time I have followed his career with great interest and hold him in the highest esteem.

His reputation as one of the outstanding lawyers of the nation and his impeccable character are so well known that anything I might say would be gilding the lily.

Suffice to say, in my opinion the President made a very wise selection when he sent the name of Lewis F. Powell, Jr., to the Senate. He will add great stature to our High Court.

I was very pleased to receive those communications and others from my State.

Mr. POWELL. Thank you very much, Senator.

CROUCH, BLAIR, CYPERT & WATERS,  
ATTORNEYS AT LAW,  
*Springdale, Ark., November 1, 1971.*

Hon. JOHN L. McCLELLAN,  
U.S. Senate, Washington, D.C.

DEAR SENATOR McCLELLAN: I sincerely hope that your Judiciary Committee will look with great favor upon the Honorable Lewis F. Powell, Jr. for one of the positions on the Supreme Court.

I first became acquainted with Mr. Powell in 1964 as our paths crossed when he was President of the American Bar Association and I was President Elect of the Arkansas Bar Association, and since that time I have followed his career with great interest and hold him in the highest esteem.

His reputation as one of the outstanding lawyers of the nation and his impeccable character are so well known that anything I might say would be gilding the lily.

Suffice to say, in my opinion the President made a very wise selection when he sent the name of Lewis F. Powell, Jr. to the Senate. He will add great stature to our High Court.

With very kindest personal regards.

Sincerely yours,

COURTNEY C. CROUCH.

Senator McCLELLAN. Mr. Powell, I have not known you very well personally. The first time I think that you came to my attention is when you served on the President's Crime Commission back in 1967. I admired your work there and I want to refer to some of it a moment later. In the meantime, I would like to ask you just a few questions and make a brief statement for the record.

A lot of the questioning here at this hearing has centered on wiretapping. The Congress in 1968 passed the Omnibus Crime Control Act, title III of which dealt with wiretapping. I note from the record in the Senate that an effort was made in the Senate—title III of the

act was in the bill as reported out by the Senate Judiciary Committee—to strike out title III of the bill.

You are familiar with this history, but I would point out for this record, that after considerable debate, the Senate voted 68 to 12 not to strike title III out of the bill.

The part of title III dealing with the constitutional right of the President to direct and order wiretapping in security cases was discussed only briefly, but it was included in the motion, of course, to strike the whole title. No separate amendment was offered to strike that portion of the bill. We dealt with it on the theory that if the President had the constitutional power to order that kind of surveillance to protect the country from foreign enemies or to protect the internal security of the country, anything that we legislated, anything we tried to do by limiting him, would be unconstitutional, even though there might be, in that particular area, still some doubt as to whether he has those powers.

However, I do believe six Presidents, beginning with President Roosevelt, have recognized or assumed that they did have such powers under the Constitution and no effort by legislation, so far as I know, has ever been made to deny the power to the President because it was believed that it is was not his under the Constitution.

When the 1968 act reached final passage in the Senate the vote was—with title III in it—72 to 4 for passage.

In the House, the bill passed with title III in it by a vote of 368 to 17.

The 1968 act authorizes, as you know, States to enact wiretapping laws not inconsistent with the Federal statute. Since then, some 18 or 36 percent of the States have adopted similar statutes.

Now, the point I wish to make is this: From my viewpoint the legislature, the Congress, has established national policy with respect to wiretapping by these votes, as I have indicated.

Now, as a member of the court, although you might think this not a wise policy, and you might disagree with the policy that the legislature—the Congress—has adopted and you might feel it was unwise to grant these powers under court supervision, would you feel that you had a right simply because you may disagree with the policy to hold the act unconstitutional?

Mr. POWELL. Well, as I have said, Senator, I would certainly not consider it appropriate to inject my own personal views with respect to a constitutional question of an act of Congress.

Senator McCLELLAN. In my judgment, when the Congress has spoken, that is the law of the land; it is the national policy; and it seems to me that those who disagree with that policy should find their remedy in the halls of Congress.

It is no question of whether you favor the act, as I see it, or whether you like all of its provisions or don't. The only thing that would be before you would be did the accused receive a fair trial under due process; and is the statute constitutional?

Let me ask the question another way. If you found it constitutional, would you, and I am sure you would, but I ask this for the record, would you enforce it as a member of the highest court of the land?

Mr. POWELL. The answer to that is clearly an affirmative.

Senator McCLELLAN. Certainly.

Then, the view I have—and I won't ask you to agree or disagree—I feel where the Congress enacts a statute that is constitutional, it is binding on the Supreme Court. I don't think it has the right to, by edict or some process, to legislate or attempt to legislate that act away or to hold it to be invalid because of personal views on what policy should be. That is what "strict constructionism," is to me. I don't know what it means to others, but I believe if the act is constitutional, it is the Congress' prerogative to set national policy in those areas within the framework of the Constitution and that that policy should stand and not be overruled by a court because the court's philosophy is that it was bad policy.

Mr. POWELL. I certainly subscribe to those views, Senator.

Senator McCLELLAN. Mr. Powell, as I mentioned a while ago, you first came to my attention as a member of the President's Crime Commission in 1967. In the report of the Crime Commission, additional views were submitted by you and Mr. Jaworski, Mr. Malone, and Mr. Storey. I have before me the excerpts of those views from that report. I have read them and read them approvingly.

May I inquire if you still subscribe to the general views expressed in the additional views that you submitted at that time?

Mr. POWELL. As I think I said in response to questions from Senator Mathias, they were certainly my views at the time. I know of no reasons why at this time I should have different views although in fairness, it is a fact that some of the issues have not been re-examined by me since my study as a member of that Commission.

Senator McCLELLAN. Very well.

I have also before me a copy of your bar association of the city of Richmond address of April 15, 1971. You are familiar with that?

Mr. POWELL. I am, sir.

Senator McCLELLAN. In general, does that still reflect your views?

Mr. POWELL. It does.

Senator McCLELLAN. And your philosophy?

Mr. POWELL. Yes, sir.

Senator McCLELLAN. I should like to have these items inserted in the record without objection at this point.

I have also asked the staff of the Criminal Laws and Procedures Subcommittee to prepare in a memorandum a summary of all wiretapping legislation and decisions and to attach thereto excerpts from some of the debate, particularly on the question of the President's powers, the memorandum of President Franklin D. Roosevelt, who really initiated this concept that the President has the inherent power under the Constitution to order wiretapping in internal security cases, the memorandum from Mr. Tom Clark, Attorney General, to President Truman, dated July 1946, together with President Truman's notation thereto, and the memorandum of June 30, 1965, of President Lyndon Johnson regarding the same subject.

I ask unanimous consent that these be inserted in the record so that readers of this record will have this information on this particular subject.

Very well, they will be inserted.

Are there any other quick questions before we recess for lunch?  
(The material referred to follows.)

### THE CHALLENGE OF CRIME IN A FREE SOCIETY

(Additional views of Messrs. Jaworski, Malone, Powell, and Storey)

We have joined our fellow members of the Commission in this report and in commanding it to the American people. This supplemental statement is submitted in support of the report for the purpose of opening up for discussion—and perhaps for further study and action—areas which were not considered explicitly in the report itself. These relate to the difficult and perplexing problems arising from certain of the constitutional limitations upon our system of criminal justice.

#### CONSTITUTIONAL LIMITATIONS

The limitations with which we are primarily concerned arise from the Fifth and Sixth Amendments to the Constitution of the United States as they have been interpreted by the Supreme Court in recent years. The rights guaranteed by these amendments, and other provisions of the Bill of Rights, are dear to all Americans and long have been recognized as cornerstones of a system deliberately designed to protect the individual from oppressive government action. As they apply to persons accused of crime, they extend equally to the accused whether he is innocent or guilty. It is fundamental in our concept of the Constitution that these basic rights shall be protected whether or not this sometimes results in the acquittal of the guilty.

We do not suggest a departure from these underlying principles. But there is a serious question, now being increasingly posed by jurists and scholars,<sup>1</sup> whether some of these rights have been interpreted and enlarged by Court decision to the point where they now seriously affect the delicate balance between the rights of the individual and those of society. Or, putting the question differently, whether the scales have tilted in favor of the accused and against law enforcement and the public further than the best interest of the country permits.

It is concern with this question which prompts us to express these additional views. As the people of our country must ultimately decide where this balance is to be struck, it is important to encourage a wider understanding of the problem and its implications.

In 1963 Chief Judge Lumbard of the Court of Appeals of the Second Circuit warned:

[W]e are in danger of a grievous imbalance in the administration of criminal justice \* \* \*.

In the past forty years there have been two distinct trends in the administration of criminal justice. The first has been to strengthen the rights of the individual; and the second, which is perhaps a corollary of the first, is to limit the powers of law enforcement agencies. Most of us would agree that the development of individual rights was long overdue; most of us would agree that there should be further clarification of individual rights, particularly for indigent defendants. At the same time we must face the facts about indifferent and faltering law enforcement in this country. We must adopt measures which will give enforcement agencies proper means for doing their jobs. In my opinion, these two efforts must go forward simultaneously.<sup>2</sup>

The trends referred to by Judge Lumbard have had their major impact upon law enforcement since 1961 as a result of far-reaching decisions of the Supreme Court which have indeed effected a "revolution in state criminal procedure."<sup>3</sup>

#### THE COURT'S DIFFICULT ROLE

The strong emotions engendered by these decisions, for and against both them and the Court, have inhibited rational discourse as to their actual effect upon law enforcement. There has been unfair—and even destructive—criticism of the Court itself. Many have failed to draw the line, fundamental in a democratic society, between the right to discuss and analyze the effect of particular decisions, and the duty to support and defend the judiciary, and particularly the Supreme Court, as an institution essential to freedom. Moreover, during the early period of the Court's restraint with respect to State action, there were many examples of gross injustice in the State courts and of indefensible inaction on the part of State

<sup>1</sup> See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965); Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 Nw. U.L. Rev. 506 (1966); Traynor, *The Devils of Due Process in Criminal Detection, Detention and Trial*, 33 U. Chi. L. Rev. 657 (1966).

<sup>2</sup> Lumbard, *The Administration of Criminal Justice: Some Problems and Their Resolution*, 49 A.B.A.J. 840 (1963). Judge Lumbard is chairman of the American Bar Association's Criminal Justice Project.

<sup>3</sup> George, *Constitutional Limitations on Evidence in Criminal Cases* 3 (1966).

legislatures. In short, there was often a pressing need for action due to neglect elsewhere, and many of the great decisions undoubtedly brought on by such neglect have been warmly welcomed.

Whatever the reason, the trend of decisions strikingly has been towards strengthening the rights of accused persons and limiting the powers of law enforcement. It is a trend which has accelerated rapidly at a time when the nation is deeply concerned with its apparent inability to deal successfully with the problem of crime. We think the results must be taken into account in any mobilization of society's resources to confront this problem.

#### THE ACCUSATORY SYSTEM

In any attempt to assess the effect of this trend upon law enforcement it is necessary to keep in mind the essential characteristics of our criminal system. Unlike systems in many civilized countries, ours is "accusatory" in the sense that innocence is presumed and the burden lies on the State to prove in a public trial the guilt of the accused beyond reasonable doubt. The accused has the right to a jury trial, and—in most if not all States—the added protection that a guilty verdict must be unanimous.

Other characteristics which have marked our system include the requirements of probable cause for arrest, prompt arraignment before a judicial officer, indictment or presentment to a grand jury, confrontation with accusers and witnesses, reasonable bail, the limitation on unreasonable searches and seizures, and habeas corpus.

Argument and controversy have swirled around the interpretation and application of many of these rights. The drawing of a line between the obvious need for police to have reasonable time to investigate and the right of an accused to a prompt arraignment occasioned one of the most intense controversies.<sup>4</sup>

There also has been serious dissatisfaction with the abuse of habeas corpus and especially the flood of petitions resulting from decisions broadening the power of Federal courts to review alleged denials of constitutional rights in State courts.<sup>5</sup> No other country affords convicted persons such elaborate and multiple opportunities for reconsideration of adjudication of guilt.<sup>6</sup>

Another constitutional limitation, affecting criminal trials and now being increasingly questioned,<sup>7</sup> requires that a conviction be set aside automatically whenever material evidence obtained in violation of the Bill of Rights was received at the trial. The purpose of the rule is not related to relevance, truth or reliability, for the evidence in question may in fact be the most relevant and reliable that possibly could be obtained. Rather, the reason assigned for the preemptory exclusion is that there is no other effective method of deterring improper action by law enforcement personnel.

#### ESCOBEDO AND MIRANDA

But the broadened rights and resulting restraints upon law enforcement which have had the greatest impact are those derived from the Fifth Amendment privilege against self-incrimination and the Sixth Amendment assurance of counsel.

The two cases which have caused the greatest concern are *Escobedo v. Illinois*<sup>8</sup> and *Miranda v. Arizona*.<sup>9</sup> In *Miranda* the requirements were imposed that a suspect detained by the police be warned not only of his right to remain silent and that any statement may be used against him at trial, but also that he has the right to the presence of counsel and that counsel will be furnished if he cannot provide it, before he can be asked any questions at the scene of the crime or elsewhere. The suspect may waive these rights only if he does so "voluntarily, knowingly and intelligently" and all questioning must stop immediately if at any stage the person indicates that he wishes to consult counsel or to remain silent.

<sup>4</sup> See *Mallory v. United States*, 354 U.S. 449 (1957).

<sup>5</sup> *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963). In 1941 fiscal year there were only 127 petitions; by 1961 there were 984. The number escalated to 3,531 in 1964; during the first 6 months of fiscal 1965 there were 2,460 applications (an increase of 32.7 percent over the previous 6 months' period). See 90 A.B.A. Rep. 463 (1965). The *Townsend* case, to take one dreary example, was in the courts for more than 10 years after conviction of the defendant, with 6½ years being consumed in various habeas corpus proceedings. The great majority of these petitions are not meritorious. See *Ibid.*

<sup>6</sup> The Commission's report, ch. 5, contains helpful recommendations as to what the States can do to minimize frivolous habeas corpus petitions.

<sup>7</sup> See *Friendly, supra* at 951-53.

<sup>8</sup> 378 U.S. 478 (1964).

<sup>9</sup> 384 U.S. 436 (1966).

Although the full meaning of the code of conduct prescribed by *Miranda* remains for future case-by-case delineation, there can be little doubt that its effect upon police interrogation and the use of confessions will drastically change procedures long considered by law enforcement officials to be indispensable to the effective functioning of our system. Indeed, one of the great State chief justices has described the situation as a "mounting crisis" in the constitutional rules that "reach out to govern police interrogation."<sup>10</sup>

#### THE FATE OF POLICE INTERROGATIONS

If the majority opinion in *Miranda* is implemented in its full sweep, it could mean the virtual elimination of pretrial interrogation of suspects—on the street, at the scene of a crime, and in the station house—because there would then be no such interrogation without the presence of counsel unless the person detained, howsoever briefly, waives this right. Indeed, there are many who now agree with Justice Walter V. Schaefer who recently wrote:

*The privilege against self-incrimination as presently interpreted precludes the effective questioning of persons suspected of crime.<sup>11</sup>*

In *Crooker v. California*, the Court recognized that an absolute right to counsel during interrogation would "preclude police questioning—fair as well as unfair \* \* \*."<sup>12</sup> Mr. Justice Jackson, familiar with the duty and practice of the trial bar, perceptively said:

*[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.<sup>13</sup>*

There will, it is true, be a certain number of cases in which the suspect will not insist upon his right to counsel. If he makes admissions or a formal confession, the question whether his waiver of counsel was "voluntarily, knowingly and intelligently" made will then permeate all subsequent contested phases of the criminal process—trial, appeal and even post conviction remedies. And the prosecution will bear the "heavy" burden of proving such waiver; mere silence of the accused will not suffice; and "any evidence" of threat, cajolery or pressure by the government will preclude admission.

The employment of electronic recorders<sup>14</sup> and television possibly may enable police to defend such an interrogation if conducted in the station house. But in the suddenness of a street encounter, or the confusion at the scene of a crime, there will be little or no opportunity to protect police interrogation against the inevitable charge of failing to meet *Miranda* standards. The litigation that follows more often than not will be a "trial" of the police rather than the accused.

There are some who argue that further experience is needed to determine whether police interrogation of suspects is necessary for effective law enforcement. Such experience would be helpful in defining the dimensions of the problem. But few can doubt the adverse impact of *Miranda* upon the law enforcement process.

Interrogation is the single most essential police procedure. It benefits the innocent suspect as much as it aids in obtaining evidence to convict the guilty. Mr. Justice Frankfurter noted:

*Questioning suspects is indispensable in law enforcement.<sup>15</sup>*

The rationale of police interrogation was well stated by the Second Circuit Court of Appeals in *United States v. Cone*:

*The fact is that in many serious crimes—cases of murder, kidnapping, rape, burglary and robbery—the police often have no or few objective clues with which to start an investigation; a considerable percentage of those which are solved are solved in whole or in part through statements voluntarily made to the police by those who are suspects. Moreover, immediate questioning is often instrumental in recovering kidnapped persons or stolen goods as well as in solving the crime. Under these circumstances, the police should not be forced unnecessarily to bear obstructions that irrevocably forfeit the opportunity of securing information under circumstances of*

<sup>10</sup> Traynor, *supra* at 664. Chief Justice Traynor discussed this "mounting crisis" in the Benjamin N. Cardozo Lecture at the Association of the Bar of the City of New York on Apr. 19, 1966, prior to the Court's decision in *Miranda*.

<sup>11</sup> Schaefer, *supra* at 520. See also Justice Schaefer's first lecture in the 1966 Julius Rosenthal Lectures, Northwestern University Law School 8 (unpublished manuscript).

<sup>12</sup> 357 U.S. 433, 441 (1958), the holding of which was overruled in *Miranda*, *supra* at 479 n. 48. [Emphasis in original.]

<sup>13</sup> *Watts v. Indiana*, 338 U.S. 49, 50 (1949) (dissenting opinion).

<sup>14</sup> As recommended in *Model Code of Pre-Arraignment Procedure* § 4.09 (Tent. Draft No. 1, 1966).

<sup>15</sup> *Culombe v. Connecticut*, 367 U.S. 568, 578 (1961), quoting *People v. Hall*, 413 Ill. 615, 624, 110 N.E. 2d 249, 254 (1953).

*spontaneously most favorable to truth-telling and at a time when further information may be necessary to pursue the investigation, to apprehend others, and to prevent other crimes.<sup>16</sup>*

#### THE FUTURE OF CONFESSIONS

The impact of *Miranda* on the use of confessions is an equally serious problem. Indeed, this is the other side of the coin. If interrogations are muted there will be no confessions; if they are tainted, resulting confessions—as well as other related evidence—will be excluded or the convictions subsequently set aside. There is real reason for the concern, expressed by dissenting justices, that *Miranda* in effect proscribes the use of all confessions.<sup>17</sup> This would be the most far-reaching departure from precedent and established practice in the history of our criminal law.

Until *Escobedo* and *Miranda* the basic test of the admissibility of a confession was whether it was genuinely voluntary.<sup>18</sup> Nor had there been any serious question as to the desirable role of confessions, lawfully obtained, in the criminal process. The generally accepted view had been that stated in an early Supreme Court case:

[T]he admissions or confessions of a prisoner, when voluntary and freely made, have always ranked high in the scale of incriminating evidence.<sup>19</sup>

It is, of course, true that the danger of abuse and the difficulty of determining “voluntariness” have long and properly concerned the courts. Yet, one wonders whether these acknowledged difficulties justify the loss at this point in our history of a type of evidence considered both so reliable and so vital to law enforcement.

#### THE “PRIVILEGE” AND CRIMINAL TRIAL

The impact upon law enforcement of the privilege against self-incrimination as now construed by the Court is not confined to the *Miranda* issues of interrogation and confession. The privilege has always protected an accused from being compelled to testify; it now prevents any comment by judge or prosecutor on his failure to testify; and it limits discovery by the prosecution of evidence in the accused’s possession or control.<sup>20</sup> It was not until 1964 that the privilege was held applicable to the States by virtue of the 14th amendment,<sup>21</sup> and the final extension came in 1965 when the Court held invalid a State constitutional provision permitting the trial judge and prosecutor to comment upon the accused’s failure to testify at trial.<sup>22</sup>

The question is now being increasingly asked whether the full scope of the privilege, as recently construed and enlarged, is justified either by its long and tangled history or by any genuine need in a criminal trial.<sup>23</sup> There is agreement, of course, that the privilege must always be preserved in fullest measure against inquisitions into political or religious beliefs or conduct. Indeed, the historic origin and purpose of the privilege was primarily to protect against the evil of

<sup>16</sup> 354 F. 2d 119, 126, cert. denied, 384 U.S. 1023 (1966). Perhaps the best published statement of the considerations favoring in-custody interrogation is that found in the *Model Code of Pre-Arraignment Procedure*, Commentary § 5.01, at 168-74 (Tent. Draft No. 1, 1966). See also Bator & Vorberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 Colum. L. Rev. 62 (1966); Friendly, *supra*, at 91, 948.

<sup>17</sup> Mr. Justice White, joined by Mr. Justice Harlan and Mr. Justice Stewart, said “[T]he result [of the majority holding] adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not.” *Miranda v. Arizona*, *supra* at 538 (dissenting opinion).

<sup>18</sup> Indeed, until very recently and back through English constitutional history, a distinction had been made between the privilege against self-incrimination and the rules excluding compelled confessions. See Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949); 3 Wigmore, *Evidence* 819 (3d ed. 1940). But see *Bram v. United States*, 168 U.S. 532, 542 (1897). In the United States, the common law and the due process clauses of the Constitution were construed to provide a voluntariness standard for the admissibility of confessions. See *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935 (1966). The Fifth Amendment was adopted in 1791. Before that time, in England and in this country, the privilege was construed to apply only at judicial proceedings in which the person asserting the privilege was being tried on criminal charges; at preliminary hearing the magistrate freely questioned the accused without warning of his rights and any failure to respond was part of the evidence at trial, such evidence being given by testimony of the magistrate himself. See Morgan, *supra* at 18. Dean Wigmore and Professor Corwin suggest that the intent of the framers of the Fifth Amendment was to retain these limitations upon the privilege. See Corwin, *The Supreme Court’s Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 2 (1930); 8 Wigmore, *Evidence* § 2252, at 324 (McNaughton rev. 1961).

<sup>19</sup> *Brown v. Walker*, 161 U.S. 591, 599 (1896). Moreover, as Judge Friendly has pointed out: “[T]here is no social value in preventing uncoerced admission of the facts.” Friendly, *supra* at 948.

<sup>20</sup> See 8 Wigmore, *Evidence* § 2264 (McNaughton rev. 1961). Beyond the trial itself, the privilege protects grand jury witnesses (*Counselman v. Hitchcock*, 142 U.S. 547 (1892)); witnesses in civil trial (*McCarthy v. Arndstein*, 266 U.S. 34 (1924)); and witnesses before legislative committees (*Emepak v. United States*, 349 U.S. 190 (1955); *Quinn v. United States*, 349 U.S. 155 (1955)).

<sup>21</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>22</sup> *Griffin v. California*, 380 U.S. 609 (1965).

<sup>23</sup> See, e.g., McCormick, *The Scope of Privilege in the Law of Evidence*, 16 Texas L. Rev. 447 (1938); Schaefer, *supra*; Traynor, *supra*; Warden, *Miranda—Some History, Some Observations and Some Questions*, 20 Vand. L. Rev. 39 (1966).

governmental suppression of ideas. But it is doubtful that when the Fifth Amendment was adopted it was conceived that its major beneficiaries would be those accused of crimes against person and property.

Plainly this is an area requiring the most thoughtful attention. There is little sentiment—and in our view no justification—for outright repeal of the privilege clause or for an amendment which would require a defendant to give evidence against himself at his trial. But a strong case can be made for restoration of the right to comment on the failure of an accused to take the stand.<sup>24</sup> As Justice Schaefer has said:

*[I]t is entirely unsound to exclude from consideration at the trial the silence of a suspect involved in circumstances reasonably calling for explanation, or of a defendant who does not take the stand. It therefore seems to me imperative that the privilege against self-incrimination be modified to permit comment upon such silence.<sup>25</sup>*

Any consideration of modification of the Fifth Amendment also should include appropriate provision to make possible reciprocal pretrial discovery in criminal cases. One specific proposal, meriting serious consideration, is to accomplish this by pretrial discovery interrogation before a magistrate or judicial officer.<sup>26</sup> The availability of broad discovery would strengthen law enforcement as well as the rights of persons accused of crime,<sup>27</sup> and would go far to establish determination of the truth as to guilt or innocence as the primary object of our criminal procedure.

#### OTHER COUNTRIES LESS RESTRICTIVE

We know of no other system of criminal justice which subjects law enforcement to limitations as severe and rigid as those we have discussed. The nearest analogy is found in England which shares through our common law heritage the basic characteristics of the accusatory system. Yet, there are significant differences—especially in the greater discretion of English judges and in the flexibility which inheres in an unwritten constitution. There is nevertheless a developing feeling in England, parallel to that in this country, that criminals are unduly protected by the present rules. The Home Secretary of the Labor Government, speaking of proposed measures to aid law enforcement, recently said:

*The scales of justice in Britain are at present tilted a little more in the favor of the accused than is necessary to protect the innocent.<sup>28</sup>*

One of the measures recommended by the Labor Government is to permit a majority verdict of 10, rather than the historic unanimous vote of all 12 jurors.<sup>29</sup> Leading members of the English bar are pressing for further reforms. After pointing out that "the criminal is living in a golden age," Lord Shawcross has commented:

*The barriers protecting suspected and accused persons are being steadily reinforced. I believe our law has become hopelessly unrealistic in its attitude toward the prevention and detection of crime. We put illusory fears about the impairment of liberty before the promotion of justice.<sup>30</sup>*

Among the reforms being urged in England are major modifications of the privilege against self-incrimination, broadened discovery rights by the state, and the adoption of a requirement that accused persons must advise the prosecution in advance of trial of all special defenses, such as alibi, self-defense, or mistaken identity. Another change suggested would allow the admission in evidence of previous convictions of similar offenses, although convictions of dissimilar crimes still would not be admissible.<sup>31</sup>

<sup>24</sup> See Traynor, *supra* at 677: "I find no inconsistency in remaining of the opinion that a judge or prosecutor might fairly comment upon the silence of a defendant at the trial itself to the extent of noting that a jury could draw unfavorable inferences from the defendant's failure to explain or refute evidence when he could reasonably be expected to do so. Such comment would not be evidence and would do no more than make clear to the jury the extent of its freedom in drawing inferences."

<sup>25</sup> Schaefer, *supra* at 520.

<sup>26</sup> Schaefer, *supra* at 518-20.

<sup>27</sup> The Commission's report emphasizes the need for broader pretrial discovery by both the prosecution and the defense.

<sup>28</sup> Address of the Rt. Hon. Roy Jenkins, M.P., Secretary of State for the Home Department, National Press Club, Washington, D.C., Sept. 19, 1966. Mr. Jenkins, in emphasizing the deterrent effect of swiftness and certainty in justice, also said: "Detection and conviction are therefore necessarily prior deterrents to that of punishment, and I attach the greatest possible importance to trying to increase the chances that they will follow a criminal act."

<sup>29</sup> The rule in Scotland long has been that a simple majority vote suffices to convict.

<sup>30</sup> Address by Lord Shawcross, Q.C., Attorney General of Great Britain, 1945-61, before the Crime Commission of Chicago, Oct. 11, 1966, reprinted in U.S. News & World Report, Nov. 1, 1966, pp. 80-82. See also Shawcross, *Police and Public in Great Britain*, 51 A.B.A.J. 226 (1965).

<sup>31</sup> See statements of Viscount Dilhorne (Q.C. and Lord Chancellor, 1962-64 and Attorney General, 1964-62), and Lord Shawcross, as reported in *The Listener*, Aug. 11, 1966, pp. 190, et seq.

## THE FIRST DUTY OF GOVERNMENT

In the first chapter of the Commission's report the seriousness of the crime situation is described as follows:

*Every American is, in a sense, a victim of crime. Violence and theft have not only injured, often irreparably, hundreds of thousands of citizens, but have directly affected everyone. Some people have been impelled to uproot themselves and find new homes. Some have been made afraid to use public streets and parks. Some have come to doubt the worth of a society in which so many people behave so badly.<sup>32</sup>*

The underlying causes of these conditions are far more fundamental than the limitations discussed in this statement. Yet, prevention and control of crime—until it is "uprooted" by long-range reforms—depends in major part upon effective law enforcement. To be effective, and particularly to deter criminal conduct, the courts must convict the guilty with promptness and certainty just as they must acquit the innocent. Society is not well served by limitations which frustrate reasonable attainment of this goal.

We are passing through a phase in our history of understandable, yet unprecedented, concern with the rights of accused persons. This has been welcomed as long overdue in many areas. But the time has come for a like concern for the rights of citizens to be free from criminal molestation of their persons and property. In many respects, the victims of crime have been the forgotten men of our society—inadequately protected, generally uncompensated, and the object of relatively little attention by the public at large.

Mr. Justice White has said: "The most basic function of any government is to provide for the security of the individual and of his property."<sup>33</sup> Unless this function is adequately discharged, society itself may well become so disordered that all rights and liberties will be endangered.

## RIGHTING THE IMBALANCE

This statement has reviewed, necessarily without attempting completeness or detailed analysis, some of the respects in which law enforcement and the courts have been handicapped by the law itself in seeking to apprehend and convict persons guilty of crime.

The question which we raise is whether, even with the support of a deeply concerned President<sup>34</sup> and the implementation of the Commission's national strategy against crime, law enforcement can effectively discharge its vital role in "controlling crime and violence" without changes in existing constitutional limitations.

There is no more sacred part of our history or our constitutional structure than the Bill of Rights. One approaches the thought of the most limited amendment with reticence and a full awareness both of the political obstacles and the inherent delicacy of drafting changes which preserve all relevant values. But it must be remembered that the Constitution contemplates amendment, and no part of it should be so sacred that it remains beyond review.

Whatever can be done to right the present imbalance through legislation or rule of court should have high priority. The promising criminal justice programs of the American Bar Association and the American Law Institute should be helpful in this respect. But reform and clarification will fall short unless they achieve these ends:

An adequate opportunity must be provided the police for interrogation at the scene of the crime, during investigations and at the station house, with appropriate safeguards to prevent abuse.

The legitimate place of voluntary confessions in law enforcement must be reestablished and their use made dependent upon meeting due process standards of voluntariness.

Provision must be made for comment on the failure of an accused to take the stand, and also for reciprocal discovery in criminal cases.

If, as now appears likely, a constitutional amendment is required to strengthen law enforcement in these respects, the American people should face up to the need and undertake necessary action without delay.

<sup>32</sup> Commission's General Report, ch. I.

<sup>33</sup> *Miranda v. Arizona*, *supra* at 539 (dissenting opinion).

<sup>34</sup> In his recent State of the Union Address, President Johnson said: "Our country's laws must be respected, order must be maintained. I will support—with all the constitutional powers I possess—our Nation's law enforcement officials in their attempt to control the crime and violence that tear the fabric of our communities." State of the Union Address, Jan. 10, 1967.

## CONCLUSION

We emphasize in concluding that while we differ in varying degrees from some of the decisions discussed, we unanimously recognize them as expressions of legally tenable points of view. We support all decisions of the Court as the law of the land, to be respected and enforced unless and until changed by the processes available under our form of government.

In considering any change, the people of the United States must have an adequate understanding of the adverse effect upon law enforcement agencies of the constitutional limitations discussed in this statement. They must also ever be mindful that concern with crime and apprehension for the safety of their persons and property, as understandable as these are today, must be weighed carefully against the necessity—as demonstrated by history—of retaining appropriate and effective safeguards against oppressive governmental action against the individual, whether guilty or innocent of crime.

The determination of how to strike this balance, with wisdom and restraint, is a decision which in final analysis the people of this country must make. It has been the purpose of this statement to alert the public generally to the dimensions of the problem, to record our conviction that an imbalance exists, and to express a viewpoint as to possible lines of remedial action. In going somewhat beyond the scope of the Commission's report, we reiterate our support and our judgment that implementation of its recommendations will have far reaching and salutary effects.

Mr. BYRNE, Chief CAHILL, and Mr. LYNCH concur in this statement.

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## ORGANIZED CRIME AND ELECTRONIC SURVEILLANCE—IN VIRGINIA?

The Virginia Crime Commission, created in 1966 and since continued, was authorized to conduct a number of studies. One of these was to determine the activities of organized crime in Virginia, and ways and means to reduce or prevent it.

## ORGANIZED CRIME IN VIRGINIA

On March 16, 1971, Delegate Stanley C. Walker, Chairman of the Virginia Crime Commission, stated:

Our preliminary work so far has found that there is some organized crime in Virginia. \* \* \* We have been told (for example) by responsible authorities that about a quarter of a million capsules of heroin are put up every week in the Richmond metropolitan area. Such large scale illegal activities could not occur without large financial support and a framework for the transportation and distribution of such narcotics.

The Commission is continuing its study, and will report by November of this year. In view of this study, it may be of interest to take a look—necessarily a superficial one—at the organized crime problem in our country, and at the use of electronic surveillance as the most effective means of attacking it.

## THE NATIONAL SITUATION

As the Virginia study is in process, I will speak generally about the national situation. While the problem is most acute in the great metropolitan areas, it is sufficiently national in scope to encompass the heavily urbanized centers in Virginia.

Most of us think we know a good deal about organized crime—especially since "The Godfather" became the book everyone hides under his mattress. Yet, the truth is that the public generally has little conception of its scope or of the extent to which it preys upon the weakest elements of society.

*What is "Organized Crime?"*

The National Crime Commission<sup>1</sup> appointed by President Johnson (and on which I served) made an extensive study of this subject. In its 1967 Report, the Commission described organized crime as follows:

An organized society that operates outside of the control of the American people and their government, it involves thousands of criminals, working within structures as complex as those of any large corporation, subject to private laws more rigidly enforced than those of legitimate governments. Its

<sup>1</sup> President's Commission on Law Enforcement and the Administration of Justice, 1965-67.

actions are not impulsive, but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activities in order to amass huge profits.

The objectives are power and money. The base of activity is the supplying of illegal goods and services—gambling, narcotics, loan sharking, prostitution and other forms of vice. Of these gambling is the most pervasive and the most profitable. It ranges from lotteries (numbers rackets), off-track betting and sports betting to illegal gambling casinos.

The importation and distribution of narcotics, chiefly heroin, is the second most important activity. This enterprise is organized much like a legitimate importing, wholesaling and retail business. The heroin, originating chiefly in Turkey, is moved through several levels between the importer and the street peddler. The markup in this process is fantastic. Ten kilos of opium, purchased from Turkish farmer at \$350, will be processed into herion and retailed in this country for perhaps a quarter of a million dollars or more.

An addict must have his heroin. He is usually unemployed, which means that he must steal regularly to support his addiction. The disastrous effect of drugs on those who become addicted is well understood. There is far less understanding of the extent to which the drug traffic directly causes other serious crimes.

The third major activity of organized crime is loan sharking. Operating through an elaborate structure, large sums of cash are filtered down to street level loan sharks who deal directly with ignorant borrowers. Interest rates would make our banker friends green with envy. A charge of 20% per week is not at all unusual. The loan sharker is more interested in perpetuating interest payments than in collecting principal. Threats and the actual use of the most brutal force are employed both to collect interest and to prevent borrowers from reporting to the police.

No one knows the total take of organized crime. The President's Crime Commission estimated an annual profit of perhaps \$6 to \$7 billion per year. This illegal, nontaxed income, is greater than the combined net profits of AT&T, General Motors and Standard Oil of New Jersey.

#### *The Victims—Those Least Able*

In all of these illicit operations the "customers"—in reality the victims—are the people least able to afford criminal exploitation. They are the poor, the uneducated and the culturally deprived. In the great cities, where organized crime flourishes, the victims come largely from the ghettos. Their number is legion.

But organized crime's activities are not limited to illicit goods and services. To an increasing extent, and with the profits from these activities, organized crime is infiltrating legitimate businesses and unions. In some cities, it dominates jukebox and vending machine operations. Its ventures range from laundries, restaurants and bars to funeral homes and cemeteries. Again, the use of force and intimidation is standard procedure.

#### *The La Cosa Nostra "Families"*

The basic core of this criminal conspiracy consists of 24 groups or families, operating as criminal cartels. Known originally as the Mafia, they are now called La Cosa Nostra. The 24 groups are loosely controlled at the top by a national body of overseers. The family members are relatively small—varying from as many as 700 to as few as 25. But their payrolls number in the thousands.

There are several aspects of organized crime which distinguish it from other crime. First, it is institutionalized as an ongoing system for making enormous profits. It protects itself, not casually or episodically but systematically, by bribery of selected police and public officials.

It also protects itself by ruthless discipline, maintained through "enforcers." It is their indequate duty to maintain undeviating loyalty by the maiming and killing of recalcitrant or disloyal members. Those of you who admit to reading "The Godfather" will remember the fate of Paulie Gatto and Carlo Rizzi.

The efficiency of these professional enforcers is such that even the Federal Government, in organized crime prosecutions, often can protect witnesses only by total confinement. Indeed, it has been necessary on occasions to change their physical appearances, change their names and even to remove them from the country.

#### *Why Has Society Been So Helpless?*

At this point, you are probably asking—as I did—why have the American people, our government and our law enforcement agencies permitted these obscene

conspiracies to exist and to prosper. Indeed, why have we seemed to be so helpless in the face of such arrogance and organized criminality?

There are a number of reasons, which I mention only in passing:

1. *Lack of resources.* The necessary commitment of resources simply has not been made—either by the federal or local governments.

2. *Lack of coordination.* Our system of law enforcement is essentially local. The FBI, despite its valiant efforts, cannot command the necessary cooperation and coordination, and the local response is often uninformed and sometimes already corrupted.

3. *Absence of strategic intelligence.* Fighting organized crime is a form of warfare against an enormously rich and well-disciplined enemy. Police intelligence is usually tactical, directed toward a specific prosecution. The greater need is for true strategic intelligence on the capabilities, long-range plans, and the vulnerability of the leadership of the La Cosa Nostra groups.

4. *Inadequate sanctions.* The penalties imposed by law and the courts have been inadequate to deter this type of crime where the profits are so enormous. Until recently, the leaders have seldom been brought to court. This has caused judges to be reluctant to impose stiff sentences on the underlings. Moreover, the rights now afforded persons accused of crime—plus the delays in criminal justice—are exploited to the fullest by the resources available to La Cosa Nostra defendants.

5. *Lack of public and political commitment.* The truth is that the services provided by organized crime are wanted by many people. This tends to blunt the sort of demand by an outraged public which would assure more effective law enforcement. There is also a pervasive ignorance and indifference as to the nature and extent of the problem.

6. *Difficulty in obtaining evidence.* Perhaps the single most crippling limitation on law enforcement has been the difficulty of obtaining evidence adequate to convict the leaders. There is no secret as to the identity of many of these leaders. Their names are known to the police, the press and often to the public. They live in luxury, are often influential in their communities, and even become the subject of admiration—especially by some of the young and witless. They are living proof that crime does pay in America.

The simple truth is that these robber barons of our time rarely are brought to justice because our system of law handicaps itself. These handicaps take many forms. Those rooted in our Bill of Rights must, of course, be preserved for the other values which they protect.

Yet, much can be done within the framework of these rights that will inhibit the growth—if not indeed destroy—these criminal cartels.<sup>2</sup>

#### ELECTRONIC SURVEILLANCE

I will speak today only of one major law enforcement weapon which, until recently, we have deliberately denied ourselves. I refer to the most modern scientific method of detection, namely, electronic surveillance.

Organized crime operates by word of mouth and the telephone. Records familiar to legitimate business are never maintained. Massive gambling operations, in particular, are conducted nationwide through telephonic communications.

#### *The Law Until 1968*

Until 1968, the law with respect to wiretapping was chaotic. The Supreme Court had ruled in 1928 (*Olmstead v. U.S.*) that the Fourth Amendment did not apply to wiretapping, as there was no unlawful entry and no seizure of tangible things. But the Federal Communications Act of 1934 prohibited the use of wiretap evidence in federal trials. The net effect was to permit wiretapping without limitation, but the fruits thereof could not be used in court.

There was no federal law with respect to bugging, and state laws—where they existed—often drew no distinction between private and law enforcement surveillance. In sum, the situation was intolerable, and the President's Crime Commission in 1967 strongly urged federal action.

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<sup>2</sup> We could, for example, relax some of the artificial rules engrafted upon the Fourth, Fifth and Sixth Amendments by divided votes of the Court in cases like *Miranda* and *Escobedo*. See *The Challenge of Crime in a Free Society*, Report of President's Crime Commission, 1967, Additional Views, p. 303 et seq. The English Courts, famous for their concern for human rights, have few such rigid, artificial rules.

### *Since 1968*

Congress responded in 1968 by adopting Title III of the Omnibus Crime Control Act.<sup>3</sup> Meanwhile, the Supreme Court—in the landmark *Burger* and *Katz* decisions<sup>4</sup> had overruled *Olmstead*, and held that wiretapping and other forms of electronic surveillance are subject to the search and seizures requirements of the Fourth Amendment.

Guided by these decisions, Congress—in Title III—outlawed all private surveillance, but authorized its court-controlled use in the crimes most frequently associated with organized syndicates—such as murders, kidnapping, extortion, bribery and narcotics offenses.

### *National and Internal Security*

Congress did not legislate affirmatively as to national security cases. Title III does provide that its provisions shall not be construed to limit the inherent power of the President to obtain evidence without a prior court order in cases involving national defense or internal security. As these issues are beyond the scope of this talk, I mention them only in the interest of completeness and to avoid any misunderstanding of the recommendation I will make for Virginia.

I will say in passing that there is little question—at least there should be none—as to the power of the President to take all appropriate measures to protect the nation against hostile acts of a foreign power. But the President's authority with respect to internal security is less clear. There is an obvious potential for grave abuse, and an equally obvious need where there is a clear and present danger of a serious internal threat. The distinction between external and internal threats to the security of our country is far less meaningful now that radical organizations openly advocate violence. Freedom can be as irrevocably lost from revolution as from foreign attack. This perplexing issue is now pending in several cases.<sup>5</sup> In the end, there may be a need for clarifying legislation.

### *Title III and Organized Crime*

Returning now to the provisions of Title III directed against major criminal activity, a specific legislative finding was made as follows:

Organized criminals make extensive use of wire and oral communications. The interception of such communications \* \* \* is an indispensable aid to law enforcement and the administration of justice.

The interception authorized by Title III requires a prior court order. The safeguards prescribed with respect to such an order include: (i) showing probable cause; (ii) describing the crime and types of conversations; (iii) limiting the time period of the surveillance (not to exceed 30 days); (iv) terminating the wiretap or bugging once the stated object is achieved; (v) renewing it only by a *de novo* showing of continued probable cause; (vi) showing that normal investigative procedures have been tried and failed; and (vii) finally, reporting to the court on the results of each wiretap.

In light of these safeguards, there is no substance to the fears of some that these provisions of Title III have police state characteristics.

### *Experience under 1968 Act*

The experience under the 1968 Act is interesting. The Johnson Administration had opposed Title III, and although it became law on June 19, 1968, the surveillance authority was not used by Attorney General Clark.

The present Administration has undertaken a massive campaign against organized crime. Task forces, organized for long-term operations, have been established in 17 cities. They use a "systems" approach to organized crime investigations—examining into all possible violations of federal laws, including racketeering, extortion, drug trafficking and income tax evasion. As Attorney General Mitchell has said, by the use of electronic surveillance, these task forces now have the capability of reaching "the whole criminal organization," including—almost for the first time—top members in the "families."

During 1969 and 1970, the Justice Department employed court-authorized surveillance on 309 occasions. Roughly 60% of these involved illegal gambling,

<sup>3</sup> Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90-351, 90th Cong., H.R. 5037, June 1968.

<sup>4</sup> *Burger v. New York*, 388 U.S. 41 (1967) and *Katz v. U.S.*, 388 U.S. 347 (1967). See also *U.S. v. White*, decided by Supreme Court April 5, 1971, which clarifies the scope of *Katz*.

<sup>5</sup> See *United States v. Smith*, Criminal Case No. 4277-CD, U.S. District Court, Central District of California, Jan. 8, 1971; *United States v. Sinclair*, Criminal Case No. 44375, U.S. District Court, Eastern District of Michigan, Jan. 26, 1971; see also recent Sixth Circuit Court of Appeals case (*Times Dispatch*, April 9, 1971), in which a Circuit Court for the first time held that the President lacks inherent power with respect to internal subversion.

and about 20% narcotics traffic. A total of more than 900 arrests have resulted, some 500 persons have been indicted, and over 100 convictions already have been obtained. Most of those indicted have not yet been tried.<sup>6</sup>

Several top leaders of organized crime already have been convicted or have pled guilty. These include two leading members of New York families, and the acknowledged syndicate boss in New Jersey, Samuel DeCavalcante.

#### NEED FOR STATE LAWS

Despite the success under Title III, there is still need for comparable state laws. Most of the crimes committed violate state laws. The fight against organized crime has the greatest chance of success where both state and federal authorities can cooperate in the employment of the same weapons. The Congress recognized this need by providing in Title III for parallel state action.<sup>7</sup> The American Bar Association also recommends the adoption of carefully safeguarded state electronic surveillance statutes.<sup>8</sup>

The situation in most states is still unsatisfactory—ranging from no law at all to inadequate or unconstitutional provisions. As of October 1970, 17 states had legislative authority for court-controlled surveillance. A model statute is now available, embodying the substance of the ABA Standards and complying with Title III of the Federal Act. New Jersey has recently adopted this model statute.<sup>9</sup>

The state with the greatest experience with wiretapping is New York. Its statute, held unconstitutional in the *Burger* case, has since been revised to meet the *Burger* and Title III standards. Frank Hogan, famed District Attorney in New York City, has testified before a Congressional Committee that electronic surveillance is "the single most valuable weapon in law enforcement's fight against organized crime". He further testified that without wiretap evidence his office could never have convicted Luciano, Jimmy Hines, Shapiro and a long list of other notorious racketeers.

#### THE NEED FOR LEGISLATION IN VIRGINIA

If the preliminary findings of the Virginia Crime Commission are substantiated, the General Assembly should consider the enactment in 1972 of an appropriate surveillance statute.

Indeed, even if the evidence as to organized crime's activities in Virginia is inconclusive, there are strong reasons for enacting a carefully drawn law which prohibits all private surveillance but authorizes court-controlled wiretapping and bugging compatible with the federal legislation and the ABA Standards.

Organized crime is not longer confined to a few major cities. Its criminal activities are being diversified in scope and extended geographically. As Virginia increasingly becomes a part of the eastern urbanized corridor, the criminal syndicates are certain to operate here.<sup>10</sup>

I am not unaware of the strong feelings of many that a free society should not tolerate this intrusion upon privacy. They argue that, despite all safeguards, the conversations of some innocent people will be intercepted.

The answer, it seems to me, on this issue—as indeed on many others—is that there must be a rational balancing of the interests involved. Uncontrolled government surveillance would indeed be intolerable. But it is not equally intolerable for society so to shackle itself that cartels of organized criminals are free to prey upon millions of decent citizens and to make a mockery of the rule of law?

Happily the choice need not be between these two extremes. The sound answer lies in the middle course charted by the Federal Act and by the ABA Standards. It is to be hoped that this is the course Virginia will follow.

<sup>6</sup> See interview with Attorney General Mitchell, U.S. News & World Report, March 22, 1971, p. 36 *et seq*.  
<sup>7</sup> Public Law 90-351, § 2516(2). Congress was careful to provide that state statutes must contain at least the procedural safeguards, protections and restrictions imposed by the federal statute.

<sup>8</sup> This was one of the subjects studied by the ABA project on Criminal Justice, and the Minimum Standards to be incorporated in state statutes were approved by the House of Delegates at its February 1971 meeting. These ABA Standards were cited with approval by the Supreme Court in the recent case of *U.S. v. White*, decided April 5, 1971.

<sup>9</sup> See article in 43 Notre Dame L. Rev. 657 (1968), discussing an earlier form of the model statute.

<sup>10</sup> The President's Crime Commission found that "organized criminal groups are known to operate in all sections of the nation." *Supra*, p. 191.

NOVEMBER 3, 1971.

## MEMORANDUM

To: Senator John L. McClellan  
From: G. Robert Blakey, Chief Counsel, Subcommittee on Criminal Laws and Procedures  
Subject: Wiretapping

You asked for a background memorandum on wiretapping.

## SUMMARY

The development of national policy in this area has been slow and often inconsistent. Nevertheless, every Attorney General since 1931, including the present, but excluding his predecessor, has supported its use in major criminal investigations. Every Attorney General, without exception, however, has supported its use in the national security area, even without judicial supervision. The courts at first refused to intervene to regulate it at all, then attempted to eliminate it, but have now seemingly recognized the legitimacy of its use under certain safeguards. Congress, as you are aware, seemed unable to resolve the issue from 1928 until 1968, when it finally enacted comprehensive legislation.

## DEFINITION OF KEY TERMS

1. *Wiretapping*: interception of communication transmitted over wire from phone *without* consent of participant.
2. *Bugging*: interception of communication transmitted orally *without* consent of participant.
3. *Recording*: electronic recording of wire or oral communication *with* the consent of a participant.
4. *Transmitting*: radio transmission of oral communication *with* the consent of a participant.
5. *Electronic surveillance*: generic term loosely used to cover all of the above, but often confined to "wiretapping" or "bugging."
6. *National security*: generic term loosely used to refer to wiretapping or bugging aimed at either "foreign" or "domestic" threats to the national security.
  - a. *Foreign security*: usually meant to cover "wiretapping" or "bugging" to obtain coverage of foreign diplomats, spies, and their American contacts; also directed at Communist party and Communist front activities in the United States; sometimes used to obtain coverage of those involved in foreign intrigue, e.g., gun running to Latin American countries, etc.; primarily useful to prevent damage (theft of documents, etc.), not "solve crimes."
  - b. *Domestic security*: usually meant to cover "wiretapping" or "bugging" to obtain coverage of extremist groups in the United States, e.g., the Black Panthers, groups within the K.K.K., and La Cosa Nostra; sometimes used to determine the influence of extremist groups in other legitimate organizations (civil rights or peace); primarily useful to prevent damage (assaults, bombings, kidnapping, homicides, riots, etc.).

Note that the "foreign" and "domestic" security distinction is sharper in theory than in practice. Often it is difficult without "wiretapping" or "bugging" to determine the "foreign" or "domestic" character of the threat.

Note, too, that since the emphasis is on the prevention of harmful activity rather than the punishment of those who have already caused harm, police action in these areas tends to cover more people for longer periods of time under less precise standards than conventional criminal investigations.

*Caveat*: Newspaper reporters, in particular, but all of us sometimes use "wiretapping," "bugging" and "national security" to refer to some or all of these techniques or areas of activity without carefully discriminating between them. This fact alone leads to most of the controversy; people often are not talking about the same things, even though they are using the same words.

## CHRONOLOGY OF SIGNIFICANT EVENTS

1. *Olmstead v. United States*, 277 U.S. 438 (1928), held: (1) that wiretapping without a warrant did not violate the Fourth Amendment's ban on unreasonable searches and seizures because without a trespass there was no "search" and

without a tangible taking there was no "seizure;" (2) that wiretapping did not violate the Fifth Amendment's ban on compulsory self-incrimination because no compulsion was placed on the speaker to speak; and (3) that the product of wiretapping illegal under state law may be used in Federal courts, since the suppression sanction applied only to violations of constitutional rules.

2. Section 605 of the Federal Communications Act of 1934, 48 Stat. 1103 (1934), 47 U.S.C. §605 (1968), prohibited the "interception" and "divulgenc[e]" or "use" of the contents of a wire communication. At passage of the Act, managers of the bill observed, "[I]t does not change existing law." 78 Cong. Rec. 1013 (1934).

3. *Nardone v. United States*, 302 U.S. 379 (1937), held that the "divulgenc[e]" of a wiretap made by a Federal officer in a Federal court violated Section 605 of the 1934 Act.

4. N.Y. Const., Art. I, §12 (1938), authorized wiretaps.

5. President Franklin D. Roosevelt on May 21, 1940, instructed Attorney General Robert H. Jackson to use wiretapping and bugging against subversive activities against the government of the United States. (A copy of this memo is attached.)

6. Attorney General Robert H. Jackson informed Congress in March 1941 that Section 605 could only be violated by both "interception" and "divulgenc[e]" or *private* "use." Hearings before Subcommittee No. 1 of House Judiciary Committee on H.R. 2266 and H.R. 3099, 77th Cong., 1st Sess. 18 (1971).

7. N.Y. Code of Crim. Proc. §813a (1942) implemented state constitution to authorize court-ordered wiretaps.

8. *Goldman v. United States*, 316 U.S. 129 (1942), held that bugging without a warrant did not violate the Fourth Amendment's ban on unreasonable searches and seizures if there was no trespass.

9. President Harry S. Truman on July 17, 1947, concurred in the recommendation of Attorney General Tom C. Clark that the F.D.R. authorization of 1940 be extended to cases of domestic security or where human life was in jeopardy. (A copy of this memo is attached.)

10. *On Lee v. United States*, 343 U.S. 747 (1952), held that the use of a transmitter by police officers without a warrant to overhear conversations between an informant and a suspect did not violate the Fourth Amendment's ban on unreasonable searches and seizures where the informant consented to its use.

11. *Irvine v. California*, 347 U.S. 128 (1954), held that bugging without a court order accomplished by a trespass violated the Fourth Amendment's ban on unreasonable searches and seizures, but that since the suppression sanction did not operate in state courts, no evidentiary consequences attached to the violation.

12. *Benanti v. United States*, 355 U.S. 96 (1957), held that a wiretap under a court order under New York law violated Section 605 of the 1934 Act and its product could not be used in a Federal court.

13. *Rathbun v. United States*, 355 U.S. 107 (1957), held electronic recording of a wire communication with the consent of a participant was not an "interception" under Section 605 of the 1934 Act.

14. *English Privy Councillors Report on Wiretapping* (1957) concluded that wiretapping under the Home Secretary's authorization was effective in criminal investigations, necessary to protect the security of the State, carried with it no harmful social consequences, and should be permitted to continue.

15. N.Y. Code of Crim. Proc. §813a extended to authorize court-ordered bugging in 1959.

16. *Lopez v. United States*, 373 U.S. 427 (1963), held that electronic recording of an oral communication with the consent of a participant was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

17. *Massiah v. United States*, 377 U.S. 201 (1964), held that electronic recording of an oral communication with the consent of a participant after the indictment of the suspect violated the suspect's Sixth Amendment right to counsel.

18. President Lyndon B. Johnson on June 30, 1965, prohibited the use of wiretapping or bugging by Federal agencies except to collect intelligence affecting the national security and on the approval of the Attorney General. (A copy of this memo is attached.)

19. *Osborn v. United States*, 385 U.S. 323 (1966), held that electronic recording of an oral communication with the consent of a participant and pursuant to a court order was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

20. Prime Minister Harold Wilson in 1966 re-affirmed the conclusions of the 1957 Privy Councillors Report but indicated that the Report's recommendations

would not be followed to the extent that they would permit the interception of the wire communications of members of Parliament. (Rept. C&P Pro. pp. 634-42 (17 Nov. 1966).)

21. The President's Commission on Law Enforcement and the Administration of Justice in 1967 recommended that a carefully drawn statute be enacted to authorize court ordered wiretapping and bugging.

22. *Berger v. New York*, 388 U.S. 41 (1967), held that Section 813a of N.Y. Code of Crim. Proc. authorized unreasonable searches and seizures contrary to the Fourth Amendment, but the Court observed that where there was provision for judicial supervision based on adequate showing of probable cause, particularization of the offense under investigation and the type of conversations to be overheard, limitations on the time period of the surveillance, a requirement of termination once the stated objective was achieved, lose supervision of the right to renew and a return to be filed with the court, such surveillance could be reasonable.

23. Attorney General Ramsey Clark, on June 16, 1967, issued regulations that prohibited wiretapping and bugging except in national security matters and required that his approval be obtained prior to recording with or without a court order or transmitting.

24. *Katz v. United States*, 389 U.S. 347 (1967), held that bugging without a warrant violated the Fourth Amendment's ban on unreasonable searches and seizures, even though there was no trespass, where the communication was uttered under a reasonable expectation of privacy; *Olmstead* and *Goldman* were overruled, and the Court repeated that a carefully drawn court order statute would be sustained and expressly left open the question of national security wiretaps or bugging without a warrant.

25. Title III of Public Law 90-351 (June 19, 1968) provided as follows:

- a. Prohibited all private wiretapping and bugging (18 U.S.C. § 2511(1)).
- b. Permitted private recording only where not done to commit a tort or crime (18 U.S.C. § 2511(2)(d)).
- c. Prohibited State or Federal law enforcement wiretapping and bugging except under court order system (18 U.S.C. § 2511).
- d. Permitted State or Federal law enforcement recording (18 U.S.C. § 2511(2)(c)).
- e. Expressly disclaimed any intent to regulate Federal, foreign, or domestic security wiretapping or bugging (18 U.S.C. § 2511(3)).
- f. Set up a Federal court order system for wiretapping or bugging (18 U.S.C. §§ 2516(1), 2518).
- g. Set standards for optional State court order systems for wire tapping or bugging (18 U.S.C. §§ 2516(2), 2518).
- h. Made unauthorized wiretapping or bugging a Federal civil tort (18 U.S.C. § 2529).
- i. Required annual reports for Federal and State wiretapping and bugging (18 U.S.C. § 2519).
- j. Set up a commission to review the operation of the first seven years of the statute in its seventh year (82 Stat. 223). (Note: P.L. 91-644 advanced this date from 1974 to 1973.)

Note: As of October 1970, the following 18 States had legislation for court ordered wiretapping or bugging:

Arizona (Post *Berger*, pre Title III).  
 Colorado.  
 Florida.  
 Kansas.  
 Georgia (Post *Berger*, pre Title III).  
 Maryland (Pre *Berger*).  
 Massachusetts (Revised after *Berger* and Title III).  
 Minnesota.  
 Nebraska.  
 Nevada (Pre *Berger*).  
 New Hampshire.  
 New Jersey.  
 New York (Revised after *Berger* and Title III).  
 Oregon (Pre *Berger*).  
 Rhode Island.  
 South Dakota.  
 Washington.  
 Wisconsin.

26. The first Annual Surveillance Report for 1968 was issued. It indicated that 174 applications had been made and orders issued for wiretaps or bugs, which resulted in 263 arrests.

27. *Alderman v. United States*, 394 U.S. 165 (1969) held that illegally obtained evidence must be disclosed to suspects with an *in camera* review so that an opportunity can be afforded them to suppress evidence against them at trial.

28. The second Annual Surveillance Report for 1969 was issued. It indicated that 304 applications had been made and 302 orders issued for wiretaps or bugs, which resulted in 625 arrests.

29. Title VIII of Public Law 91-452 (October 15, 1970) set aside the result of Alderman for wiretapping and bugging occurring prior to June 19, 1968, and set up an *in camera* disclosure procedure.

Note: 18 U.S.C. § 2518(8)(d) and (10)(a) govern disclosure of wiretapping or bugging after June 19, 1968 and provides for an *in camera* disclosure procedure.

30. *United States v. Clay*, 430 F. 2d 165 (5th Cir. 1970), held that wiretapping under the direction of the Attorney General without a warrant to obtain foreign security intelligence did not violate the Fourth Amendment's ban on unreasonable search and seizure. (*Cert.* has been denied as to this issue.)

31. The American Bar Association on February 8, 1971, approved electronic surveillance standards for recording, wiretapping and bugging under court order and the use of such techniques in the foreign security field.

32. *White v. United States*, 401 U.S. 745 (1971), sustained against Fourth Amendment objections the use of a transmitter by police officers without a warrant to overhear conversations between an informant and a suspect where the suspect consented to its use.

33. *United States v. Keith*, No. 71-1105, United States Court of Appeals for the Sixth Circuit, decided April 8, 1971, held that an authorization of a wiretap in a domestic security matter by the Attorney General without judicial sanction violated the Fourth Amendment's ban on unreasonable searches and seizures. *Cert.* has been granted in the case.

#### ADDENDUM

Following is the text of the foreign and domestic surveillance exclusion of 18 U.S.C. § 2511(3):

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Attached also is the portion of the Senate debate on the 1968 Act relevant to Section 2511(3):

[114 Cong. Rec. S 6245-46 (daily ed. May 23, 1968)]

#### AMENDMENT NO. 715

**Mr. DIRKSEN.** Mr. President, I call up my amendment No. 715.

**Mr. HART.** Mr. President, would the Senator from Illinois before calling up his amendment—which would control our time—permit me a couple of minutes to engage in colloquy on one section of the wiretapping title with the Senator from Arkansas?

**Mr. DIRKSEN.** Mr. President, I ask unanimous consent, without losing my right to the floor, that the distinguished Senator from Michigan [Mr. HART] may have 5 minutes in which to explain the matter he wishes to discuss and not impair my time.

**The PRESIDING OFFICER.** The Senator will not lose the floor. The Senator from Michigan has yielded to him the right to speak.

Mr. HART. Mr. President, I thank the Senator from Illinois very much.

Mr. President, I invite attention to page 56 of the bill. I refer to section 2511 (3). As I read it, this is an exemption to insure that nothing in the restriction on wiretapping shall limit the President in certain areas and under certain conditions. What does it say?

It says that nothing in this chapter or in the bill shall limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means.

It then goes on to say that nothing in the bill shall limit the power of the President to take such measures as he deems necessary to protect the United States—and this is what bothers me—"against any other clear and present danger to the structure or existence of the Government."

What is it that would constitute a clear and present danger to the structure or existence of the Government? As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government.

If that is the case, section 2511(3) grants unlimited tapping and bugging authority to the President. And that means there will be bugging in areas that do not come within our traditional notions of national security.

Is my reading of that a fair one? Is my concern a valid one? If it is, why do we not agree to knock out the last clause?

Mr. McCLELLAN. Mr. President, this language is language that was approved and, in fact, drafted by the administration, the Justice Department. I have not challenged it. I was perfectly willing to recognize the power of the President in this area. If he felt there was an organization—whether black, white, or mixed, whatever the name and under whatever auspices—that was plotting to overthrow the Government, I would think we would want him to have this right.

What such an amendment would do would be to circumscribe the powers we think the President has under the Constitution. As far as I am concerned, I would like to see it remain in here. I do not want to undertake to detract from any power the President already has. I do not think we could do so by legislation anyway. In fact, I know we could not. However, what we have done here is in keeping with the spirit of permitting the President to take such action as he deems necessary where the Government is threatened. I cannot find any bugger in the woodpile from looking at it, myself.

Mr. HART. Mr. President, some people can take comfort, I think, in the language of section 2511(3), and especially the statement that the President is indeed limited by the Constitution in his exercise of the national security power. This is why I think it might be useful to have this exchange.

We notice that the recital runs this way:

Nothing contained in this chapter . . . shall be deemed to limit the constitutional power of the President to do whatever he wants in the area of bugging against any other clear and present danger to the structure or existence of the Government.

If we agree that the President does not have constitutional power to put a tap on an organization that is advocating the withholding of income tax payments—to cite a current, though as yet a small movement—I would feel more at ease. But if, in fact, we are here saying that so long as the President thinks it is an activity that constitutes a clear and present danger to the structure or existence of the Government, he can put a bug on without restraint, then clearly I think we are going too far.

The PRESIDING OFFICER. The time allotted to the Senator from Michigan has expired.

Mr. McCLELLAN. Mr. President, I ask unanimous consent that the Senator from Michigan have an additional 5 minutes without being charged any time.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HOLLAND. Will the Senator yield?

Mr. HART. I yield.

Mr. HOLLAND. Mr. President, I think that the distinguished Senator is unduly concerned about this matter.

The section from which the Senator has read does not affirmatively give any power. It simply says, and I will not read the first part of it because that certainly says that nothing shall limit the President's constitutional power, but the part from which the Senator has read continues in the same spirit. It reads:

Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against.

And so forth. We are not affirmatively conferring any power upon the President. We are simply saying that nothing herein shall limit such power as the President has under the Constitution. If he does not have the power to do any specific thing, we need not be concerned. We certainly do not grant him a thing.

There is nothing affirmative in this statement.

Mr. McCLELLAN. Mr. President, we make it understood that we are not trying to take anything away from him.

Mr. HOLLAND. The Senator is correct.

Mr. HART. Mr. President, there is no intention here to expand by this language a constitutional power. Clearly we could not do so.

Mr. McCLELLAN. Even though intended, we could not do so.

Mr. HART. A few days ago I wondered whether we thought that we nonetheless could do something about the Constitution. However, we are agreed that this language should not be regarded as intending to grant any authority, including authority to put a bug on, that the President does not have now.

In addition, Mr. President, as I think our exchange makes clear, nothing in section 2511(3) even attempts to define the limits of the President's national security power under present law, which I have always found extremely vague, especially in domestic security threats, as opposed to threats from foreign powers. As I recall, in the recent Katz case, some of the Justices of the Supreme Court doubted that the President has any power at all under the Constitution to engage in tapping and bugging in national security cases without a court order. Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by title III. As a result of this exchange, I am now sure no President thinks that just because some political movement in this country is giving him fits, he could read this as an agreement from us that, by his own motion, he could put a tap on.

Mr. PASTORE. Mr. President, will the Senator yield?

Mr. HART. I yield.

Mr. PASTORE. Mr. President, I think the only mistake is in the use of the word "deems." That word indicates someone else's interpretation. The word should be "intends." When we say "Nor shall anything in this chapter be deemed to limit," that is an interpretation that someone makes. I think the word ought to be "intended."

Mr. HOLLAND. Mr. President, I still reiterate my position. I do not think there is a single indication here that anything affirmative is being done.

We are simply negating any intention to take away anything that the President has by way of constitutional power. We could not do it if we wanted, and we are making clear that we are not attempting any such foolish course.

Mr. PASTORE. That is the point I make. No matter what is "deemed," you just cannot take powers away from the President that he constitutionally has. All we are saying is that we do not intend to do it because of anything that is in the bill.

THE WHITE HOUSE,  
Washington, D.C., May 21, 1940.

#### MEMORANDUM FOR THE ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including -us-

pected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

(S) F. D. R.

OFFICE OF THE ATTORNEY GENERAL,  
*Washington, D.C., July 17, 1946.\**

The PRESIDENT,  
*The White House.*

MY DEAR MR. PRESIDENT: Under date of May 21, 1940, President Franklin D. Roosevelt, in a memorandum addressed to Attorney General Jackson, stated:

"You are therefore authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."

This directive was followed by Attorneys General Jackson and Biddle, and is being followed currently in this Department. I consider it appropriate, however, to bring the subject to your attention at this time.

It seems to me that in the present troubled period in international affairs, accompanied as it is by an increase in subversive activity here at home, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt's memorandum. At the same time, the country is threatened by a very substantial increase in crime. While I am reluctant to suggest any use whatever of these special investigative measures in domestic cases, it seems to me imperative to use them in cases vitally affecting the domestic security, or where human life is in jeopardy.

As so modified, I believe the outstanding directive should be continued in force. If you concur in this policy, I should appreciate it if you would so indicate at the foot of this letter.

In my opinion, the measures proposed are within the authority of law, and I have in the files of the Department materials indicating to me that my two most recent predecessors as Attorney General would concur in this view.

Respectfully yours,

(S) TOM C. CLARK,  
*Attorney General.*

July 17, 1947\*

I concur.

(S) HARRY S. TRUMAN.

THE WHITE HOUSE,  
*Washington, D.C., June 30, 1965.*

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

I am strongly opposed to the interception of telephone conversations as a general investigative technique. I recognize that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that indiscriminate use of these investigative devices to overhear telephone conversations, without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy. In my view, the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at stake. To avoid any misunderstanding on this subject in the Federal Government, I am establishing the following basic guidelines to be followed by all government agencies:

(1) No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved. (except in connection with investigations related to the national security).

(2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.

(3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.

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\*The possibly conflicting dates are quoted as set forth in the original document.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem, which raises substantial and unresolved questions of Constitutional interpretation. I desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telephone conversations. In addition, such reports shall contain a list of any interceptions currently authorized and the reasons for them.

(S) LYNDON B. JOHNSON.

Senator ERVIN. I would just like to make some observations, since some of the questions have been asked.

I think the Supreme Court in the *Escobido* case only held that the confession there was inadmissible as an involuntary confession. When I worked in this field, they said if a confession was induced by hope or extorted by fear, it was involuntary. The law enforcement officer in the *Escobido* case had the man in custody; he wanted to see his lawyer, and they said, in effect, "We won't let you see your lawyer unless you confess." We won't let you see your lawyer unless you confess—it was both a promise and a threat, and I don't believe the majority ought to sail out on an unknown sea and make some new law there because it was so unnecessary.

Now, with reference to *Miranda*, Dr. Oliver Wendell Holmes said, "Life and language are alike sacred. Homicide and verbicide—that is, violent treatment of a word with fatal results to its legitimate meaning—are alike forbidden." I think in the *Miranda* case, the Supreme Court majority committed verbicide in the self-incrimination clause. The self-incrimination clause says no person shall be compelled in any criminal case to be a witness against himself. There is nothing compelled about a voluntary confession. The man is not even a witness there. So they committed verbicide on the plain words of the Constitution, with fatal consequence by 60 percent of the majority of the Court.

Just one other observation: I say I agree with Senator Fong, if the self-incrimination clause does not prohibit comments by a prosecutor on the failure of the accused to testify, we might as well do away with the presumption of innocence. The prosecution has to prove beyond a reasonable doubt. We might as well repeal the self-incrimination clause because its purpose would be destroyed. I just don't think that the Constitution can possibly permit a prosecutor to make a comment on the failure of a man to go up and incriminate himself.

Senator McCLELLAN. Senator Hart?

Senator HART. I take it, Mr. Chairman, that we are coming back?

Senator McCLELLAN. Yes, sir; the Chair intended to recess until 2:30.

Senator HART. Perhaps just to help the record, Mr. Powell, it was my understanding that when you discussed the *Escobido* case, you indicated an appreciation of the reasoning of the majority, but your conclusion was that you were rather more persuaded by the minority. Is that correct?

Mr. POWELL. I think I said or I intended to say—

Senator HART. Let me explain why I ask. Subsequently a direct question was asked, and you responded that the majority opinion seemed more persuasive, and I am just trying to get the record straight.

Mr. POWELL. No. I agree with Senator Ervin, if I had had to decide *Escobedo*, I would have set his conviction aside on the facts. In other words, I think it was a clear case, as the Senator has said, of the man being denied the right to counsel, when the counsel was sitting outside the room where he was being interrogated.

I said with respect to the philosophy of those two majority opinions where they went in terms of prescribing, as it seemed to me, rather fixed standards of procedure without regard ultimately to whether or not a confession was in fact voluntary, went further than I would have gone.

So I would have agreed as of that date with the minority opinion in those two cases.

Senator HART. Thank you.

Senator McCLELLAN. The committee will stand in recess until 2:30.

(Whereupon, at 1 p.m., the hearing was recessed, to reconvene at 2:30 p.m. this date.)

#### AFTERNOON SESSION

The CHAIRMAN. Senator Hart, you may proceed.

Senator HART. Thank you, Mr. Chairman.

Mr. Powell, may I add a welcome and congratulations which have already been voiced.

#### TESTIMONY OF LEWIS F. POWELL, JR.—Resumed

Mr. POWELL. Thank you, sir.

Senator HART. There is no doubt, I think, in the minds of any of us that you are a very distinguished member of the American bar. There is every mark of excellence, and while I listened, I am not sure I understand whether there is any problem at all in connection with your holdings, but in any event, as far as I am concerned, there is no problem in the sense of any alleged conflict of interest, so in the true traditional rules of thumb, the nominee's professional skill and conflict of interest, I would anticipate voting with the others favorably on the nomination.

But there is, rightly or wrongly, this varied, less tangible item of so-called judicial philosophy. We spent much of last week wrestling with the other nominee. It is difficult to get a handle on it.

I sense from your answers that you do, as does Mr. Rehnquist, believe there is an appropriate role and, indeed, a responsibility of the Senate to attempt to identify and to understand the philosophy of the nominee. Am I right on that?

Mr. POWELL. I have no doubt on that.

Senator HART. As far as I am concerned, we have yet to come up with a method of doing this satisfactorily, either from our standpoint or yours.

This morning you quite properly said you could not put yourself into the mind of the President, but see what comment you feel able to make, first, on this broad question, and then on a more narrow, and, perhaps, a more manageable question.

The President who nominates you says that he believes that the Warren court—and I paraphrase—that the Warren court had moved in the directions which he would like to see reversed; that he has selected men whose philosophy indicates to him that they would

share that feeling about the Warren court and would, to the extent they would be able as Members of the Court, reverse the trend.

As one who has felt that the Warren court was good medicine for this country, I find myself sort of presented with a miserable dilemma. You have all the marks of excellence and in your answers this morning suggested that you regarded much of the Warren court as landmark advances.

How would you counsel me on this: if, indeed, I thought the Warren court made sense and that you were nominated, in order to reverse that, shouldn't I vote against you?

**Mr. POWELL.** Well, that does pose an awkward question for me, Senator Hart. I quite understand though what concerns you.

I think it is clear from the testimony I gave this morning that there are some decisions of the Warren court that trouble me, certainly at the time I studied them carefully, and this was the occasion of my service on the President's Crime Commission. I also said that there were many other decisions which seemed to me to be decisions long overdue in our law. I tried to find, and have found, a paragraph in one of the talks that I gave—this was from an address I made to the Fourth Circuit Judicial Conference in 1965—and, if I may, I would like to read just one brief paragraph, which may shed some light.

Before I do that, let me say this: As a lawyer, I never had any trouble with the Warren Court. I do not think many lawyers did. I do not have any trouble, I never have had trouble with the Supreme Court as an institution. I have disagreed with a good many decisions of various courts, and in decisions that are very, very close as to the issues involved, but respect for that tribunal and its role in our system has been one of the guiding lights in my professional career. I would never criticize the Court.

But this paragraph that may be relevant to what is in your mind reads as follows:

The right to a fair trial, with all this term implies, is one of our most cherished rights. We have, therefore, welcomed the increased concern by law enforcement agencies and the courts alike in safeguarding a fair trial. Many of the decisions of the Supreme Court which are criticized today are likely in the perspective of history to be viewed as significant milestones in the ageless struggle to protect the individual from arbitrary and oppressive government.

**Senator HART.** When did you give that speech, Mr. Powell?

**Mr. POWELL.** It was in 1965. I would place the month at June or July. This was after most of them—perhaps it was before, it was before *Miranda*—but I had in mind, for example, cases like *Gideon* and *Mapp*.

**Senator HART.** I would welcome, Mr. Chairman, the statement to which Mr. Powell referred being made part of the record at this point.

**The CHAIRMAN.** It is in the record.

(The address referred to follows.)

ADDRESS BY LEWIS F. POWELL, FOURTH CIRCUIT JUDICIAL CONFERENCE  
JUNE 26, 1965, WHITE SULPHUR SPRINGS, W. VA.

STATE OF CRIMINAL JUSTICE

My talk today is on the state of criminal justice—a problem of special concern both to the bench and the bar. This is a vast and complex subject. There are few absolutes in this field, and no simple answers. In a brief talk, I can only be suggestive; certainly not be definitive.

It is now generally recognized that we have an increasingly serious crime problem. Indeed, this may be our number one domestic problem.

The facts as to crime are generally familiar to each of you. Unfortunately, they are growing worse every year.

Serious crime was up 13% in 1964 over 1963.

There were increases in all major categories, with crimes of violence causing special concern.<sup>1</sup>

Organized crime—despite heroic efforts by the Department of Justice—still operates largely beyond the reach of the law.

Juvenile crime is a national disgrace, with more than 40% of all arrests involving teenagers, 18 years of age and under.

More than two and one half million serious crimes were committed in 1964—a staggering total.

The single most depressing statistic is that since 1958 major crime has increased five times faster than the population growth.

Indeed, it is not too much to say that we have reached the point—in certain areas in this country—of a partial breakdown of law and order. In his message to Congress of March 8, President Johnson said:

"Crime has become a malignant enemy in America's midst."

So much for a brief and oversimplified summary of the crime situation. The question is what can the legal profession do to assist in meeting this problem.

The most direct area of action relates to our criminal laws, and the enforcement thereof by police and in the courts. The strengthening and clarifying of criminal laws and the improvement in the administration of criminal justice, especially in its certainty and swiftness, will help restore the state of law and order which is so urgently needed.<sup>2</sup>

Historic decisions of the Supreme Court in recent years have strengthened significantly the rights of accused persons. Most notably, these decisions have extended standards from the Bill of Rights Amendments to the state courts. This has been accomplished in a series of far-reaching cases reinterpreting the due process clause of the Fourteenth Amendment to include specific safeguards of the Fourth, Fifth and Sixth Amendments.<sup>3</sup>

There is, of course, room for considerable difference of opinion with respect to some of these decisions—and lawyers differ widely as do members of the Court on occasions. Yet, it must be remembered that in all of these cases the Court was confronted with the difficult question of protecting the constitutional rights of the individual against alleged unlawful acts of government.

Unfortunately, the Court itself has been unfairly criticized for some of these decisions. Lawyers, as the guardians of our system of freedom under law, have a special responsibility to defend the Supreme Court and our judicial system when they come under unfair attack. We have too often failed to draw the line—essential to the safeguarding of our institutions—between the right to disagree with particular decisions and the duty to sustain and defend the judiciary. Unfortunately, many have failed to appreciate that the surest way to undermine the very foundations of our system is to destroy public confidence in the honor and integrity of our courts.

The right to a fair trial, with all that this term implies, is one of our most cherished rights. We have therefore welcomed the increased concern by law enforcement agencies and the courts alike in safeguarding fair trial. Many of the decisions of the Supreme Court which are criticized today are likely, in the perspective of history, to be viewed as important milestones in the ageless struggle to protect the individual from oppressive government.

<sup>1</sup> For the year 1964 as compared with 1963: murder was up 9%, robbery up 12%, aggravated assault up 18%, and rape up 19%.

<sup>2</sup> This talk is not concerned with the underlying causes of crime. The criminalists and sociologists are deeply concerned—and often divided as to the causes and prevention of crime. These are questions of first importance, and merit continued and intensive study. Appropriate and determined action, both by government and private agencies, to remedy conditions which promote crime is imperative. In the long run improved education and job opportunities afford the most hope.

<sup>3</sup> For example, *Mapp v. Ohio*, 367 U.S. 643 (1961), applies the Fourth Amendment to the states through the Fourteenth so as to render inadmissible evidence seized in violation of the federal rule. *Aguilar v. Texas*, 378 U.S. 108 (1964) similarly holds federal arrest warrant standards applicable to the states [For a subsequent application see *U.S. v. Ventresca* (March 1, 1965). U.S. Sup Ct. Bulletin 888]. *Gideon v. Wainwright*, 372 U.S. 335 (1963) holds the Sixth Amendment right to counsel applicable to the states through the Fourteenth. And *Escobedo v. Illinois*, 378 U.S. 478 (1964) significantly expands the right to counsel by holding that it attaches as soon as the investigation by the police reaches the "accusatory stage". See also *Ker v. California*, 374 U.S. 23 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Beck v. Ohio*, 379 U.S. 89 (1964).

As in earlier milestone cases of due process, some of these recent decisions have significantly complicated the task of law enforcement by changing the applicable standards. In addition, while erasing old guidelines, these cases have not substituted precise new lines. Some have left a twilight zone of considerable uncertainty and confusion.

These consequences are not surprising to lawyers, familiar as we are with our case by case system of developing the law. But it is important to recognize that we are in a period of transition, and that the limits of many of the recent cases remain for future determination.

Let us take a look at the implications of several of these historic decisions.

As this audience is familiar with these cases, I will not burden you with detailed discussion:

Let us start with *Mapp v. Ohio*,<sup>4</sup> as it has so recently been in the news. As you know, that case applied the Fourth Amendment restriction on illegal search and seizure to the states and thus forbade State use of any evidence obtained in violation of the amendment.

Happily, in *Linkletter v. Walker*<sup>5</sup> the question as to Mapp's retroactivity was settled negatively. A different decision would have imposed a tremendous strain on state and federal courts and on state prosecutors and police in having to retry a great number of cases.

But perplexing questions remain.

How far will Mapp's doctrine be extended? What constitutes illegal search and seizure?

Will some or all types of wire-tapping be so classified?

What about other means of police investigation and surveillance which intrude upon the privacy of citizens?

*Gideon v. Wainwright*<sup>6</sup> is another landmark case—leaving many unanswered questions.

Few decisions have been more widely applauded by the bench and bar.

This could well be one of the great decisions in promoting improvement of the administration of justice. The very presence in court of competent counsel will ameliorate many of the problems now plaguing the courts.

Yet, questions as to Gideon's limits are already being pressed. Does it, for example, apply to "misdemeanors" and so called "petty offenses"?<sup>7</sup>

The Fifth Circuit Court of Appeals in *Harvey v. Mississippi* (decided January 12, 1965) applied *Gideon* in a misdemeanor case where a justice of the peace had fined a Mississippi defendant \$500 and sentenced him to 90 days in jail for "illegal possession of whiskey". This was the maximum offense for this misdemeanor.<sup>8</sup>

A New York Court has recently held that the constitutional right to counsel applies to trials of certain traffic violations.<sup>9</sup>

It is also being seriously urged that the right of an indigent to counsel means the right to counsel of his own choice—not merely the public defender or a court assigned counsel.

If the outer limits of *Gideon* should be stretched to include all misdemeanors—including minor traffic offenses—and to require counsel chosen personally by the indigent defendant, earlier judgments as to the unqualified wholesome effect of this decision might well undergo some re-examination. The burden on the bar and the public treasury might become intolerable.

<sup>4</sup> 367 U.S. 643 (1961).

<sup>5</sup> U.S. (June 7, 1965), 14 L. ed 2d 601, 85 S.Ct. —.

<sup>6</sup> 372 U.S. 335 (1963).

<sup>7</sup> The House of Delegates of the American Bar Association, at its August 1964 meeting, recommended that: "Counsel should be provided at least in all cases where any serious penalty may be imposed and since, in fact, the advice and assistance of counsel would be desirable in all cases, the objective should be to extend rather than limit the right to counsel." Like the Court's opinion, this resolution leaves much to be decided in the future.

<sup>8</sup> The Criminal Justice Act of 1964 provides for the appointment of counsel where the defendant is charged "with a felony or a misdemeanor, other than a petty offense". A "petty" offense is defined as any misdemeanor, the penalty for which does not exceed imprisonment of six months or a fine of not more than \$500, or both. Thus, the *Harvey* case goes well beyond the implications of the Criminal Justice Act. Cf. *Evans v. Rives*, 126 F.2d 633 (D.C.Cir. 1942).

<sup>9</sup> See April 1, 1965 N.Y. Times, reporting on the reversal of conviction of John W. Kohler, Jr., by the Appellate Term, Supreme Court. The offense charged was "speeding", which a majority of the court said could "result in revocation of a license to operate an automobile, which could be the only mainstay for a defendant's living."

It is the *Escobedo*<sup>10</sup> case, however, that raises perhaps the most difficult unanswered questions. There a principal suspect while being questioned at length by the police repeatedly asked to see his lawyer. The lawyer was at the station house asking to see his client. There was no evidence that the defendant was advised of his right not to incriminate himself and there is an allegation that he was tricked into doing so. Under these circumstances the Supreme Court held he was denied "due process" when the incriminating statement obtained during the interrogation was admitted in evidence. A holding based strictly on these facts would have raised few questions. But much uncertainty has resulted from the citation of *Gideon*, and particularly from the following sentence:

"We hold only that when the process [questioning a witness] shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and under the circumstances here, the accused must be permitted to consult his lawyer."<sup>11</sup>

Four dissenting members of the Court thought that the majority opinion overruled prior decisions<sup>12</sup> and extended the Sixth Amendment right to counsel to the point where "the task [of law enforcement will be] made a great deal more difficult."<sup>13</sup>

Since the *Escobedo* decision in June 1964, opinions have differed widely as to what it actually requires. Some have asserted that it may have the effect of prohibiting all police questioning of potential suspects. If a lawyer is present, his advice obviously will be to answer no questions. It is further pointed out that where the suspect is indigent the state may have to furnish him counsel.<sup>14</sup>

Still others believe that *Escobedo* may only require that the suspect be advised of his right to consult a lawyer prior to interrogation.<sup>15</sup> Yet another view is that *Escobedo* merely requires that the suspect be warned of his constitutional right to remain silent, prior to police interrogation.<sup>16</sup> Others suggest that perhaps it requires affirmative advice as to both the right to counsel and to remain silent.<sup>17</sup> Finally, some believe *Escobedo* is limited to the situation where the witness asks for counsel and his request is denied.<sup>18</sup>

But whatever may be its ultimate interpretation, *Escobedo* strikingly illustrates that key decisions often leave many questions unanswered. The result is that law enforcement officers and trial courts must then operate without dependable guidelines.

There are other landmark decisions which come to mind.

Among these, *Mallory v. U.S.*<sup>19</sup> has provoked much discussion—as well as consternation among law enforcement officials. Congress is now wrestling with legislation trying to define the difficult and delicate issue of what constitutes "unreasonable delay" in presenting a suspect to a magistrate for arraignment.

And, in terms of actual impact on the courts, perhaps most important of all to Federal judges, are the decisions which opened the flood gates of habeas corpus—particularly *Fay v. Noia*,<sup>20</sup> *Townsen v. Sain*,<sup>21</sup> and *Sanders v. U.S.*<sup>22</sup>

As Professor Meador of the University of Virginia has said:

"The writ of habeas corpus now has a built-in expansion factor, since every new 14th Amendment right judicially formulated for a defendant—furnishes a new ground for habeas corpus."<sup>23</sup>

An example of Professor Meador's "built-in expansion" doctrine is *Jackson v. Denno*<sup>24</sup>—holding invalid the New York rule which permitted the jury to determine whether a confession is voluntary.

It now appears—especially from the dicta in *Linkletter*—that *Denno* must be applied retroactively.

<sup>10</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964).

<sup>11</sup> *Id.* at p. 492.

<sup>12</sup> Cf. *Cicenia v. Logay*, 357 U.S. 504.

<sup>13</sup> Dissenting opinion of Mr. Justice White, 378 U.S. at pp. 493, 499.

<sup>14</sup> See Kaufman, "The Uncertain Criminal Law," *Atlantic Monthly*, January 1965.

<sup>15</sup> *State v. Hill*, 397 P.2d 261 (1964).

<sup>16</sup> E.g., *People v. Nulty*, 395 P.2d 557 (Ore. 1964).

<sup>17</sup> See *People v. Dorado* (Cal. Crim. 7468, Jan. 29, 1965); *Carson v. Commonwealth*, 382 S.W.2d 55 (Ky. 1964); *State v. Dufour*, 206 A.2d 82 (R.I. 1965).

<sup>18</sup> Cf. *State v. Fox*, 131 N.W.2d 604 (Iowa 1964); *Anderson v. State*, 205 A.2d 281 (Md. 1964); *Beau v. State*, (N.Y. 1965); *Browne v. State*, 131 N.W.2d 169 (Wis. 1964); *People v. Sanchez*, 33 L.Wk 2571 (N.Y. April 22, 1965).

<sup>19</sup> 354 U.S. 449 (1957).

<sup>20</sup> 372 U.S. 391 (1963).

<sup>21</sup> 372 U.S. 293 (1963).

<sup>22</sup> 373 U.S. 1 (1963).

<sup>23</sup> ABAJ, Vol. 50 (Oct. 1964), p. 928.

<sup>24</sup> 372 U.S. 391 (1963).

*Griffin v. California*<sup>25</sup> is another recent example of this escalation (prosecutor may not comment on failure of defendant to testify).

Whatever may be the ultimate interpretation or resolution of these and similar cases, I have mentioned them to illustrate the truism that great landmark cases in this area usually leave many unanswered questions.

And the most immediate result is that law enforcement officers and trial courts must then operate without dependable guidelines.

In time, much of this uncertainty will be removed by future court decisions. But the present need for clarification of criminal law is far too urgent to leave this to the slow and necessarily uneven process of judicial decision. There must also be action—where this is appropriate—by legislation and rules of court, as well as by clarifying police procedure.

The key problem, in providing workable solutions, is one of balance. While the safeguards of fair trial must surely be preserved, the right of society in general, and of each individual in particular, to be protected from crime must never be subordinated to other rights.

When we talk of "individual rights" it is well to remember that the right of citizens to be free from criminal molestation is perhaps the most basic individual right. Unless this is adequately safeguarded, society itself may become so disordered that in the end all rights are endangered.

There is a growing body of opinion that an imbalance does exist, and that the rights of law abiding citizens have in effect been subordinated.<sup>26</sup>

Lord Shawcross, former Labour Party Attorney General of Great Britain, in writing recently about a comparable condition there, said:

"The truth is, I believe, that the law has become hopelessly unrealistic in its attitude toward the prevention and detection of crime. We cling to a sentimental and sporting attitude in dealing with the criminal. We put illusory fears about the impairment of liberty before the promotion of justice . . ."<sup>27</sup>

One need not go all the way with Lord Shawcross to agree that the pendulum in criminal justice may indeed have swung too far.<sup>28</sup>

But recently, there have been some distinctly encouraging signs.

President Johnson, in his message of March 8, placed his administration behind a broadly conceived program to combat crime and the conditions under which it flourished. A new unit, designated the Office of Criminal Justice, was created last year within the Department of Justice, and is ably headed by James Vorenberg of Harvard Law School.<sup>29</sup>

As recently as March 18, the Law Enforcement Assistance Act of 1965 was introduced in the Congress with Presidential approval. This is intended to provide financial and other assistance to state and local law enforcement agencies with the view to improving techniques of crime control and prevention.<sup>30</sup>

A number of states are also re-examining their criminal codes, many of which are out-dated and inadequate under modern conditions and in light of recent court decisions.<sup>31</sup>

The ABA welcomes this recognition of the need for modernizing and strengthening criminal laws and for improved enforcement methods and techniques. Indeed, the Association itself has initiated in this area one of the most significant projects ever undertaken by the organized bar.

Under the Chairmanship of Chief Judge J. Edward Lumbard, of the United States Court of Appeals for the Second Circuit, a distinguished national committee has been authorized to formulate and recommend standards with the view to "improving the fairness, efficiency and effectiveness of criminal justice

<sup>25</sup> 380 U.S. 609 (1965).

<sup>26</sup> As Judge J. Edward Lumbard put it: "The average citizen's impression is that the public interest is not receiving fair treatment and that undue emphasis has been placed on safeguarding individual rights . . ." Address, Section of Judicial Administration, Aug. 10, 1964. See also Lumbard, *The Administration of Criminal Justice*, 48 ABAJ 840 (1963).

<sup>27</sup> Volume 51 ABAJ, p. 225, 227 (March 1965).

<sup>28</sup> Walter Lippmann, commenting on the crime problem and this imbalance, recently said: "The balance of power within our society has turned dangerously against the peace forces, against governors and mayors and legislators, against the police and the courts" Herald Tribune, March 11, 1965.

<sup>29</sup> The American Law Institute has in process a model code dealing with many of the difficult pre-arraignment problems.

<sup>30</sup> H.R. 6508. 89th Cong. See address by Attorney General Katzenbach before National League of Cities, Washington, D.C., April 1, 1965.

<sup>31</sup> Message of Gov. Rockefeller to legislature, reported in New York Times, Jan. 7, 1965. New York State has already set an interesting example by the enactment of its "stop and frisk" and "no knock" laws. These laws, presently being tested in the courts, seek to clarify and increase the power of police to question on the scene persons suspected of crime and delineate the right of police, pursuant to court order, to enter and search for evidence.

in state and federal courts". The entire spectrum of the administration of criminal law is being examined.

Six advisory committees—composed of highly qualified judges, lawyers, law teachers and public officials—have been formed to work on particular areas of criminal justice. Each advisory committee has engaged a recognized authority on criminal law to serve as its "reported". The project, expected to require three years and to cost \$750,000 is being financed by the American Bar Endowment, and by grants from the Avalon and Vincent Astor Foundations. The Institute of Judicial Administration, affiliated with the Law School of New York, is providing staff assistance.

The remedies for the present unsatisfactory situation include, of course, far more effective enforcement of existing laws. In addition, there are undoubtedly areas in which the need is for legislative action, both state and federal, which strengthens and clarifies our criminal laws. There is also a need for appropriate changes in court rules, and in procedures and standards followed by law enforcement officials.

In short, our criminal justice is in a state of considerable disarray, and broadly based reforms are indicated.

In accomplishing these needed remedies, care must, of course, be exercised to avoid another pendulum swing too far in the opposite direction.

We must certainly have a system which preserves law and order, and this today is the most urgent need. But if our system is to deserve and receive public support, it must also be fair to the accused and compatible with constitutional rights. At times, the striking of a just and workable balance is very difficult indeed. But this must ever be our objective.

There are, unfortunately, some who frame this problem as an inevitable and irreconcilable conflict between the "law enforcement view" and the "individual rights" view. As James Vorenberg has said, this is a "false conflict which obscures and obstructs" rather than contributes to sound and sensible solutions.

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Perhaps I have said enough to indicate the timeliness of the American Bar Association project—as well as the magnitude and complexity of the task of formulating national standards for consideration by legislative bodies, courts and police authorities. Since these standards will merely be recommendations, their authority and influence will depend upon the wisdom with which the Committee and the Advisory Committees function. Their acceptance will depend in major part upon the extent to which the bench and the bar support them.

Senator HART. All right.

The Senator from California and you discussed the extent to which a black American today could be said to enjoy equal protection and equal opportunity. As I recall it, you said you felt that so far as formal treatment under the law, so far as the statutes could achieve it, one could say that there was equality, both of opportunity and freedom, but that in the implementation of some of these laws, and in the attitudes which are personal to a man, we have yet a way to go. Is that a fair statement?

Mr. POWELL. I think that is a correct summary of what I said.

Senator HART. Would you agree that many of the decisions of the Warren Court most sharply criticized might fairly be said to be an effort, and a constitutionally sound effort, to reduce some of the disability which attaches to an American merely because he is poor or black or unpopular?

Mr. POWELL. I would agree with that.

Senator HART. The unpopularity of the decisions ought never confuse us as to the soundness of them nor lessen our willingness, either as a judge or as a public commentator to defend them, if indeed, we think, that which is unpopular nonetheless is right.

Mr. POWELL. Of course.

**Senator HART.** This morning there was discussion about the degree to which there is a chilling effect on the exercise of first amendment rights because of Government threat or presence.

The question in the minds of some of us has been the extent to which the court has an obligation to prevent, as an example, the presence of a photographer or a number of photographers and several observers in attendance at a meeting—whether the crowd is large or small—which is assembled to protest a policy of the Government.

You said that clearly it is necessary and right that a citizen have the opportunity freely to protest, freely to advance an idea. Do you believe that that right could be thwarted by Government action of the sort I have described, and, if so, would you feel that it would be appropriate for a court to intervene between the Government and the individuals assembled?

**Mr. POWELL.** I would certainly think it conceivable that free expression could be thwarted in that way, given certain facts and circumstances, and if it were I would assume the first amendment would be applicable.

**Senator HART.** It is not a matter merely of aversion to publicity as you, with understandable humor, described your own situation in the last two and a half weeks; it is the problem of most citizens who have to have a job in order to survive, who feel a deep resentment about some injustice in the society, some unwise Government policy; they want to do more than just write their Senator; they want to stand up in broad daylight and say, "you are wrong" and try to change it.

Yet, if they know there is the camera there, the likelihood is great there will be a dossier file and, as we have learned in this committee, once the file is opened on you, you have one awful time finding out what goes into it, and you are never sure why you are dismissed from employment or find new employment difficult to get. You always have the nagging feeling that, "I had better not go to that meeting because who knows what happens when they take my picture."

This describes a very real fear and not a very schizophrenic or even hypersensitive citizen, isn't that so? Isn't this something where we should not just dismiss it by saying, "Well, the Executive is trying to protect freedom."

**Mr. POWELL.** I have not had any experience with this problem. If it is as serious as you would describe it, it would certainly seem to me a problem that needs attention. I assume, Senator Hart, you are not talking about the presence in a public meeting of photographers from the news media, are you? You are talking about Government photographers.

**Senator HART.** The Government.

**Mr. POWELL.** I would assume also that you are talking about peaceful assembly rather than situations in which it has already broken into violence.

**Senator HART.** Yes.

**Mr. POWELL.** Right.

**Senator HART.** I am talking about the prospect—

**Mr. POWELL.** Right.

**Senator HART.** And how it affects a citizen's ability to exercise his first amendment rights.

If increasingly our practice as a Government is to send out photographers and have the hall well secured, lots of people will find very sound reasons why they won't show up for that meeting, and it is this very suppression of ideas that was intended to be avoided by the first amendment; isn't that right?

Mr. POWELL. If that were widespread, I would have no hesitation in saying that it would seem to me to have chilling consequences. I would be surprised—

Senator HART. Even if it applied only to one citizen it would have a chilling consequence on him?

Mr. POWELL. I would have to say in answer that I think it would have to depend somewhat on the citizen. I think I have known people who like publicity. But the facts you state exclude publicity. They include only surveillance by some governmental agency.

Senator HART. That is right.

There has been much discussion about your article that was originally in the Times-Dispatch, and then in the New York Times. As I understand it, your general theme was that most of the fears about repressive actions by the Government were exaggerated or unfounded.

You stated that whatever past validity there may have been in distinguishing between external threats of subversion and internal threats, that distinction now is largely meaningless because "the radical left is plotting a revolution and is collaborating with foreign Communist enemies."

What was your concept of the radical left when you used that? Are you defining it as those groups who are conspiring with foreign enemies in this country and no others, or does it include those whom you referred to later on in that article as sympathizers with radical organizations?

Mr. POWELL. It includes, Senator, groups that would like to destroy our democratic form of government.

Senator HART. Well, let us assume I want to destroy the democratic form of government and substitute a vegetarian government?

Mr. POWELL. Substitute a what? What type of government?

Senator HART. Vegetarian, as distinguished from a Communist or Socialist. Does that desire, without an assumption that vegetarians will bomb, warrant the labeling of that vegetarian domestic group as the same as a foreign group and, therefore, to be put under surveillance without any court approval?

Mr. POWELL. I think the example you put is very far-removed from anything that I had in mind. The basic concept that I had in this regard, with regard to change, is that our system provides within its structure the means for peaceful change and any change that the people wish to impose or to achieve within the system is change which would be lawfully accomplished.

The change that I would oppose, and there are organizations and individuals in this country who quite openly advocate this kind of change, is change without the system. They say the system no longer accommodates itself properly enough to the need for change, and I honestly disagree with those people.

I believe that any change by coercion or force will in the long run be as harmful to the people who initiate it as to those who, in the beginning, may seem to be the victims. This is my basic philosophy on this

particular subject. I think you will see it running through a good many of the talks that I have made.

**Senator HART.** The Government must then be sensitive, first, to the identification and observation of those who seek to destroy us, not by change within the form but through the introduction of action not permitted by the form of the system.

**Mr. POWELL.** Force, violence primarily.

**Senator HART.** And, secondly, while the Government properly is concerned to protect society against those elements, in a public meeting place and a public assembly, to what extent do you believe that this justifies the Government, through its police power, to short-circuit the right peacefully to be assembled of those who do not share the methods that this minority group would use, and were in danger, therefore, of being guilty by association with this group advocating violence although they are in no way sympathetic to its program?

**Mr. POWELL.** You are describing a group which may include some who would wish to use force and others who would not wish to use force? Obviously, that presents a problem. I do not know what the clear answer would be unless I know the facts precisely, and then I would try to know.

**Senator HART.** I may be doing an unkindness to even the most extreme of those who were here on May Day, but isn't it somewhat descriptive of the situation we had here on May Day where the vast majority, and the vast majority of those who were arrested, were being stuck with association with a handful who were upsetting automobiles? Do you think the Government is justified in making the kind of mass arrests, and subsequent acknowledgement that they were wrong, simply because there were a handful doing violence?

**Mr. POWELL.** I was not here. I, of course, read the press accounts. I would assume, Senator Hart, that—and I had no responsibility so this is an assumption—that those in authority had to make a decision whether to allow the bridges across the river to be closed in pursuance of what was announced as a plan to close down Washington, D.C.

Now, I agree with you from what I have heard from my own young that there were masses of innocent people who were there just to watch the fun, who were swept up in procedures that certainly no lawyer would recommend normally.

Now, what happens involves questions of degree. I myself do not know how serious the problem was, whether there were other alternatives to prevent the city from being closed in the sense that the bridges were closed.

I would say, in all candor, that I think the public authorities had a responsibility to keep the bridges and streets open. I think they had a responsibility to accomplish that with a minimum of force. I think they had a responsibility to try to accomplish it without injury to or arrest of innocent people. But in large groups of people it does appear to me that sometimes it may be difficult, particularly with large numbers of police involved, to attain all of those rather obvious objectives.

**Senator HART.** As you remind us, you were not here, but speaking again as a lawyer, and following each step of your explanation down to the point where you say that it should be done with a minimum of restraint on innocent people or however you phrased it—

**Mr. POWELL.** I said a minimum of force and every effort not to implicate innocent people.

**Senator HART** (continuing). Wouldn't just commonsense suggest with equal force that once a government discovered that it had on its hands people whom they could not prove to have been involved in any illegal conduct, that it should on its own initiative have released those people? Isn't that the mark of just a basically sensitive Department of Justice to release them rather than waiting until court orders were obtained to release them? If you were responsible for the cage in which 200 people were being contained or detained, and you discovered that there is no charge and there was no basis for a charge, not even an ability to identify, wouldn't a sensitive government unlock the cage?

**Mr. POWELL.** Certainly the way you put it, there is only one answer, Senator.

**Senator HART.** I think that is not an inaccurate description of a situation that did exist with respect to a cage, with a larger number than 200. I do not ask you to agree that this is so.

**Mr. POWELL.** I will say—I think I won't proceed. I was going to volunteer something that may be slightly irrelevant. I have told witnesses not to volunteer and here I find myself about to do it. [Laughter.]

**Senator HART.** I intruded in your exchange with Senator Tunney when he read the paragraph from President Nixon's acceptance speech in Miami where the then nominee and now President said that he would seek judges, who have the responsibility to interpret our laws, to be men dedicated to the great principles of civil rights.

You described your concerns, and actions which you thought might suggest that this kind of concern on your part, and I made the point that in the last 10 years, in any event, you have never argued that public accommodation laws should be kept off the books. I think I should also add for the record a communication which was brought to the attention of the Senate through its introduction in the record on November 2, by Senator Byrd, who was sitting here with you, of a letter from a member of the Virginia House of Delegates representing Richmond and Henrico County, Dr. William Ferguson Reed. Doctor Reed is the first Negro elected to the Virginia General Assembly during this century, and that letter, written by Doctor Reed to Senator Byrd, strongly recommends your confirmation and makes reference to the fact that all regard you as a fair-minded man. I think it is well that you be aware of that comment by Doctor Reed.

**Mr. POWELL.** Thank you, Senator.

**Senator HART.** I have no further questions Mr. Chairman.

**The CHAIRMAN.** Senator Kennedy?

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

I, too, want to join my colleagues, Mr. Powell, in congratulating you for winning this nomination.

I have had a number of friends and colleagues who have been involved in Government work in the Justice Department while you were serving as the President of the American Bar Association and who have been tremendously impressed not only with your skill as a lawyer and your objectivity and craftsmanship in the law but also with your sense of fairness and equity.

An incident which I thought was quite revealing was related to me by Mr. Burke Marshall, who was serving in the Justice Department in the early part of 1960 and had a very difficult case involving a defendant

in Virginia. It was a very controversial situation and he called you and you responded affirmatively, immediately, and fulfilled the responsibility with great concern and judgment. I have had communication with former Attorney General Katzenbach as well, urging favorable consideration, from the former head of the Massachusetts Bar Association, and many of the lawyers in whom I have a great deal of confidence in my own State who worked with you in a number of different matters and who are all extremely kind and generous in their comments about you.

Mr. POWELL. Senator Kennedy, excuse me, sir, but I think the episode or event to which Burke Marshall referred involved representing a defendant in an unpopular cause and I have heard that he gives me credit for having done it. The fact is, I did not do it. I was perfectly willing to do it. I was not in position to act. I think I was out of town at the time and one of my partners referred him to a very competent lawyer in Richmond, named George Allen, who actually represented the individual and, I think, got him off. But he did a whole lot better than I would have done because I never practiced criminal law.

Senator KENNEDY. You got great credit from Burke Marshall and I am sure you would have done it had you been in town.

You have gone over a number of my different areas of interest. I would like to review some aspects of these with you.

You have commented on some of them, but I know it will be very helpful to me if you felt that you could make some further response in these areas of inquiry.

A point has been made that many of your general views on social and political and constitutional questions have changed in the last 5 or 6 years, and I am wondering whether you have noticed any consistent pattern in whatever changes there have been.

The view has been expressed, in light of your comments in "Civil Liberties Repression; Fact or Fiction?" that there may have been a hardening of your viewpoint, and a certain hardness creeping into some of your writings in the last few years. At the time you were president of the American Bar Association, your style was observed as being extremely balanced and measured, and then the recent publication used the phrases "standard leftist propaganda," "sheer nonsense," "predictable voices cried repression and brutality." You suggest that many persons generally concerned with civil liberties have joined "in promoting or accepting the propaganda of the radical left." Would you care to comment?

Is this an unfair characterization of a change of view, or how would you respond to that suggestion?

Mr. POWELL. I would like to respond, Senator Kennedy. I do not know that I would say it is unfair, because one can never judge himself. I do not think my views have changed. I would say that a good deal depends, certainly in my own instance, and perhaps that of others, in terms of writing style as to what one is doing. When I write for a law review article, for example, or if I am making an address to lawyers, I will do more work in preparation, and I will be more careful in the articulation of my views than if I am asked to make a speech, say, to a lay group at a civic club luncheon or a businessmen's organization.

I think the quotations that you read into the record came from my one newspaper article. I ought to know better than to write any newspaper articles from now on. I wrote that primarily on the issue of repression and I dealt in a shorthand way with some very complex issues and, as a lawyer, that is a dangerous thing for one to do.

My thesis was that America, if viewed fairly, overall, is certainly not a repressive society, and I cited four or five examples. You mentioned some of them.

But coming back to your point of departure, while I suppose there may be subtle changes in one's views of which one is not altogether aware, I am not conscious of any philosophical change in my own judgments from those that I have expressed when I was president of the American Bar Association, and I was very careful about what I said.

Senator KENNEDY. In this article, again on the question of repression, you talk about the charges of repression as no more than "standard leftist propaganda." and I must say many of us see in a good many of the recent events, not necessarily a conspiracy, but a pattern that has been directed against dissenters on the left. Of course we do, as you point out quite rightfully, retain many of our cherished freedoms. But when we observe a series of events like the Kent State and Jackson State shootings, with no indictments afterwards; and the large number of wiretap listening not approved by the courts; the FBI trying to make dissenters feel there is an agent behind every mailbox—and I have a copy of an FBI memo here; the spying on Earth Day rallies; the effort to suppress the Pentagon Papers during the debate on the end-the-war amendments; the efforts to revive and strengthen the Subversive Activities Control Board; the indiscriminate arrests and other law enforcement excesses of May Day—that, taken as a series of events all of which have taken place relatively recently—and I could go on—may very well be a legitimate concern to rational and moderate men. This series of events that has taken place, the ones which I have just indicated—May Day; spying at various peace rallies and Earth Day rallies, those being in attendance having absolutely no idea of participating in violence or disturbance; the increase in non-court-authorized wiretapping and the different definition that is being used in wiretapping for national security cases, for example, which is different from the definition that was used back in 1968; you can take at least these examples, and I think there are others as well, and draw from them—or at least reasonable men, rational men, may draw from them—the conclusion that there has been increased repression, lessened respect for constitutional rights and civil liberties. And whether you agree or not with the characterization, at least it could be understood why rational men are interested about the threat of repression as well as those making as you point out, "standard leftist propaganda."

Mr. POWELL. I would like to agree with you without qualification, and yet, Senator, I must say that it seems to me that one of the major contributing causes to what concerns you is a problem which has concerned me and has been the subject of several speeches that I have made since my ABA days, and this is a problem that has developed since then, and that has been the escalation of the use of coercion, force, and violence by certain groups and individuals, and this always

provokes a response, and the response tends to attain the level and sometimes to exceed the level of the provocation.

I became concerned about what, for lack of a more precise term, has been called the New Left movement in this country primarily, initially in my role as a trustee. At that time I was a trustee of two colleges. The impact became very visible at the college level, as we all know, and millions of innocent people got caught up in all this, and when a few people resort to force and coercion, innocent people are not able to exercise their rights, the government responds and we have these problems which you mention. We have some of the problems which I mentioned in some of the things I wrote. I do not know whether that response is helpful but that is basically the way I look at it.

Senator KENNEDY. Well, to give a few examples, we have been through spying on Earth Day demonstrations, war demonstrations, and the chilling effect that this has on innocent people. And I have in front of me a bulletin that is used by the Federal Bureau of Investigation, entitled "FBI Instructions for Agents in Pennsylvania." In this particular document it talks about how "There was a pretty general consensus that more interviews with these subjects and hangers-on are in order for plenty of reasons, chief of which are it will enhance the paranoia endemic in these circles and will further serve to get the point across there is an FBI agent behind every mailbox."

I would like to ask that the bulletin—it is an unclassified bulletin—be put in the record.

The CHAIRMAN. It may be.

(Document given to Judiciary Committee staff.)

Senator KENNEDY. You know, I suppose, that one could be rightfully concerned about the FBI as a matter of policy conducting interviews with either subjects or hangers-on or whatever they define as hangers-on, whoever they define as subjects, to try to get the point across that there is an FBI agent behind every mailbox. Does this sort of thing concern you at all?

Mr. POWELL. It certainly does.

Senator KENNEDY. Well, if you could just talk about that concern in terms of the impact of this sort of police activity on liberties of individuals, I would be interested in hearing that.

Mr. POWELL. Well, the brief excerpt you read from the bulletin, which I have not seen, suggests policemen behind every bush. That would be an intolerable situation, and I do not think anybody would support that type of society.

Senator KENNEDY. I suppose many of us who are very much concerned about the procedures that were followed on May Day, which you talked about with Senator Hart, feel that other steps could have been taken, other procedures followed.

Do you think it would not have been unreasonable to expect a greater sense of flexibility by the Government in planning for things like May Day, so that there would not have to be such a reliance on the kind of sweeping dragnet that was used in attempting to meet the threat or apparent threat of May Day? Do you think there is a responsibility on the Government for that?

Mr. POWELL. I would certainly think there is a responsibility on Government to try to plan to meet situations such as the one you described.

Senator KENNEDY. One of the things that was mentioned, I believe, earlier today, in terms of your expressing concern about rights and liberties, was the work you did to develop legal services for the needy people in our society. I understand that you did a magnificent job in establishing a system for delivering legal counsel to the poor, and you have spoken time and time again, eloquently, indeed, to make sure that the adversary systems worked fairly by making sure justice was not denied because of poverty, and, as I understand, you were troubled by a survey showing what large numbers of laymen and lawyers felt about the nature of legal justice given to these people. Yet you were quoted, from remarks before the Richmond Bar Association last April, as saying that we could cut back on some of the "artificial rules" engrafted in such cases like *Miranda* and *Escobedo* which solved some of the problems that troubled you.

Would you care to comment on the apparent tension that would exist between these different approaches?

Mr. POWELL. I do not recall the specific reference you make to the Richmond Bar Association talk, and yet, if I understand the thrust of your question, it relates to whether I would feel that some of the decisions which are designed to assure protection to the rights of persons accused of a crime are incompatible with the view I took requiring or emphasizing the desirability of having counsel in all cases involving the poor. I would see no inconsistency in that if you are talking about the views I have expressed, for example, with respect to *Miranda*.

Senator KENNEDY. Wasn't that pretty much the case in *Miranda*, the *Miranda* situation?

Mr. POWELL. The issue there was not whether counsel would be provided; it was whether, so far as I was concerned, all interrogation at the scene of a crime, for example, or the station house prior to arraignment, had to be conducted in the presence of counsel or such presence be waived consciously by the individual.

Now, here we have a judgment as to conflicting interests, society's interest on the one hand, to try to get at the facts of crime, and an accused person's interest, on the other hand, to have counsel at a fairly early stage.

We wrestled with this balancing of interests on the Crime Commission at great length. I forgot the exact recommendation we made, but I think it was that gradually counsel should be made available at an early stage. I say gradually because there may not be enough lawyers to meet the demand. Certainly, as a minimum, there should be counsel if desired from arraignment through appeal and postconviction remedies. But again the facts and circumstances become relevant, such as in the *Escobedo* case where they had the man in the station house and the lawyer was sitting outside and they would not let him interview him, which as I stated, was quite outrageous.

Senator KENNEDY. In the U.S. News & World Report of October 30, 1967, there was an article on "Civil Disobedience: Prelude to Revolution?" I do not know who gave the title, but in any event during the early part of it you talk about the disquieting trend so evident in our country "toward organized lawlessness and even rebellion. One of the contributing causes is the doctrine of civil disobedience. This heresy was dramatically associated with the civil rights movement by the famous letter of Martin Luther King from a Birmingham jail."

You say, "As rationalized by Dr. King, some laws are 'just' and others 'unjust'."

Now, in the letter from Dr. King—I have excerpts of it here and I am quoting from it—he wrote:

The answer lies in the fact that there are two types of laws: just and unjust. . . . I would agree with St. Augustine that "an unjust law is no law at all".

Now, what is the difference between the two? How does one determine when a law is just or unjust? A just law is a manmade code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality.

And he continues:

I hope you are able to see the distinction I am trying to point out. In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

What is so distressing to you about that comment?

Mr. POWELL. Senator, I wrote an article published in the Washington and Lee Law Review. Actually it was the Tucker Lecture that I gave to the Washington and Lee Law School in the Spring of 1966, I think, on the subject of civil disobedience and I think that article reflects accurately the views that I had at that time and still have.

It is important to understand that when I use the term "civil disobedience" in a critical sense—and this is clear from the article to which I referred—I am not talking about the testing in good faith, usually on a lawyer's advice, of specific laws deemed to be both unjust and invalid, and this was the way the civil rights movement started. The early cases, all of which were sustained in the United States Supreme Court, involved broadly speaking two types of situations, tests as to the validity of segregation laws, such as against occupying any seat you wished in a bus, and tests involving the validity of badly drawn breach of the peace or disorderly conduct laws. I have never criticized the type of civil disobedience action that brings a law of that character into the courts for testing.

The type of civil disobedience that seems to me to be destructive of the very fundamentals of our society was perhaps best expressed by the man who was most often cited as the father of it in this country, and that is Thoreau. He said, in substance, that he thought the best society was one with no laws at all.

Now we can sympathize with that point of view, particularly in the age in which we live where there are so many laws. And yet it is basically contrary to our system which is predicated on the rule of law, and what happened to the civil rights movement was that, with respect to civil disobedience, that concept was picked up and expanded and extended, and instead of disobedience being confined to specific laws which were sought to be tested as to their constitutionality, civil disobedience was extended to any ill or grievance against society that particular individuals might have. For example, there were people who withheld their payment of certain percentages of their

income taxes because they did not wish any part of their taxes to be used in the Vietnam war. While I can understand that and understand and sympathize with their motive, it is perfectly obvious we would have total chaos if each of us undertakes to decide which appropriation acts of Congress were just or unjust and pays our taxes accordingly.

So that broadly, in response to your question, I would say that it does seem to me that the doctrine of civil disobedience, as I have defined it and used it in the two or three occasions to which I have alluded, the definitive statement being in the Washington and Lee Law Review, is quite contrary to the rule of law in that it would allow each man to decide for himself which laws are unjust and then disobey those he regarded as unjust.

Senator KENNEDY. Your article at that time was directed towards the particular quotations from Dr. King which I have read here this afternoon. Your article also states:

"As rationalized by Dr. King, some laws are 'just' and others 'unjust'; each person may determine for himself which laws are 'unjust'; and each is free—indeed even morally bound—to violate the 'unjust' laws."

And then you say:

"Coming at a time when discriminatory State and local laws still existed in the South, civil disobedience was quickly enthroned as a worthy doctrine."

You referred on another occasion to Gandhi's civil disobedience campaign, in an article in the University of Florida Review, where you talk about Gandhi's historic struggle for independence. And yet this technique was used in India not as a means of recognizing constitutional rights, but to attain independence. You said that there were no courts, no established political institutions in India to which the issue of independence could be referred or contested. You said that there was no parallel situation in America where wrongs may be addressed in the courts and where we have established political institutions.

I am just wondering whether Mr. King thought there were remedies in courts or political institutions in the South as they related to the civil rights laws and existing statutes at that time.

Mr. POWELL. Well, I intended to make it clear that certainly in the early stages of what has been called the Civil Rights or Civil Disobedience Movement, I thought Dr. King was entirely within his rights to bring those cases, and it hardly need be said that he will be recognized as one of the great leaders of his people.

Senator Kennedy, I have thought a good deal about the subject of civil disobedience because it concerned me. At the time I wrote, the only article I could find when I was doing my research on it that was at all applicable to the modern situation was one by Burke Marshall published in the Virginia Law Review. There have been a number of discussions of it since. One that I brought with me here today and that, I think, is of interest is an essay by Archibald Cox which, I think, was published by the Harvard Press and I have no difference from former Solicitor General Cox as to his views with respect to civil disobedience. I have re-read the article. I think he expressed his views far better than I did, but in terms of the philosophic content and approach I would agree with him.

Senator KENNEDY. Is that the speech he made up at—he made a marvelous speech on this which was just off the cuff at a time when they had a demonstration up at Harvard, and was later reprinted in its entirety.

Mr. POWELL. No. This was an earlier one. This was published in 1967 by the Harvard Press. It has an essay in it by Professor Howe, and one by J. R. Wiggins who used to be managing editor of the Washington Post.

Senator KENNEDY. If I could just, finally, Mr. Powell, get back again into an area that we have gone over to some extent—this is the wiretapping which is taking place. I know you have commented on a number of observations which have been made by my colleagues here. I just raise the point of the concern that the Congress has shown on this, as expressed during the comments of Senator McClellan earlier today, and set out certain criteria, and that is obviously the expression of Congress. Ultimately, you are going to be making the decisions as to whether the actions of Congress are consistent with the rights and liberties declared by the Constitution.

The area which I think a number of us are very much concerned with is the expansion of wiretapping in national security cases.

As you can well understand, although the statute permits national security wiretapping to be done, the question is who sets out what is national security, and who makes the decision in individual cases? Quite clearly, there has been an expansion of the concept of "national security" certainly from 1968 to now. And there is considerable unauthorized wiretapping which is based upon foreign and internal security precepts. You developed to some extent this morning your own views about the legitimate concerns over the indiscriminate use of wiretapping in domestic situations.

We have seen, at least in my exchange of correspondence with the Justice Department, that there is three times as much listening as a result of taps and bugs not approved by the courts as they have been doing with court approval. So with the more expanded national security definition, there is an increase in the amount that is being done by taps and bugs without court approval. This raised some question in at least my mind about your statements when you were writing the article on civil liberties and repression, when you made the point about the chorus of unsubstantiated charges about the extent of Government wiretapping activity. And the outcry against wiretapping, you said, "is a tempest in a teapot."

Don't you think we have a legitimate, very legitimate, right to be concerned about the general expansion of wiretapping, even under the existing laws which were passed by Congress?

Mr. POWELL. I think the subject obviously is one of great concern to the American people.

I indicated before the luncheon break that I thought Congress was very wise in putting a 7-year limitation on the title III provisions of the Omnibus Crime Act. I was also glad to see that Senator McClellan has proposed an examination or investigation of this entire problem in terms of public concern.

One point that I was trying to make in the article you mentioned is that there is confusion for a number of reasons, one of which is that the public generally does not understand the distinction between the

wiretapping authorized by the Omnibus Crime Act and that which has been exercised up to this point by Presidential prerogative, nor do many members of the public understand that in the latter category there are two subdivisions, one involving foreign activities and the other involving domestic activities, although the two sometimes blend together.

It is a very difficult thing to analyze even if one is a lawyer and has studied it, and you have studied it far more than I have. I have not had access to the statistics you mentioned.

Senator KENNEDY. Well, can I just gather some degree of concern that you would have over the indiscriminate use of wiretapping? Do you see this as a ——

Mr. POWELL. If I may interrupt you——

Senator KENNEDY. Yes.

Mr. POWELL (continuing). You should have no concern about my opposing indiscriminate use of wiretapping. I remember very well Mr. Justice Holmes' shorthand way of disposing of it. He said: "Wiretapping is dirty business." Of course, it is dirty business. The public interest, on the other hand, is to try to protect the innocent people from business that is equally dirty and in many instances dirtier.

Rationalizing an' balancing those interests in the best way for total public interest is an extremely difficult and delicate problem, but I am quite mindful of the concerns which you have expressed.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. Any further questions?

Senator BAYH. Yes, Mr. Chairman.

Mr. Powell, if I might explore another area that has been a matter of some concern to me, specifically as far as you are concerned: I believe that if we do have an obligation to explore a prospective nominee's philosophy, the one area that is of most immediate concern to me, and would have the most dramatic effect on future generations, is the philosophic position of prospective nominees in the area of human rights, equal rights, equal opportunities for all of our citizens.

Permit me, if I may, to explore that with you a bit. You have had the opportunity to serve your State and your home on various boards of education, I understand; is that not correct?

Mr. POWELL. I have, sir.

Senator BAYH. Could you give us just a capsule of that experience, please; what these specific offices were that you held?

Mr. POWELL. I sat on the Richmond Public School Board for about 10 years; served on the State Board of Education of Virginia for 8 years.

Senator BAYH. What were the general time frames?

Mr. POWELL. 1950 to 1959, as I recall, January 1959. I meant 1969.

Senator BAYH. It is fair to say that those were rather tumultuous years so far as the school system of Virginia was concerned?

Mr. POWELL. One could hardly have picked a less peaceful time to serve on a school board.

Senator BAYH. Because of the experience you have had—and I think several members of this committee would vouch for the fact that the tumultuous character of the times seem to be increasing rather than decreasing, at least in the past several months, with reference to education—you will be called upon to put your philosophy

to work in deciding cases in the field of education. Being mindful you do not want to prejudge any cases that may come before you, could you give us your general philosophy relative to the importance of quality education, the importance of equal education and opportunities, how the constitutionality of this right comes into play?

Mr. POWELL. I suppose every man who ever served on a school board pays lip service to quality education. I think most of them, certainly those with whom I worked, want to improve the overall quality of education. I have talked about it a great deal in my life. I have tried to do something about it, with what success I cannot say.

I think also most people, certainly those with whom I worked, were anxious that the quality of education would be equal for all students, and this has been a goal, perhaps not yet attained in many States. It is a goal to which the State of Virginia is striving. I think we still have a ways to go and yet I believe in my own city, although I have not been on the local board in a long time, that a great deal has been accomplished in that respect.

I will add this, if I may, we had occasion to adopt a new Constitution in Virginia—I guess it was last year, wasn't it, Senator Spong? I served on the commission which recommended that Constitution to the legislature and we added to the bill of rights of Virginia a provision which, I think, is unique enough that I would like to read it into the record, if I may. It is not long.

Senator BAYH. Please.

Mr. POWELL. I may say that our Bill of Rights was drawn basically by George Mason, although the Statute on Religious Freedom was drawn by Thomas Jefferson, and until we wrote the new Constitution the Jefferson statute was not incorporated directly into the Bill of Rights; it was in a separate place in the Constitution. But in any event, the provision I now wish to read relates to education, and it may be unique; we thought it was. This is in the same article that deals with the necessity to preserve free government:

That free government rests, as does all progress, upon the broadest possible diffusion of knowledge and that the Commonwealth shall avail itself of those talents which nature has sown so liberally among its people by assuring the opportunities for their fullest development by an effective system of education throughout the Commonwealth.

There is an education article in this new Constitution which imposes far greater authority in the State board of education than it had before. The prime authority for what happened in the public school systems, until this Constitution was adopted, lay on the local boards which were provided for by the Constitution itself; in other words, school board members were, in effect, constitutional officers. But now under the newly adopted constitution of Virginia, the State itself, the State board of education, has a far higher degree of responsibility, the view being that perhaps only in this way could we raise the general quality of education for whites and blacks throughout the State to a satisfactory level.

In other words, we had the problem of some of the counties being very poor compared to counties that were more affluent, with the quality of schools in one county varying widely as compared to those in another county, and with different standards being applied with respect to meeting the Supreme Court tests for unitary school systems. So, perhaps, one answer to your question is that I have had some part,

although a modest part, in moving Virginia forward to what I believe today is a progressive and fair policy and posture with respect to public education.

Senator BAYH. You did support the provisions to which you refer when they were being debated?

Mr. POWELL. I had a hand in drafting both of them, although the principal architect of both of those was former Governor Colgate Darden, who was a colleague on the Commission. He was chairman of the Education Subcommittee but he and I had served 8 years together on the State board of education and our views had been substantially identical throughout that entire period.

Senator BAYH. And after they had been drafted, you supported them?

Mr. POWELL. Oh, yes; yes, indeed.

Senator BAYH. May I ask you, please, to just give your thoughts relative to how some of the following programs or strategies fit into or should be excluded from the provisions of the Constitution, which seem to be laudatory, very similar to the doctrine put down in *Brown v. Board of Education*. You were serving in an official capacity in the educational system at the time that *Brown v. Board* came down?

Mr. POWELL. Yes.

Senator BAYH. Perhaps you could give us the benefit of your opinion at the time and, if this opinion was changed, I would personally like to know it. When *Brown v. Board of Education* came down, it is fair to say a number of the school districts resorted to certain types of activities to avoid having to meet the criterion of *Brown v. Board of Education*. Could you give your opinion at the time as to what you did, what you felt should be done in the Virginia school system on which you served and if this is the same feeling we would like to know it, or if you have different thoughts now, I would like to have those thoughts, too.

Mr. POWELL. Senator Bayh, that would open up a very long story, obviously. I will try to telescope it and if there is anything I say you would like to followup on, of course, please do so.

Senator BAYH. Well, let me say I think most of us have been apprised of your record, the fact that you did serve for a number of years in the two specific capacities. If I might just deal with specifics so that the different questions won't be repetitive—

Mr. POWELL. All right.

Senator BAYH. The items of the Gray Commission report, what your thoughts were then, what they are now; the whole matter of whether a school should be closed or not closed to avoid meeting *Brown v. Board of Education*; the fee system, busing, the dual attendance system, did those have relevance in this experience, and if they did, I would like for you to emphasize your feelings on them now, as well as what your position was at the time you served in this official capacity.

Mr. POWELL. Well, at the time of *Brown v. Board of Education*, Virginia, as was true, I think, of every other Southern State, by its Constitution and statutes and long practice, followed the doctrine of *Plessy v. Ferguson*. We had segregated schools, completely so.

When the *Brown* case came down, our board—there were five people on the board, four whites and one black—resolved that we would comply with the law and we issued a little statement to that effect.

We also made another decision that resulted in the record, the printed record, being fairly sparse, and that is in view of the emotional situation that began to develop, no member of the school board, white or black, would make any public speeches, and we would direct and concentrate our attention on trying to keep the public schools open until the conflict between the Federal and State law was resolved.

If you will look back on it now, the situation may be hard to understand. But if one lived through those days, as Senator Spong and I did, he may have a different perspective.

As you know, we had the great misfortune in Virginia for the schools to be closed in Norfolk, then the second city in the Commonwealth; the schools were also closed in Front Royal, Charlottesville, and Prince Edward County. There were strong voices in our State that wished to close the schools if there was any integration.

So the task of my board, and my task as I conceived it, was to keep the schools open, and that we did. Finally they were integrated and we ran into all sorts of criticism, primarily from the whites.

Senator BAYH. The Gray Commission proposal of November 11, 1955—may I read from a portion of that and then ask you to put the Gray Commission in proper perspective as to what it was designed to do, and then give us your thoughts on that, please.

Commission further proposes legislation to provide that no child be required to attend that school wherein both white and colored children are taught and that the parents of those children who object to integrated schools or who live in communities where no public schools are operating be given tuition grants for educational purpose.

Mr. POWELL. I was not a member of that commission. I did not support its provisions.

Senator BAYH. You did not support its provisions?

Mr. POWELL. No, I did not.

Senator BAYH. Did you believe that the vehicle of tuition grants had or has a proper place, a proper role to play in educational systems of the country?

Mr. POWELL. Let me come back to the preceding answer, Senator, and then I will come to the question you just asked.

The Gray Commission recommendation resulted in certain laws being enacted in Virginia, and there was a long period of time when school boards were literally caught in the middle. The *Brown* decision had said: "Integrate these schools with all deliberate speed." The State legislature said, in effect: "All deliberate speed doesn't mean now; it means next year, or some time off in the future," so our school board did continue to operate segregated schools, as I indicated earlier, until we were finally forced by a court to integrate. I think that is the sequence—Senator Spong may be sharper in his recollection than I was—but I remember very painfully the dilemma we were in, and the critical test in Richmond came in an oblique and indirect way when we wished to build two new high schools.

It was perfectly obvious if we built them in the locations recommended by the school board, that they would become integrated in a fairly short period of time, and this is not the place to go into all the details as to the long weeks and months the board spent trying to work it out so we could obtain the necessary funds to build those schools. There were many in the community who did not want to build them.

We finally obtained authorization from council at sort of a crisis meeting, at which this issue was thrashed out, and when we walked into the city council that night, I had no idea what the outcome would be. It was that close.

Senator BAYH. What was the final resolution of it?

Mr. POWELL. The final resolution was that we were authorized by resolution of council to build the schools, although there was a subsequent attempt that never reached fruition to cut off funds, even within the city of Richmond, for any school which was integrated.

Our school board had full responsibility for running the schools, but money had to be raised by the city council as we did not have the jurisdiction that some school boards have in other States of being able to make a levy in order to support public education. So we had to sell our program to city council.

Senator BAYH. Well, there has been some confusion reading the news dispatches relative to what the result of this decision was. Did the decision result in going ahead and building two high schools that were all white, or did it result in the building of two high schools that became integrated or were in the process of being integrated?

Mr. POWELL. It resulted in building two high schools, one is the George Wythe High School and the other the John Marshall—two pretty good names—and I could not say because I do not remember when they became integrated. It was obvious in view of the locations, anyone familiar with my city would know, that they would be integrated, and they were integrated.

Senator BAYH. Could you give us your thoughts relative to the busing question without prejudging any case that may come before you.

Let me be just a bit more specific because I realize the breadth of the question. If we believe, as you believe, in the Virginia Constitution, in accordance with making the educational institution available for all of our citizens, does busing fit in this picture?

Mr. POWELL. I think it is fairly obvious that there will be cases going to the Supreme Court involving busing.

Senator BAYH. I realize that.

Mr. POWELL. So I am quite conscious of the restraint that I think would be appropriate for me to exercise with respect to this subject.

I would say this, though, it is fairly obvious but I will say it nevertheless, that busing has been used in public education for many years, and I am sure it will continue to be used in public education for many years. In many instances it is a necessity.

A particular case as to whether busing is or is not in the best interest of the children and of education, I think would have to be resolved on the facts and in light of the Supreme Court decisions.

Senator BAYH. Do you feel that we have a problem in education in the disparity in the ability to finance schools? We are talking about making educational experience meaningful—is that something that should be considered in the overall picture?

Mr. POWELL. You are thinking about the problem addressed by the California court?

Senator BAYH. Yes, sir. I am not asking you to overrule or affirm the California decision, but is this something that you would consider in the light of your past experience in educational matters in Virginia?

**Mr. POWELL.** It is a problem which worried us a great deal when I was on the State board of education primarily because we were more or less powerless to deal with it.

Senator BAYH. Without prejudging it, is this matter we are talking about of quality education, and the accessibility of it, one we need to consider insofar as looking at the plans from the judicial standpoint?

**Mr. POWELL.** It certainly is.

Senator BAYH. Mr. Chairman, I would like to put in the record, if I may, a letter from Jean Camper Cahn of the Urban Law Institute of Antioch College, and inasmuch as our witness has been very patient, and I appreciate his patience, I would like to say, if I might just make it a bit more concise, it is an 18-page recitation, double-spaced, Mr. Chairman, of the contribution that our nominee has made in the legal service program. I might just read brief excerpts from it:

My letter is limited to those matters known to me personally in my capacity as the official charged with operational responsibility for bringing the legal service program into being and for representing the OEO through months of intense discussions.

Mrs. Cahn goes on to emphasize she has had continuing opportunity to observe both Mr. Powell's statesmanship in broadening the organized bar's commitment to legal services and equally the effect of his fierce insistence on preserving the professional integrity of the program and insulating the program from any improper political pressures.

She continues by saying:

The extraordinary impact that Mr. Powell's efforts had then, and the imprimatur they have left on the Legal Service Program—still clearly evident some seven years later—have direct bearing upon the matter presently before your Committee.

She goes on to document in some degree the contribution that Mr. Powell made at the early stages of the implementation of the Legal Services program in OEO, and she points out and specifically, I quote again:

In deciding to respond affirmatively, Lewis Powell knew that the leadership was ahead of "the troops" and yet he decided to take the gamble.

There can be no doubt about the fact that Lewis Powell placed his credibility and leadership on the line with full awareness of the risks and dangers but impelled nonetheless by his own deeply held sense of the profession's public trust.

One concluding remark that I think is particularly important to some of us who must make this judgment ultimately on philosophy is where you draw the line with someone you have worked with, as I have worked with you, and while we do not agree on all issues, I certainly respected the contribution you made and I would just like to read this final quote from this letter in which she says, Mrs. Cahn says:

By way of a final observation I would note that while I support Lewis Powell's nomination—and have limited the scope of my remarks to those facts which I know at first hand—I do not base that support on the fact that Mr. Powell is a supporter of the Legal Services Program. My support is more fundamental because I would expect that while we agree on some things, we would disagree on others. I would not want to rest my support solely on agreement or disagreement on some particular subject.

My support is based upon the fact that I am drawn inescapably to the sense that Lewis Powell is, above all, humane; that he has a capacity to empathize, to respond to the plight of a single human being to a degree that transcends ideologies of fixed positions. And it is that ultimate capacity to respond with humanity to individualized instances of injustice and hurt that is the best and only guarantee

I would take that his conscience and his very soul will wrestle with every case until he can live in peace with a decision that embodies a sense of decency and fair play and common sense.

That is quite a testimonial, I would say, Mr. Powell, and I want to compliment you on the confidence that this lady has in you.

Mr. POWELL. It is far more than any man deserves and I appreciate your reading it.

(The letter referred to follows:)

URBAN LAW INSTITUTE OF ANTIQUITY COLLEGE,  
Washington, D.C., November 3, 1971.

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

DEAR MR. CHAIRMAN: It is a matter of general knowledge and public record that the American Bar Association endorsed the Office of Economic Opportunity legal services program during Lewis F. Powell, Jr.'s tenure as ABA President. There are, however, few who stand in a position to speak on the basis of first hand knowledge of the extensiveness of Mr. Powell's role, the depth of his involvement, or the extent to which he played not only an initiating but also a continuing role both in securing the support of the organized bar and in moving to insure that the OEO Legal Service program remained true to its mission.

My letter is limited to those matters known to me personally in my capacity as the official charged with operational responsibility for bringing the Legal Service Program into being and for representing the OEO through months of intense discussions. These negotiations culminated in the February 8 resolution of the American Bar Association, and subsequently in the public reaffirmation of the understanding on the occasion of the first personal contact between Mr. Shriver and Mr. Powell at the February 17 meeting of the Planning Committee for Legal Services.\* Subsequent to February 17, my husband (who was Sargent Shriver's Special Assistant) and I served as a continuing liaison between the OEO and the organized bar (and Mr. Powell more specifically) in order to insure that those basic understandings were in fact honored in the process of implementation. From August of 1965 up to the present date I have served as a member of the National Advisory Committee of the OEO Legal Services Program. In that capacity, I have had continuing opportunity to observe both Mr. Powell's statesmanship in broadening the organized bar's commitment to legal services and equally the effect of his fierce insistence on preserving the professional integrity of the program and insulating the program from any improper political pressures. The extraordinary impact that Mr. Powell's efforts had then, and the imprimatur they have left on the Legal Service Program—still clearly evident some seven years later—have direct bearing upon the matter presently before your committee.

Today almost 7 years later, it is difficult to communicate the atmosphere of suspicion, caution and outright distrust which surrounded those first exploratory talks. The legal profession was suspicious of the OEO, and OEO was suspicious of the organized bar.

The distance to be bridged could hardly have been cast more symbolically than to ask a white lawyer from the ranks of Southern aristocracy leading the then lily-white AVA and a black woman lawyer representing the "feds" to hammer out a relationship of trust and cooperation.

I approached the negotiations with some misgivings despite direct personal assurances of support from Mr. Powell on January 12 and 22. It was not until the beginning of the 1st week in February of 1965 after Mr. Powell and his staff (Lowell Beck and Bertram Early) initiated daily rounds of consultations and briefings for myself and my staff did I begin to believe that Mr. Powell was prepared to use all the prestige and power of his position as President of the ABA to gain the formal and continuing support of the organized bar to make the goal of the fledgling legal service program—equal access to justice—a reality.

Within OEO, the memory of AMA's resistance to Medicare was still vivid, and negotiations with the bar were *a priori* assumed to be the equivalent of consorting with the enemy. OEO's bias was reinforced by the suspicion and distrust with which the poor looked upon law and the legal profession.

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\*See Attachment I, letter from Sargent Shriver to Jean Camper Cahn, and Attachment II, article by Sargent Shriver, *ABA Journal*, June 1970.)

Lewis Powell had at least as difficult an obstacle to cope with, flanked on one side by the so-called "old line" legal aid agencies that demanded monopoly control of any government funds for legal aid, and on the other side by lawyers fundamentally distrustful of any governmental involvement. Orison Marden, who was later to succeed Powell as President of the ABA, recalled the dilemma in these words in an address at Notre Dame in 1966:

"Yet, when the Office of Economic Opportunity announced its willingness to assist in financing legal services for the poor, many lawyers were skeptical and suspicious. Here are some fairly typical reactions:

"What is big brother up to now?

"Are we going to be 'socialized' by snooping 'Feds' from Washington?

"Will the Federal program help or hurt our legal aid society?

"Will the Federal program compete with the bar, especially with the struggling neighborhood lawyer?"

These and similar questions were the natural concern of many lawyers and bar associations throughout the land.

Such was the situation which confronted the national leadership of our profession in late 1964. Lewis F. Powell of Richmond, Virginia was then President of the American Bar Association. In my opinion, he will go down in history as a great statesman of our profession. Conservative by nature and environment, President Powell saw the opportunities as well as the dangers in the new program.

In deciding to respond affirmatively, Lewis Powell knew that the leadership was ahead of "the troops", and yet he decided to take the gamble.

On February 17 at the Planning Committee meeting in Washington, nine days after the historic resolution, Lewis Powell bluntly told Sargent Shriver and those assembled:

"The success we had at New Orleans in bringing the House of Delegates of the American Bar Association along with the concept of cooperating with the OEO, I think, should not mislead us into thinking that the bar of the United States is prepared for this yet.

"I think the truth is that most of the lawyers know as little about what the OEO is planning to do as I knew two months ago. . . ."

There can be no doubt about the fact that Lewis Powell placed his credibility and leadership on the line, with full awareness of the risks and dangers, but impelled nonetheless by his own deeply held sense of the profession's public trust.

Mr. Powell knew that nominal endorsement was not enough. The organized bar had to support and implement its decision. That support could not be half-hearted or extracted at the cost of bitter and lasting schisms. And this had to be accomplished in nine weeks time.

The events that followed speak for themselves.

The historic endorsement was passed not once but three times: first, by a conference of 60 representatives of concerned ABA committees and sections; second, by unanimous vote of the Board of Governors in an even stronger form; and finally, by unanimous vote of the House of Delegates.

Within the next 24 hours, Sargent Shriver dispatched a telegram of congratulations particularly saluting the bar for its flexibility in holding "no brief for any one solution" and for its "willingness to concentrate on the need, to shape your response to fit the need, and to innovate where needs calls for innovation."

By return mail Lewis Powell thanked Sargent Shriver for the telegram which was received in time to be read to the entire House of Delegates prior to adjournment.

Yet that resolution was only the most visible and symbolic of many actions which Powell felt were needed to give substance to that resolution.

Although Mr. Powell believed that the Canons of Ethics would not inhibit legal service lawyers in providing full service to their client, he agreed to seek a clarification of the matters that troubled legal service lawyers in the then contemplated revision of the Canons. Under the direction of William Gossett the Canons and the Code of Ethical Responsibility has brought clarity to the role of the legal service lawyer.

It was under Mr. Powell's leadership that some eleven odd committees and sections of the ABA dealing with matters relating to legal representation for the poor were reorganized, consolidated and strengthened.

Mr. Powell also played a key role in shaping the National Advisory Committee to the Legal Service Program. On February 16, 1968, the Law and Poverty Planning Committee which was to evolve into the powerful National Advisory

Committee met for the first time in Washington. As Sargent Shriver has stated officially for the record:

"The composition of that committee was the subject of intensive review by both the OEO and the Association. The principles that guided the selection of this initial group also governed the subsequent selection process that determined the composition of the National Advisory Committee."

For the legal Service Program to flourish it was necessary that lawyers of all races work together. Thus, Lewis Powell reaffirmed the American Bar Association's desire for affiliation with the National Bar Association (the association of black lawyers); the National Bar Association responded affirmatively and provision for the NBA's involvement was, of course, made in determining the composition of the Planning Committee and its successor, the National Advisory Committee. Today, because of that breakthrough in establishing a working relationship, the National Bar Association and the American Bar Association have pursued a course of cooperation in many areas.

Sybolically, the Chairmanship of the planning committee meeting on February 16 was shared by Sargent Shriver and Lewis Powell. In the course of that meeting Mr. Powell articulated several cardinal principles which were to become firmly embedded in the official policy of the Legal Service Program of the Office of Economic Opportunity.

1. The poor should receive "across-the-board legal services"; past coverage has been inadequate. Herein lies the genesis of the policy that the poor were entitled to representation in every forum and in every way in which the non-poor now receive legal representation.

2. Indigency standards must be flexible and be shaped locally in response to real need.

3. The new OEO program should not be used in the criminal field to the extent possible in order not to discourage State legislatures from going ahead on their own responsibility. Mr. Powell said:

"To put it differently, I don't want a State legislature to get the idea that the OEO and organized bar will relieve it of responsibility for providing appropriately for the defense of indigents in criminal cases."

4. The program for rendering of legal services to the poor had to maintain the highest standards of professional integrity and that coordination of this program with other services could not be permitted to erode that integrity.

5. A national campaign to educate the profession as to the legal needs of the poor had to be launched. Discussion centered around a national conference—which had been agreed to and was, in fact held. But Mr. Powell, personally, undertook to use the status and prestige of his office and of the ABA nationally to allay the fears, clear up the misunderstandings and win the cooperation and support of county and state bars which, in some sense were violently opposed to the program. In this connection, Mr. Powell relied heavily on moral suasion and the credibility of his position and background. I admit I grew frustrated sometimes at his deference to local sensibilities when it seemed unduly solicitous of obstructionists. Yet his own personal credibility used unsparingly, paid off handsomely in generating a broadly based sentiment of support within the bar for legal services.

6. Subsequently, Powell took a lead role in supporting the proposition that the client community to be served should be represented on the board of directors of local legal service programs while at the same time refusing to accept any inflexible, mechanical formula.

The meeting ended with a resolution that a steering committee would undertake responsibility, both for planning the national conference and for providing guidance in the development of policies and guidelines for legal service grants, a role that was to become a central prerogative.

In short, the cornerstone of the legal services program—in terms of mission, constituency, non-partisan support, shared decision-making by the profession and officials, all these had been articulated and established by Lewis Powell at the outset—not to secure control as an end in itself—but, rather to insure that the highest professional standards obtained and that the professional integrity of the program was preserved against improper pressure.

Yet, even beyond these contributions, Powell was to embark on one other course of action that perhaps in the long run has meant as much to the survival of the Legal Services Program as the intense team effort that culminated in the ABA resolution of February 8. Between the February 16th meeting—and the next meeting of the ABA in August (which marked the end of Lewis Powell's term of office), there was a grave and nearly fatal interregnum in the legal services program.

Policy remained unformulated; conflicting instructions, rumors and draft guidelines circulated; grantmaking ground to a halt—and whatever precarious relationship of trust and good will that had been built so painstakingly was stretched to the breaking point. In fact, there was every sign of a major revolt by a reactionary element within the bar—emerging at the state and local level—which threatened to lead to a total severance of all relationships and withdrawal of endorsement. The bar had made good on all its promises—and more. The federal government was in default. And it took a singular combination of firmness, tact, diplomacy, and political maneuvering to set up a special plenary session to which Sargent Shriver was invited as keynote speaker—with commentary by two moderately critical and well known figures in the bar. Powell was quite appropriately designated as moderator for this session. Once again the negotiations began; but the crux of them was that Powell was once again prepared to put his own prestige on the line and utilize the full weight of his position if Sargent Shriver was prepared to reaffirm unequivocally OEO's commitment to a legal service program consonant with the highest traditions of the profession and to deal with each of the old controversial issues that had flared up. Sargent Shriver did so in a major statement characterized by bluntness, candor, and specificity that was no accident. In the March issue of the 1971 ABA Journal Sargent Shriver recalls that period:

"After February there was a hiatus and lull in communications. During that time misunderstandings arose, and it became important to reaffirm the commitments made earlier by my staff and by me and to spell out publicly what form the relationship of the organized bar would take. In August of 1965 at the annual meeting of the American Bar Association in Miami Beach, I spoke extensively concerning the understanding which the agency had regarding the legal services program generally and its relationship to the organized bar in particular. It was at that time that I publicly announced the formation of the National Advisory Committee:

"We will shortly establish a National Advisory Committee on Law and Poverty to the community action program, a committee which will play a key policy making role. We have extended twenty-one invitations. Among those who have accepted membership on that committee are Lewis Powell, Orison Marden, Edward Kuhn, Theodore Voorhees, John Cummiskey and William McCalpin.

"That group can be just a paper group—a sop thrown out to quiet the bar. But that is not our intention. We mean business. We want—we need—this group to assume a leadership role in determining how we ought to proceed cooperatively, what procedures and internal organization we need and what kinds of guidelines we ought to establish. The bar—and I should add we also have representation from the National Bar Association—has heavy representation (some would charge over heavy representation) on this committee. But we believe in you—and you have more than justified that faith last February. If any one has slacked off or defaulted, it has been us! So I say to you today, it will be your job as well as ours—the job of your representatives and leaders to see to it that that committee is no paper organization but a powerful and vital force."

Once again Mr. Powell energized all his resources to see that an agreement entered into in good faith could be reconstituted. Mr. Powell's willingness to do everything within his power to see that OEO created a National Advisory Committee to serve as the agency's official internal vehicle for consultation was the organized bar and the profession has to my mind been crucial in securing a strong and vital program for rendering legal service to the poor.

As the House Committee report on the 1967 amendments to the Economic Opportunity Act H. Rep. No. 866, 90th Cong. 1st Sess. 24-25 (1967)) indicated expressly, Congress relied upon the National Advisory Committee to serve as guarantor of the maintenance of professional standards and attributed the success of the program in large part to the unique role the National Advisory Committee had played in guiding and policing the program.

As Sargent Shriver commented:

"The factor that to my mind made the NAC so effective was that it was brought into being, shaped and expanded by a process of mutual consultation with the whole spectrum of the organized bar; its composition and its areas of concern were the result of joint deliberations as to the kind of body which could best insure the maintenance of the professional integrity of the program. Once those underlying agreements were reached neither party felt free to tamper with them unilaterally or to break the underlying relationship of good faith and mutuality."

It is typical of Lewis Powell that his role in this entire sequence should have remained so obscure and that he was prepared publicly to accept an invitation to

serve on the National Advisory Committee. That was Lewis Powell's way of assuring that the integrity of the Legal Service Program would be maintained.

But nowhere will you find it recorded that, prior to Sargent Shriver's public reaffirmation in Miami, the summer of 1965 was a long hot summer for Lewis Powell. In this commentary I cannot forbear to mention that I know Mr. Powell to have been the moving figure behind an invitation extended to me by the President of the Junior Bar to address a plenary session. And so far as I have been able to ascertain, I was the first black lawyer, male or female to address a plenary session at the ABA's annual meeting.

Since that time, I have had the pleasure of personal chats with Lewis Powell—and have, in my capacity as Director of the Urban Law Institute referred to him indigent clients who needed a lawyer in Richmond and who received representation from his firm.

Those are, in sum, the facts known to me personally. They reveal Powell's involvement in the launching of Legal Service—the nurturing of it through the most critical ten months—to be far more extensive than has been generally known or assumed.

But for me they say more than that about the man. They are the pretty nearly the sum total of what I know about him. Yet within this context, they permit me to say that this is a man of principle—who when he pledged his word kept it—and who has a peculiar and most tenacious notion that when a government official pledges his word, he too should honor it.

As a black person who has seen many promises made and not kept, it has been all too rare an experience to find a man who not only holds to such a belief—but who is prepared to back that belief with all the resources and stature and skill at his command.

In the context in which I have known him he has come to symbolize the best that the profession has to offer—a man imbued, even driven, by a sense of duty, with a passion for the law as the embodiment of man's ordered quest for dignity. Yet he is a man so curiously shy, so deeply sensitive to the hurt or embarrassment of another, so self-effacing that it is difficult to reconcile the public and the private man—the honors and the acclaim with the gentle, courteous, sensitive spirit that one senses in every conversation, no matter how casual. And it is an unceasing source of wonder to me that so much seems to get done without any sense that the man is ever burdened, hurried, under strain or unable to give you his full and undivided attention.

By way of final observation, I would note that while I support Lewis Powell's nomination—and have limited the scope of my remarks to those facts which I know at first hand—I do not base that support on the fact that Mr. Powell is a supporter of the Legal Services Program. My support is more fundamental—because I would expect that while we agree on some things, we would disagree on others. I would not want to rest my support solely on agreement or disagreement on some particular subject.

My support is based upon the fact that I am drawn inescapably to the sense that Lewis Powell is, above all, humane; that he has a capacity to empathize, to respond to the plight of a single human being to a degree that transcends ideologies or fixed positions. And it is that ultimate capacity to respond with humanity to individualized instances of injustice and hurt that is the best and only guarantee I would take that his conscience and his very soul will wrestle with every case until he can live in peace with a decision that embodies a sense of decency and fair play and common sense. In that court of last resort to which I and my people so frequently must turn as the sole forum in which to petition our government for a redress of grievances, it is that quality of humanity on which we must ultimately pin our hopes in the belief that it is never too much to trust that humanity can be the informing spirit of the law.

Sincerely yours,

JEAN CAMPBELL CAHN, *Director.*

The CHAIRMAN. Senator Scott?

SENATOR SCOTT. Mr. Chairman, I really will not take the time of the committee at any length at all and perhaps for a different reason.

I confess to a certain modesty, Mr. Powell, in attempting to develop any legal knowledge of mine that would even thrust itself in a cross-examination of you, because you are an eminent lawyer with the highest qualifications I have known for many years, and were I to

engage in any attempt at learned discourse it would appear for me to be an unequal colloquy, if not unequal contest, and I know precisely what I am going to do when these hearings are closed.

I will have a statement, as will other Senators.

I commend you on your legal ability, your acumen, your reputation for personal integrity, and your vast knowledge of the law, which has been put to good, compassionate, civic usage, as well as to the pursuit of those occupations which are commonly associated with a good trial lawyer. So I will not take the time of the committee, because by yielding back my time perhaps I can expedite these proceedings and I have already missed the p.m. deadlines and I may have missed the a.m. deadlines, too.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Tunney?

Senator TUNNEY. Mr. Chairman, I have just one last question.

Mr. Powell, I noticed in some of your writings that you addressed yourself to expediting criminal law procedures, and I was wondering if you could tell the committee two things: one, a general question, with perhaps a general answer, on what you feel has to be done to expedite criminal procedures in this country; and, second, more specifically, what you feel that a Supreme Court Justice ought to do to help expedite criminal procedures.

Mr. POWELL. I will comment on your second question first. I know from the addresses which I have heard him deliver, as perhaps you do, Chief Justice Burger puts this subject at the top of his list of necessary reforms in the criminal justice system.

I really do not know to what extent other Justices of the Court would take part in an organized effort led by the Chief Justice, but I would hope I would be on that team, if I am confirmed, to assist him in that because unless we find more effective ways of expediting the criminal justice system, in particular, the entire system could collapse. I think it is that serious.

It is fairly easy to make that sort of generalization. It is not so easy to come up with any answers. Some of the problems are quite intractable, because they are rooted in our Constitution. No one would abandon constitutional rights in the interest of speed, and yet to cite one area in which there must be a better system developed to minimize delays in the ending of criminal causes, I refer to the use of habeas corpus to transfer cases which have gone through the State courts into the Federal system for postconviction review. This was necessary, in my judgment, certainly with respect to most States at a time when criminal procedure and practice in those States had not really caught up with the constitutional safeguards that we are all now familiar with.

The American Bar Foundation has initiated a study—there have been a good many, but none yet has produced completely satisfactory results—an empirical study taking a State or two as examples to try to ascertain exactly what is happening with respect to the flood of habeas corpus proceedings. The criminal justice project of the American Bar Association addressed this problem and concluded that the best answer was to try to make the State processes conform to constitutional requirements, and to have records made that these constitutional requirements were, in fact, met, so that once an accused

person had gone through the State system he would have received his constitutional rights; and, second, there would be a record of it so that there would be no occasion for Federal de novo review and starting the whole chain back through the courts.

If you would move to the area of appellate practice, I think any lawyer who has been in the appellate courts will recognize that much can be done to speed appellate practice, particularly with respect to the requirements for records.

My circuit, the fourth circuit, has been a leader in minimizing the requirements for records. I think a great deal more can be done. I think a great deal more can be done, perhaps, in exercising restraint in the writing of opinions by judges. At the moment I am not addressing myself to the Supreme Court; I am thinking perhaps about all courts and when one looks at the flood of cases that come into one's law library, and the feeling apparently that every judge has to write an opinion at the district court level—of course, he must make findings of the fact and conclusions of law, and sometimes a case requires an opinion—but there are many things in this broad area that can and must be done so that the entire system can be expedited.

SENATOR TUNNEY. Thank you very much, Mr. Powell.

I heard before you came before this committee, after you were nominated by the President, that you were a man of brilliance, compassion, and imagination, and certainly your testimony here today has demonstrated those qualities.

Thank you.

MR. POWELL. I thank you very much, sir.

THE CHAIRMAN. You made a very fine witness.

SENATOR HART. I want to ask one question that I did not ask Mr. Powell.

MR. POWELL, in your writings or speeches in the past, have you taken a position on capital punishment?

MR. POWELL. No, sir. I would say this, the Crime Commission did take a position on it in which I concurred in the recommendations.

SENATOR HART. I have been trying to find out what that recommendation of the Commission was ever since it came out.

MR. POWELL. I could find it if I had the volume of the report. I have not looked at it for a long while.

SENATOR HART. Well, thank you. Mr. Chairman, if that question could be addressed for receipt in writing from Mr. Rehnquist, I would appreciate it. I forgot to ask that question: had he spoken or taken a position on capital punishment. Could we address that question to him?

THE CHAIRMAN. Why, of course.

(The following letter was subsequently received from Mr. Rehnquist:)

DEPARTMENT OF JUSTICE,  
Washington, D.C., November 10, 1971.

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

DEAR MR. CHAIRMAN: I understand that during the questioning of Lewis Powell on November 8, Senator Hart asked him whether he had spoken or taken a position on capital punishment. I also understand that Senator Hart requested that, with your acquiescence, I be asked to supply an answer to his question.

A review of my recent speeches and comments, copies of which have been sent to your Committee, indicates that I have not there discussed this subject. Additionally, I cannot recollect that apart from these statements I have ever publicly discussed this question.

In the course of my testimony before your Committee last week, Senator Bayh asked if I would object to compiling a list of my former clients for the Committee. Although I do not recall being asked formally by the Committee to forward such a list, the following are representative clients of my former firm in Phoenix as listed in the 1969 edition of Martindale-Hubbell (which, as I recall, would have appeared in print in January, 1969): American District Telegraph Co.; American Optical Co.; Butler Homes, Inc.; Casa Blanca Construction Co.; Sherrill & LaFollette; Remington Rand Division of Sperry Rand; Transamerica Title Insurance Co.; Arizona Testing Laboratories; National Insurance Underwriters; Town of Paradise Valley; D. N. & E. Walter Co.; Blake, Moffitt & Towne; Cactus Beverage Distributing Company of Arizona; True Childs Distributing Co.; Valley Vendors Corp.; Herb Stevens, Inc., Lincoln-Mercury; Time Realty, Inc.

Sincerely,

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

Mr. POWELL. You do not wish any further response from me?

The CHAIRMAN. Sir?

Mr. POWELL. I was asking Senator Hart whether he wished any response from me.

Senator HART. No. Thank you, Mr. Powell.

The CHAIRMAN. You are excused.

Thank you, sir.

Mr. POWELL. I wish to thank the chairman and the members of the committee for this very generous opportunity to appear before you in what to me, at least, has been a very stimulating discussion. I thought all of the questions were relevant and fair, and it has been a great pleasure and privilege to be here.

The CHAIRMAN. Thank you, sir.

Now, the committee will recess until 10:30 tomorrow morning. We are going to meet in the Judiciary Committee hearing room. We are going to hear the witnesses against the two nominees and also some other witnesses for them.

Senator SCOTT. Is that room 2300, Mr. Chairman, for the benefit—is that the room number?

The CHAIRMAN. It is the Judiciary Committee hearing room.

Senator SCOTT. Room 2228. I just say it for the benefit of those who might wish to be there.

(Whereupon, at 4:20 p.m., the committee adjourned to reconvene Tuesday, November 9, 1971, at 10:30 a.m.)

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

TUESDAY, NOVEMBER 9, 1971

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

The committee met, pursuant to recess, at 10:05 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Hart, Kennedy, Bayh, Burdick, Tunney, Hruska, Fong, Cook, Mathias and Gurney.

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

The CHAIRMAN. Congressman Corman. Is he present?

[No response.]

The CHAIRMAN. Congressman Conyers. Is he present?

[No response.]

The CHAIRMAN. Mr. Biemiller. Is Mr. Biemiller present?

Mr. MITCHELL. He said he would be here, Mr. Chairman.

The CHAIRMAN. Do you want to testify? Come on.

Mr. MITCHELL. If it is all right with you. [Laughter.]

Senator Hart (presiding). The committee will be in order.

Our first witnesses, and I am delighted to welcome them, are two men who have appeared on a number of occasions in connection with judicial nominations and always have made a constructive—and to many of us persuasive—contribution.

I would suggest that they proceed in such order as seems most appropriate for them.

Mr. Rauh and Mr. Mitchell, speaking for the civil rights leadership.

### TESTIMONY OF CLARENCE MITCHELL, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND LEGISLATIVE CHAIRMAN, LEADERSHIP CONFERENCE ON CIVIL RIGHTS; ACCOMPANIED BY JOSEPH L. RAUH, JR., COUNSEL

Mr. MITCHELL. Thank you very much, Senator Hart and other members of the committee who are here.

I am Clarence Mitchell, director of the Washington Bureau of the National Association for the Advancement of Colored People, and legislative chairman of the Leadership Conference on Civil Rights. I am accompanied by Mr. Joseph L. Rauh, Jr., who is the counsel for the Leadership Conference on Civil Rights.

We appear in opposition to the nomination of Mr. William L. Rehnquist to the U.S. Supreme Court.

In making this appearance, we are speaking for the Leadership Conference, and that is an organization of 126 national groups, some in the labor groups, some in religious groups and some in other persuasions who meet together for the purpose of trying to promote civil rights; and we were authorized to speak for the organization.

In addition, I am speaking for the National Association for the Advancement of Colored People, and Mr. Rauh is also speaking for the Americans for Democratic Action.

We are not taking any position on the nomination of Mr. Lewis F. Powell.

The Arizona-Southwest Area of NAACP Conference passed a resolution opposing the nomination of Mr. Rehnquist. The sense of this resolution is set forth in the following four points:

(1) In 1964 Mr. Rehnquist appeared as a witness in opposition to a public accommodations ordinance being considered by the Phoenix City Council. His written statement said:

The ordinance summarily does away with the historic rights of the owner of a drug store, lunchcounter or theater to choose his own customers. By a wave of the legislative hand, hitherto private businesses are made public facilities which are open to all persons regardless of the owner's wishes. It is, I believe, impossible to justify the sacrifice or even a portion of our historic individual freedom for a purpose such as this.

The second point in the NAACP Bill of Particulars is: In 1964, Mr. Rehnquist personally denounced persons who had gathered at the Arizona State Capitol in the interest of civil rights legislation.

The third point is when school officials in Phoenix made proposals to end de facto segregation in the high schools, an Arizona newspaper published a letter from Mr. Rehnquist opposing the move. His letter said that those seeking to end de facto segregation in the public schools, and I quote:

Assert a claim for special privileges for this minority, the members of which in many cases do not even want the privileges which the social theorists urge be extended to them.

The fourth point is that during some of the elections in Phoenix, Mr. Rehnquist was a part of a group of citizens who engaged in campaigns to challenge voters and thereby prevent them from casting their ballots. Most of such voters were the poor and black citizens of Phoenix.

In matters of this kind, it is important to look at the total picture of a nominee's past record.

During the historic fight against another nominee who was accused of having racist views, there were many who said that he had repudiated such philosophies. However, a distinguished member of this committee made what to me was an unforgettable speech on the floor of the United States Senate in which he said:

Do we wish to put on the Court a man to whom we must say to 20 million black Americans. "Take our word for it; he really does not believe it anymore."

In that instance, the Senate rejected the nominee. Later activities of that nominee in a political campaign revealed that the fears of Negroes about his racial views were justified. He had not really changed.

Although I had not intended to do this, I think the world should know that the distinguished Senator to whom I have reference is the Honorable Philip Hart of the State of Michigan and I feel eternally grateful to you, Senator, for standing up at the important time and making a declaration which, in my judgment, gave heart to millions of people who love you for what you did.

As we look at the record of Mr. Rehnquist, there is a consistent pattern of opposition to the rights of black Americans in areas of public accommodations, freedom of expression, education and voting. These, taken singly or together, raise grave doubts about whether he could mete out to the black America equal justice under the law.

The first point of the NAACP resolution deals with Mr. Rehnquist's opposition to a public accommodations ordinance. It must be remembered that he came forward as a volunteer and indicated that he was speaking for himself. It is also somewhat startling to note that his opposition to the ordinance was not based solely on the fact that it would give Negroes the opportunity to eat at luncheounters.

The plain language of his testimony states that drug store owners have historic rights "to choose their customers." By including drug stores, it would appear that Mr. Rehnquist did not stop simply at denying Negroes the right to eat at lunch counters or to buy a cup of coffee. Apparently he believed that even the purchase of an aspirin in a drug store depended on the pleasure of the owner; and I might say I have never, in all the years I have been traveling around the country, encountered in even the worst parts of the country, where prejudice is rampant, a drug store owner who wouldn't want to sell somebody an aspirin because he was not white. But Mr. Rehnquist apparently feels that you don't have to sell it to them even if they have got a king-sized headache if they are black.

Mr. Rehnquist apparently was the only person who testified against that ordinance. It is interesting to note that the ordinance passed which means he was part of a very small minority of those opposing it, possibly a minority of one.

I have talked by long distance with State Senator Cloves Campbell of the 28th Senatorial District in the State of Arizona. Mr. Campbell advised me that he had talked with Mr. Rehnquist about his opposition to the public accommodations ordinance. Senator Campbell said, and I quote, "After the meeting I approached Mr. Rehnquist and asked him why he was opposed to the public accommodations ordinance. He replied, 'I am opposed to all civil rights laws.' "

I offer for the record an affidavit from Senator Campbell on his official State Senate stationery dated November 4, 1971, in which he asserts that Mr. Rehnquist made that statement. Senator Campbell's affidavit was notarized on November 4, 1971, in the City of Phoenix, Maricopa County, Arizona. With your permission, Mr. Chairman, I would like to offer it.

**Senator HART.** Without objection, it will be received.

**Senator BAYH.** Mr. Chairman, could I ask our witness if he would yield long enough to provide one initial bit of pertinent information?

Have you documented the date of the statement to the State senator? What was the date of Mr. Rehnquist's statement to the State senator?

**Mr. MITCHELL.** The Rehnquist statement was in 1964, and the reason I did not mention the date, Senator Bayh, is because it is

my understanding that his letter or rather his statement has been submitted to the committee with the specific date on it, that is, June 15, 1964, at a public hearing before the city council in the city of Phoenix. It is interesting—you gentlemen who were Members of the Senate at that time will remember—that this was the very year when the U.S. Senate, speaking for all the people of this country, was going on record overwhelmingly in favor of public accommodation.

We were casting aside our geographic differences and traditions and mores and trying to come to the relief of American citizens who wanted to buy a ham sandwich and a cup of coffee at a place of public accommodation.

So Mr. Rehnquist was out of step with the Senate.

Senator BAYH. I thought that should be dated and if we could, Mr. Chairman, I think it would be appropriate to have that statement. Perhaps it has been put in the record, but it it hasn't, I believe it should be made a part of the record.

Senator HART. I anticipate that statement will be offered for the record by Mr. Rauh. He signals that he will.

Mr. MITCHELL. Mr. Rauh says that he will offer it.

The second point of the NAACP resolution asserts that Mr. Rehnquist attempted to oppose those persons who staged a civil rights march to the capital of the State of Arizona in the spring of 1964.

I have talked with some of the participants in that march and they insist that Mr. Rehnquist was abusive in his approach to them. Here, again, Mr. Rehnquist seemed to be acting as a volunteer. I invite the committee's attention to the fact that in all of these appearances and activities of Mr. Rehnquist he seems to be more or less of a self-propelled segregationist; he doesn't attempt to speak for any organization but apparently he is so deeply moved in his desire to deny people their rights that he volunteers to come forward and interfere with those who are in need of redress.

Unfortunately, some of those who were present on that occasion are unwilling to come forward to describe what happened. I am advised that they believe their appearances would subject them to economic reprisals. However, I do have the statement of one individual who was present. He is Mr. Moses Campbell, Jr., who is not related to Senator Campbell. Mr. Campbell lives at 2741 West Adams Street in Phoenix, Ariz., and I have put in here his telephone area code so he is a real flesh-and-blood person.

He sent a letter dated November 3, 1971, on the official stationery of the Phoenix branch of the National Association for the Advancement of Colored People. He states that he was present with the branch's president at that time, the Rev. George Brooks, and Mr. William Rehnquist engaged in what Mr. Campbell describes as "bitter recriminations concerning the group's purpose for marching, and intimating that the march was communistically inspired."

Mr. Campbell further asserts that Mr. Rehnquist's conduct "brought irreparable harm and insult to the blacks of Phoenix, Ariz." and for that reason he asks to be listed as one of those opposing the nomination. And with your permission, Mr. Chairman, I would like to offer Mr. Moses Campbell's letter for the record.

Senator HART. Without objection, it will be received.

(Letter from Moses Campbell dated Nov. 3, 1971, follows:)

NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE,  
*Phoenix, Ariz. November 3, 1971.*

I, Moses Campbell, do hereby attest to the following:

II. That I was a member of the Civil Rights march on the Capitol Building of the State of Arizona in the Spring of 1964.

II. That I was present at the time our Past President, Rev. George Brooks, of the NAACP and Mr. William Rehnquist exchanged bitter recriminations concerning the groups purpose for marching, intimating that the march was communistic inspired.

III. I believe that owing to the conduct of Mr. Rehnquist in his desire to disrupt and intimidate the Blacks in their peaceful presentation of what they considered just grievances to the State of Arizona's officials, that he has brought irreparable harm and insult to the Blacks of Phoenix, Arizona, and should not be considered for the lofty position as United States Supreme Court Justice.

(Signed) MOSES CAMPBELL.

Mr. MITCHELL. On the matter of school desegregation, which is point three of the NAACP's resolutions, I would like to call the committee's attention to the intemperate language used by Mr. Rehnquist in his published letter. Here again he was acting on his own initiative as a private citizen. I think most of the members of this committee who heard the rhetoric associated with these matters know that it is customary for those who attack efforts to achieve interracial justice in our country to brand the advocates of brotherhood as starry-eyed dreamers, bleeding hearts and social theorists. This is the rhetoric that has led to confrontations between whites and blacks in America. This is the rhetoric which has encouraged public officials to station themselves in school doorways to prevent the entrance of black children. This is the kind of appeal to emotions that has caused burning of buses in Pontiac, Mich.

In our country, there is room enough for all kinds of views and, fortunately, no one would deny Mr. Rehnquist the right to say whatever he believes, either as a representative of a group of citizens or as an individual. However, we ask this question: Is a man who believes that honest attempts to desegregate public schools are the works of social theorists worthy of sitting as an impartial justice on the U.S. Supreme Court? We believe that no black man and perhaps very few members of any other minority group could believe that Mr. Rehnquist would give fair and impartial consideration to any legal question involving race that would come before him as a Justice.

The fourth point of the NAACP's resolution sounds like an echo from the year of 1957. For the convenience of the members of the Senate, I offer a page from the record of the subcommittee, or hearings of the Subcommittee on Constitutional Rights in 1957. That page, 238, describes how the white citizens of Ouachita Parish, La., organized for the purpose of denying Negroes the right to vote even though they were already registered.

These citizens succeeded in eliminating more than 3,300 Negro voters from the rolls in violation of the laws of Louisiana as well as those of the United States.

This information was presented to the subcommittee during the administration of President Eisenhower. It was gathered by a distinguished lawyer, Mr. Warren Olney III, who was then Assistant

Attorney General in charge of the Criminal Division of the U.S. Department of Justice.

As I said, for the convenience of the members of the committee, I just lifted that page out of a committee hearings, and with your permission, Mr. Chairman, I will offer it. I assume you have the hearings, but just for the convenience of the members I submit it.

Senator HART. Without objection, it will be received in the record.

(Page 238, 1957 Civil Rights hearings follows:)

#### CIVIL RIGHTS—1957

**HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-FIFTH CONGRESS, FIRST SESSION ON S. 83, AN AMENDMENT TO S. 83, S. 427, S. 428, S. 429, S. 468, S. 500, S. 501, S. 502, S. 504, S. 505, S. 508, S. 509, S. 510, S. CON. RES. 5**

**PROPOSALS TO SECURE, PROTECT AND STRENGTHEN CIVIL RIGHTS OF PERSONS UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES**

FEBRUARY 14, 15, 16, 18, 19, 20, 21, 26, 27, 28, MARCH 1, 4, AND 5, 1957

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On January 17, 1956, there were approximately 4,000 persons of the Negro race whose names appeared on the list of registered voters of Ouachita Parish as residing within wards 3 and 10 in that parish. It would appear that these persons were and are citizens of the United States, possessing all of the qualifications requisite for electors under the Constitution and the laws of Louisiana and of the United States, because a system of permanent voter registration, provided for under the laws of the State of Louisiana, was in effect in Ouachita Parish, and all of these persons had registered and qualified for permanent registration and had been allowed to vote in previous elections.

As of October 4, 1956, the names of only 694 Negro voters remained on the rolls of registered voters for wards 3 and 10 of Ouachita Parish, the names of more than 3,300 Negro voters having been eliminated from the rolls in violation of the laws of Louisiana, as well as those of the United States. This mass disfranchisement was accomplished by a scheme and device to which a number of white citizens and certain local officials were parties.

The scheme appears to have taken form as early as January of 1956, and its principal purpose was to eliminate from the list of registered voters of Ouachita Parish the names of all persons of the Negro race residing in wards 3 and 10, and thereby deprive them of their right to vote.

On March 2, 1956, a nonprofit corporation, organized under the laws of the State of Louisiana, and called the Citizens Council of Ouachita Parish, La., was incorporated. Among its ostensible objects and purposes, as stated in its articles of incorporation, are the following:

"1. To protect and preserve by all legal means, our historical southern social institutions in all their aspects;

"2. To marshal the economic resources of the good citizens of this community and surrounding area in combating any attack upon these social institutions.

Notwithstanding these stated objects, subsequent developments have demonstrated that one of the principal objects and purposes of the Ouachita Citizens Council was and is to prevent and discourage persons of the Negro race from participating in elections in the parish.

The names of the officers, directors, and members of the Ouachita Citizens Council will be made available to the subcommittee if the subcommittee wishes them.

During the month of March 1956, the officers and members of the citizens council began to carry out their plan to eliminate the names of Negro persons from the roll of registered voters. This scheme consisted of filing purported affidavits with the registrar of voters challenging the qualifications of all voters of the Negro race within wards 3 and 10, and of inducing the registrar to send notices to the Negro voters requiring them within 10 days to appear and prove their qualifications by affidavit of 3 witnesses. The scheme further consisted of inducing the registrar to refuse to accept as witnesses bona fide registered voters of the parish who resided in a precinct other than the precinct of the challenged

voters, or who had themselves been challenged or who had already acted as witnesses for any other challenged voter. Of course it was a part of this scheme that none of the registered Negro voters would be able to meet these illegal requirements and upon the basis of such pretext, that the registrar would strike their names from the roll of registered voters.

These people in the Ouachita Citizens Council appear to have succeeded either by persuasion or intimidation in procuring the help and cooperation of the election officials of Ouachita Parish.

In April and May of 1956, the registrar and her deputy permitted the officers and members of the citizens council to use the facilities of the office of the registrar to examine the record and to prepare therefrom lists of registered voters of the Negro race. The citizens council was given free run of the registrar's office and was permitted to occupy the office and work therein during periods when the office of the registrar was not officially open to the public.

Between April 16, 1956, and May 22, 1956, the members and officers of the Ouachita Citizens Council filed with the registrar approximately 3,420 documents purporting to be affidavits, but which were not sworn to either before the registrar or deputy registrar of Ouachita Parish as required by law. In each purported affidavit it was alleged that the purported affiant had examined the record on file with the registrar of voters of Ouachita Parish, that the registrant named therein was believed to be illegally registered, and that the purported affidavit was made for the purpose of challenging the right of the registrant to remain on the roll of registered voters, and to vote in any elections. These purported affidavits were not prepared and filed in good faith, but were prepared and filed \* \* \*

\* \* \* \* \*

Mr. MITCHELL. At that time the country was indignant because of such attempts to deny Negroes the right to vote. This information gathered by Mr. Olney was one of the persuasive factors that resulted in the enactment of the 1957 Voting Rights Act. It is ironic that now, 14 years later, the White House is offering for consideration as a Justice of the U.S. Supreme Court a man who is charged with using the same tactics to deprive Negroes of the right to vote in the State of Arizona.

As I understand it, Mr. Rehnquist in his appearance before the committee indicated that he was a part of this operation, and I have from one of our witnesses down in the State of Arizona a statement about how this worked. It didn't come in until last night by telephone conversation and therefore it appears at the end of my testimony. But this was given to me on November 8, 1971, by Mr. Leonard Walker, of 4841 South 22d Street, Phoenix, Ariz., by long distance.

He said the practice of challenging voters had caused a large number of complaints in 1960, 1964, and 1968; and it is my recollection that Mr. Rehnquist testified that he was identified with that effort during all of those years.

Mr. Walker said that to his knowledge the challengers were concentrated in the precincts with heavy black registrations. According to his statement, two white persons would station themselves between the line of voters and at a table where voting numbers were issued. The whites would then ask whether the blacks could read parts of the Arizona constitution and whether they had "reregistered." Mr. Walker said that the challengers seemed to pick on the older voters who were not likely to make a fuss. "In other words, they didn't just go out and try to knock the Negroes off the books but they took the weak and the humble who probably wouldn't physically defend themselves for the purpose of trying to knock them off of the books."

The whites would then ask whether the blacks could read parts of the constitution, as I said. Mr. Walker said that in 1968 he ran for the legislature in district 28. He said that he observed two white

men who later said that they were lawyers challenging a number of voters. After some discussion with him, these men left. Mr. Walker said he thought he had better check other precincts. He went to the Bethune precinct which he said was predominantly black. There he found two white men challenging voters, the same two who had been at the other precinct. He said he lost the election by less than 100 votes.

Later he told me a number of persons who had promised him support said that they had tried to vote for him but were challenged and prevented from voting. He said to the best of his knowledge those prevented from voting were eligible to vote.

I call to the committee's attention the fact that while Mr. Rehnquist was testifying he did state that he was supposed to be a settler of disputes in these polling places in 1968, and I would like to ask the question: Here is evidence by an individual who was directly involved over an extended persistent and unfair attempt to interfere with the right to vote. Where was Mr. Rehnquist the arbiter in that exchange of difficulties between the people in that area, and did he approve of what was going on in those precincts?

The NAACP in Arizona alleges that Mr. Rehnquist was active in attempts to deprive Negroes of the right to vote over a period of several years, beginning as early as 1958. It is stated that in one election Mr. Rehnquist appeared at what was called the Granada precinct and engaged in extensive questioning of would-be voters. The Arizona NAACP advises that the questions raised by Mr. Rehnquist himself had to do with the provisions of the Arizona constitution. This is strikingly similar to the kind of questions raised by the citizens of Ouachita Parish, La., in 1957, and indeed by those who have sought to deny Negroes the right to vote through the years.

The NAACP states further that after Mr. Rehnquist had questioned a number of would-be voters, officials at the polling place, which was the Granada precinct, insisted that he leave because he was creating considerable delays in voting. The association further states that Mr. Rehnquist then left the Granada precinct and used the same tactics in a precinct known as the Bethune precinct, which I have referred to earlier.

I have carefully considered the testimony of Mr. Rehnquist which appears on page 148 [of the typewritten transcript] of the hearing record in these hearings. It is interesting to note that he has a clear recollection of his activities which he states were jointly carried on with a Democrat. He has a clear recollection of suspicious or so-called tombstone voting, but he does not seem to have a clear recollection of the circumstances surrounding his personal activity in the years preceding 1968.

Because of the seriousness of this charge, I have again called our officials in Arizona after considering the substance of Mr. Rehnquist's testimony before this committee. Our officials insist that a witness is available who can verify that Mr. Rehnquist was present and did personally interrogate voters at the Granada polling place. I have the name of that individual but I am advised that we are confronted with the usual problem of the poor and humble versus the powerful. The witness is unwilling to come forward and to state to us what he observed.

However, it is well known that the reluctance of witnesses to testify in circumstances of this kind does not release the Government of the United States from its duty to ascertain the facts in other ways. I might say, gentlemen of the committee, if we had been required as a condition of proving that there was discrimination against would-be voters in the South, I am afraid in many instances we would not have been able to prove it because all too often the witnesses were so intimidated that they didn't appear; and in many cases some of them were killed before they had an opportunity to testify.

Accordingly, we recommend that Mr. Rehnquist be recalled and asked these specific questions of whether he was at the Granada and Bethune precincts prior to 1968 and whether he personally asked voters questions about their knowledge of the Arizona constitution or any other matter bearing on their fitness to vote in that State.

The Bethune precinct is mostly black, as I have said before. We respectfully urge that this committee take into consideration the fact that Mr. Rehnquist offers a general assertion that he was involved in disputes over voting qualifications because of reports of tombstone voting. He also states that he was working in company with a member of the Democratic Party. We urge the committee to ask him to name this Democrat and we respectfully urge that this person be questioned also for his version of what was happening.

I happen to know that the individual to whom Mr. Rehnquist referred is now a judge in the State courts of Arizona, and if Mr. Rehnquist is going to make a full disclosure of what happened, it would seem to me he ought to tell this committee the name of that man; and it seems to me it would be wise to have that gentleman come before the committee to give his version because, as I understand it, his version is different from the version that Mr. Rehnquist offers.

According to our NAACP officials in Arizona, a gentleman who is now a U.S. judge in Arizona was instrumental in seeking an FBI investigation of interference with voting during that voting. As I understand it, that is U.S. District Judge Miche. I have not met the gentleman but I understand that he did ask for an FBI investigation because what was going on was so outrageous at that time.

Senator BAYH. What is the name?

Senator HART. Did you say he was a judge from Michigan?

Mr. MITCHELL. No, his name is M-i-c-h-e, but I think it was pronounced Miche to me. In any event, I got this from our Arizona people and he is a U.S. district judge.

Senator BAYH. In Arizona?

Mr. MITCHELL. In Arizona. As I understand it, during the period when all of this interference with voting was going on, he asked for an FBI investigation of it. We respectfully urge that this committee ask the FBI whether it made an investigation and, if so, what were the findings of that investigation.

During the long and dramatic struggle of black citizens for rights and equality of treatment, there have been many frustrations and fears. However, if there has been any fixed star by which they could set a course that would take them to their goal, it has been up until now, and still is, the U.S. Supreme Court.

The Rehnquist nomination raises a grim warning: Through that nomination the foot of racism is placed in the door of the temple of

justice. The Rehnquist record tells us that the hand of the oppressor will be given a chance to write opinions that will seek to turn back the clock of progress. We cannot believe that this is fair to our country in a time when we are trying to build bridges of friendship to other nations of the world.

We hope that the nomination will be rejected because it is an insult to Americans who support civil rights. But if that is not sufficient reason to vote against it, we hope that it will be opposed because this nomination will follow the President and our representatives wherever they go in the civilized world. No matter what they may say about our intentions, the Rehnquist record will speak louder than anything that they can say, and it will be a refutation of any fair words and promises and hopes that may be held out by the President or any other person representing our Government in relationship with other people of the world.

That concludes my statement, Mr. Chairman.

Mr. RAUH. Mr. Chairman.

Senator HART. Mr. RAUH.

Mr. RAUH. May it please the committee, Mr. Mitchell's brilliant testimony just given makes anything I can say an anticlimax, but, nevertheless, there is a volume of things to be said.

I appear this morning, as Mr. Mitchell said, on behalf of and as general counsel of the Leadership Conference on Civil Rights. I also appear on behalf of Americans for Democratic Action.

As Mr. Mitchell has made clear, we strongly oppose the nomination of Mr. Rehnquist. We do not oppose nominations lightly. Although we disagree with Chief Justice Burger on many things, we did not oppose his nomination. Although we disagree with Mr. Justice Blackmun on many things, we did not oppose his nomination. Although we disagree with Mr. Powell on many things, we have not asked to testify against his nomination.

Before discussing our reasons for opposing Mr. Rehnquist, I should like to take up two preliminary matters to put our opposition in its proper setting.

The first preliminary matter is the standard for Senate review of a Supreme Court nominee. The Constitution provides:

The President shall nominate, and by and with the advice and consent of the Senate, shall appoint judges of the Supreme Court.

The Senate is not a rubber stamp on appointments. President Nixon's letter to Senator Saxbe during the Carswell debate was in error in so suggesting. "Advice" means something more than simply saying yes, and that advice is more important here than on any other type of nomination. What you do on a Supreme Court nomination is vital, not only because of the importance of the position but also because of the length of time that the person serves. The man whom we oppose today will be on the Court to do his damage to our children and our grandchildren.

Charles L. Black, Jr., the Henry R. Luce Professor of Jurisprudence at Yale Law School, put it best in the March 1970 Yale Law Journal. He concluded a brilliant analysis of the precedents with these words:

There is no just reason at all for a senator's not voting in regard to confirmation of a Supreme Court nominee on the basis of a full and unrestricted review not embarrassed by and presumption of the nominee's fitness for the office. In a world

that knows a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the senator thinks will make a judge whose service on the bench will hurt the country, then the senator can do right only by treating this judgment of his unencumbered by the deference to the President as a satisfactory basis in itself for a negative vote.

Whether the Chair would like the Yale Law Journal article in the record is a matter entirely for his decision. I am not asking to have it put in the record. I don't know whether you care to have these things introduced at this point, Mr. Chairman.

**Senator HART.** If there is no objection, let it be printed.

**Mr. RAUH.** Thank you, sir.

(The Yale Law Journal article follows:)

[From The Yale Law Journal, Volume 79, Number 4, March 1970]

#### A NOTE ON SENATORIAL CONSIDERATION OF SUPREME COURT NOMINEES

(By Charles L. Black, Jr.)

If a President should desire, and if chance should give him the opportunity, to change entirely the character of the Supreme Court, shaping it after his own political image, nothing would stand in his way except the United States Senate. Few constitutional questions are then of more moment than the question whether a Senator properly may, or even at some times in duty must, vote against a nominee to that Court, on the ground that the nominee holds views which, when transposed into judicial decisions, are likely, in the Senator's judgment, to be very bad for the country. It is the purpose of this piece to open discussion of this question; I shall make no pretense of exhausting that discussion, for my own researches have not proceeded far enough to enable me to make that pretense.<sup>1</sup> I shall, however, open the discussion by taking, strongly, the position that a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by so doing.

I will open with two prefatory observations.

First, it has been a very long time since anybody who thought about the subject to any effect has been possessed by the illusion that a judges' judicial work is not influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great questions of his time. The *loci classici* for this insight, now a platitude, are in such writers as Oliver Wendell Holmes, Jr., Felix Frankfurter, and Learned Hand. It would be hard to find a well-regarded modern thinker who asserted the contrary. The things which I contend are both proper and indispensable for a Senator's consideration, if he would fully discharge his duty, are things that have definitely to do with the performance of the judicial function. The factors I contend are for the Senator's weighing are factors that go into composing the quality of a judge. The contention that they may not properly be considered therefore amounts to the contention that some things which make a good or bad judge may be considered—unless the Senator is to consider nothing—while others may not.

Secondly, a certain paradox would be involved in a negative answer to the question I have put. For those considerations which I contend are proper for the Senator are considerations which certainly, notoriously, play (and always have played) a large, often a crucial, role in the President's choice of his nominee; the assertion, therefore, that they should play no part in the Senator's decision amounts to an assertion that the authority that must "advise and consent" to a

<sup>1</sup> I shall not provide this discussion with an elaborate footnote apparatus. I am sorry to say that I cannot acknowledge debt, for I am writing from my mind; experience teaches that, when one does this, one unconsciously draws on much reading consciously forgotten, for all such obligations unwittingly incurred I give thanks. I have had the benefit of discussion of many of the points made herein with students at the Yale Law School, of whom I specifically recollect Donald Paulding Irwin; I have also had the benefit of talking to him about the piece after it was written.

HARRIS, THE ADVICE AND CONSENT OF THE SENATE (1953) came to my attention and hands after the present piece had gone to the printer. This excellent and full account of the entire function would doubtless have fleshed out my own thoughts, but I see nothing in the book that would make me alter the position taken here, and I hope a single-shot thesis like the present may be useful.

nomination ought not to be guided by considerations which are hugely important in the making of the nomination. One has to ask, "Why"? I am not suggesting now that there can be no answer; I only say that an answer must be given. In the normal case, he who lies under the obligation of making up his mind whether to advise and consent to a step considers the same things that go into the decision whether to take that step. In the normal case, if he does not do this, he is derelict in his duty.

I have called this a constitutional question, and it is that (though it could never reach a court), for it is a question about the allocation of power and responsibility in government. It is natural, then, for American lawyers to look first at the applicable text, for what light it may cast. What expectation seems to be projected by the words, "The President . . . shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . Judges of the Supreme Court . . ."?<sup>2</sup> Do these words suggest a rubber-stamp function, confined to screening out proven malefactors? I submit that they do not. I submit that the word "advice," unless its meaning has radically changed since 1787, makes next to impossible that conclusion.

*Procedurally*, the stage of "advice" has been short-circuited.<sup>3</sup> Nobody could keep the President from doing that, for obvious practical reasons. But why should this procedural short-circuiting have any effect on the *substance* so strongly suggested by the word "advice"? He who merely *consents* might do so perfunctorily, though that is not a necessary but merely a possible gloss. He who *advises* gives or withholds his advice on the basis of *all* the relevant considerations bearing on decision. Am I wrong about this usage? Can you conceive of sound "advice" which is given by an advisor who has deliberately barred himself from considering some of the things that the person he is advising ought to consider, and does consider? If not, then can the Presidents, by their unreviewable short-circuiting of the "advice" stage, magically have caused to vanish the Senate's responsibility to consider what it must surely consider in "advising"? Or is it not more reasonable to say that, in deciding upon his vote at the single point now left him, every Senator ought to consider everything he would have considered if, procedurally, he were "advising"? Does not the word "advice" permanently and inescapably define the *scope* of Senatorial consideration?

It is characteristic of our legal culture both to insist upon the textural reference-point, and to be impatient when much is made of it, so I will leave what I have said about this to the reader's consideration, and pass on to ask whether there is anything else in the Constitution itself which compels or suggests a restriction of Senatorial consideration to a few rather than to all of the factors which go to making a good judge. I say there is not: I do not know what it would be. The President has to concur in legislation, unless his veto be overridden. The Senate has to concur in judicial nominations. That is the simple plan. Nothing anywhere suggests that some duty rests on the Senator to vote for a nomination he thinks unwise, any more than that a duty rests on the President to sign bills he thinks unwise.

Is there something, then, in the whole structure of the situation, something unwritten, that makes it the duty of a Senator to vote for a man whose views on great questions the Senator believes to make him dangerous as a judge? I think there is not, and I believe I can best make my point by a contrast. The Senate has to confirm—advise and consent to—nominations to posts in the executive department, including cabinet posts. Here, I think, there is a clear structural reason for a Senator's letting the President have pretty much anybody he wants, and certainly for letting him have people of any political views that appeal to him. These are his people; they are to work with him. Wisdom and fairness would give him great latitude, if strict constitutional obligation would not.

Just the reverse, just exactly the reverse, is true of the judiciary. The judges are *not* the President's people. God forbid! They are not to work with him or for him. They are to be as independent of him as they are of the Senate, neither more nor less. Insofar as their policy orientations are material—and, as I have said above, these can no longer be regarded as immaterial by anybody who wants to be taken seriously, and are certainly not regarded as immaterial by the President—it is just as important that the Senate think them not harmful as that the President

<sup>2</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>3</sup> Even this short-circuiting is not complete. First, the President's "appointment," *after* the Senate's action, is still voluntary (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 (1803)), so that in a sense the action of the Senate even under settled practice may be looked on as only "advisory" with respect to a step from which the President may still withdraw. Secondly, nominations are occasionally withdrawn after public indications of Senate sentiment (and probable action) which may be thought to amount to "advice."

think them not harmful. If this is not true, why is it not? I confess here I cannot so much as anticipate a rational argument to which to address a rebuttal.

I can, however, offer one further argument tending in the same direction. The Supreme Court is a body of great power. Once on the Court, a Justice wields that power without democratic check. This is as it should be. But is it not wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than in the narrowest manner possible, under the Constitution? He is appointed by the President (when the President is acting at his best) because the President believes his world-view will be good for the country, as reflected in his judicial performance. The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President. Is it not wisdom to take that second opinion in all fullness of scope? If not, again, why not? If so, on the other hand, then the Senator's duty is to vote on his whole estimate of the nominee, for that is what constitutes the taking of the second opinion.

Textual considerations, then, and high-political considerations, seem to me strongly to thrust toward the conclusion that a Senator both may and ought to consider the lifeworld and philosophy of a nominee, before casting his vote. Is there anything definite in history tending in the contrary direction?

In the Constitutional Convention, there was much support for appointment of judges *by the Senate alone*—a mode which was approved on July 21, 1787,<sup>4</sup> and was carried through into the draft of the Committee of Detail.<sup>5</sup> The change to the present mode came on September 4th, in the report of the Committee of Eleven<sup>6</sup> and was agreed to *nem. con.* on September 7th.<sup>7</sup> This last vote must have meant that those who wanted appointment by the Senate alone—and in some cases by the whole Congress—were satisfied that a compromise had been reached, and did not think the legislative part in the process had been reduced to the minimum. The whole process, to me, suggests the very reverse of the idea that the Senate is to have a confined role.

I have not reread every word of *The Federalist* for this opening-gun piece, but I quote here what seem to be the most apposite passages, from Numbers 76 and 77:

"But might not his nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal."

"To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration."

"It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates

<sup>4</sup> 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83 (M. Farrand ed. 1911).

<sup>5</sup> *Id.* at 132, 146, 155, 169, 183.

<sup>6</sup> *Id.* at 498.

<sup>7</sup> *Id.* at 539.

who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure." \*

\* \* \* \* \*

"If it be said they might sometimes gratify him by an acquiescence in a favorite choice, when public motives might dictate a different conduct, I answer, that the instances in which the President could be personally interested in the result, would be too few to admit of his being materially affected by the compliances of the Senate. The *power* which can *originate* the disposition of honors and emoluments, is more likely to attract than to be attracted by the *power* which can merely obstruct their course. *If by influencing the President be meant restraining him, this is precisely what must have been intended* [emphasis supplied]. And it has been shown that the restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that Magistrate. The right of nomination would produce all the good of that of appointment, and would in a great measure avoid its evils." \*

I cannot see, in these passages, any hint that the Senators may not or ought not, in voting on a nominee, take into account anything that they, as serious and public-spirited men, think to bear on the wisdom of the appointment. It is predicted, as a mere *probability*, that Presidential nominations will not often be "overruled." But "special and strong reasons," thus generally characterised, are to suffice. Is a Senator's belief that a nominee holds skewed and purblind views on social justice not a "special and strong reason"? Is it not as "special and strong" as a Senator's belief that an appointment has been made "from a view to popularity"—a reason which by clear implication *is* to suffice as support for a negative vote? If there is anything in *The Federalist Papers* neutralizing this inference, I should be glad to see it.

When we turn to history, the record is, as always, confusing and multifarious. One can say with confidence, however, that a good many nominations have been rejected by the Senate for repugnancy of the nominee's views on great issues, or for mediocrity, or for other reasons no more involving moral turpitude than those. Jeremiah Sullivan Black, an eminent lawyer and judge, seems to have been rejected in 1861 because of his views on slavery and secession.<sup>10</sup> John J. Crittenden was refused confirmation in 1829 on strictly partisan grounds.<sup>11</sup> Wolcott was rejected partly on political grounds, and partly on grounds of competence, in 1811.<sup>12</sup> There is the celebrated Parker case of this century.<sup>13</sup> The perusal of Warren<sup>14</sup> will multiply instances.

I am very far from undertaking any defense of each of these actions severally. I am not writing about the wisdom, on the merits, of particular votes, but of the claim to historical authenticity of the supposed "tradition" of the Senators' refraining from taking into account a very wide range of factors, from which the nominees' views on great public questions cannot, except arbitrarily, be excluded. Such a "tradition," if it exists, exists somewhere else than in recorded history. Of course, all these instances may be dismissed as improprieties, but then one must go on and say why it *is* improper for the Senate, and each Senator, to ask himself, before he votes, *every* question which heavily bears on the issue whether the nominee's sitting on the Court will be good for the country.

I submit that this "tradition" is just a part of the twentieth-century mystique about the Presidency. That mystique, having led us into disastrous undeclared war, is surely due for reexamination. I do not suggest that it can be or should be totally rejected. I am writing here only about a little part of its consequences.

To me there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered

<sup>8</sup> THE FEDERALIST NO. 76, at 494-95 (Modern Library 1937) (Alexander Hamilton).

<sup>9</sup> *Id.* No. 77, at 498 (Alexander Hamilton).

<sup>10</sup> 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 364 (rev. ed. 1926).

<sup>11</sup> *Id.* at 704.

<sup>12</sup> *Id.* at 413.

<sup>13</sup> L. PFEFFER, THIS HONORABLE COURT, A HISTORY OF THE UNITED STATES SUPREME COURT 288 (1955).

<sup>14</sup> C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1926).

by deference to the President's, as a satisfactory basis in itself for a negative vote I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view. Will someone please enlighten me?

**Mr. RAUH.** Mr. Rehnquist apparently had a similar view. Mr. Rehnquist said, writing in the Harvard Law Record in 1959:

Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

Then, again he says:

The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

The President seems to have a similar view, too. Apparently shifting his views from the Saxbe letter, the President went on the air to suggest that he was making his appointments on an ideological basis. Certainly if the President is making his decisions on an ideological bent, the Senate of the United States has a right to do likewise.

Let me make this point: One does not have to go as far as Professor Black's statement to reject Mr. Rehnquist. His lack of compassion for human rights and his lack of fidelity to the Bill of Rights of the Constitution is enough. In other words, while I subscribe to Professor Black's statement, I want to make it clear that Professor Black's statement is not a necessary part of our case. A review of the human rights aspects and the constitutional rights aspects of Mr. Rehnquist's career is adequate, as I shall show, to the rejection of Mr. Rehnquist.

But whether one follows the Black theory or Mr. Rehnquist's earlier theory or the President's present position, or the lack of fidelity to the Constitution, ample grounds appear for rejection of Mr. Rehnquist.

The second preliminary matter I want to present is a question raised by President Nixon when he called Mr. Rehnquist a judicial conservative and said he was appointing him for that reason, not because he was a political conservative.

I respectfully submit that President Nixon had it exactly backward. Mr. Rehnquist, if confirmed, and I hope he will not be, will be a judicial activist, not a conservative, and will use his activism to put over his views as a political conservative.

His judicial activist nature is obvious. Just took at the last page of this same Harvard Law Record piece in 1959. I quote:

The Supreme Court in interpreting the Constitution is the highest authority in the land. Nor is the law of the Constitution just there waiting to be applied. In the same sense that an inferior court may bemoan precedents, there are those who bemoan the absence of stare decisis in Constitutional law, but of its absence there can be no doubt.

And then Mr. Rehnquist goes on to talk about the generalities in the Constitution.

The whole life of Mr. Rehnquist is one of jumping in with his own views. You heard Mr. Mitchell explain how on civil rights he volunteered all of these anti-civil-rights positions. Mr. Rehnquist is an advocate with a sharp cutting edge. He is the antithesis of a judicial passivist—I use that word as the opposite of a judicial activist. I would like to spell it: p-a-s-s-i-v-i-s-t—not a pacifist but a passivist.

If you compare Mr. Justice Frankfurter, who Mr. Rehnquist likes to compare himself to, and Mr. Rehnquist, you get exact opposites.

The point I want to make is that they are totally 180 degrees apart. Mr. Rehnquist would be a judicial activist seeking to put over political conservatism. Justice Frankfurter was a judicial passivist who refused to try to put over his political liberalism. They are opposite both on their judicial philosophy and their political philosophy. The idea—and I say this with deep conviction for I was the first Frankfurter law clerk—the idea that Justice Frankfurter was an activist conservative just distorts history. He was a judicial passivist who was a political liberal. What you have got here is the exact opposite; and Mr. Nixon's speech to the contrary cannot wash away this fact.

While on the subject of political liberalism or conservatism, it should be noted at this point that on an absolute basis one would have to go back to President Harding to find a Supreme Court nominee as far to the right as Mr. Rehnquist; and on a relative basis, considering the times, Mr. Rehnquist is probably farther to the right than any appointee to the Supreme Court this century. I make the distinction between absolute and relative because times have changed. I have the list here of the justices and I can find none since Harding—Mr. Hoover's appointments, for example, actually were quite liberal—I find none since then that were on an absolute basis as conservative or reactionary, if you care to use the word, as Mr. Rehnquist; and on a relative basis to the times, I challenge anyone to find a more conservative nominee in this country.

Leaving the general, and turning to the specific, we oppose Mr. Rehnquist for three separate and adequate reasons:

- (1) Mr. Rehnquist has opposed, rather than supported, minority rights.
- (2) Mr. Rehnquist has opposed, rather than supported, constitutional liberties under the Bill of Rights.

(3) Mr. Rehnquist's testimony before this committee was wholly lacking in candor; and I intend before I am finished to demonstrate to this committee that his testimony was, as I just said, wholly lacking in candor.

Now, I would like to take each of these three grounds separately.

First, Mr. Rehnquist's opposition to civil rights: Mr. Mitchell has spoken of the true facts eloquently and I shall not repeat any of the voting matters on which Mr. Mitchell testified. I do not see how this committee can do anything but ask for an FBI investigation of Mr. Rehnquist's previous activities and seek to get the facts on the voting harassment. I support Mr. Mitchell's position 100 percent, but I certainly don't want to take the committee's time to repeat it.

Second, the Phoenix ordinance on public accommodations: I think it important to set the stage for when this was in issue. That was adverted to in a question to Mr. Mitchell. I would like to go into a little more detail on what the situation was in America on June 15, 1964, when Mr. Rehnquist testified against the Phoenix ordinance. Before doing that, may I offer for the record the statement by William Rehnquist before the city council on June 15, 1964?

Senator HART. It will be received.

(The June 15, 1964, statement follows.)

COMMENTS OF WILLIAM REHNQUIST, MADE JUNE 15, 1964, AT THE PUBLIC  
HEARING ON THE PUBLIC ACCOMMODATIONS ORDINANCE PROPOSED FOR THE  
CITY OF PHOENIX

Mr. Mayor, members of the City Council, my name is William Rehnquist. I reside at 1817 Palmcroft Drive, N.W., here in Phoenix. I am a lawyer without a client tonight. I am speaking only for myself. I would like to speak in opposition to the proposed ordinance because I believe that the values that it sacrifices are greater than the values which it gives. I take it that we are no less the land of the free than we are the land of the equal and so far as the equality of all races concerned insofar as public governmental bodies, treatment by the Federal, State or the Local government is concerned, I think there is no question. But it is the right of anyone, whatever his race, creed or color to have that sort of treatment and I don't think there is any serious complaint that here in Phoenix today such a person doesn't receive that sort of treatment from the governmental bodies. When it comes to the use of private property, that is the corner drugstore or the boarding house or what have you. There, I think we—and I think this ordinance departs from the area where you are talking about governmental action which is contributed to by every tax payer, regardless of race, creed or color. Here you are talking about a man's private property and you are saying, in effect, that people shall have access to that man's property whether he wants it or not. Now there have been other restrictions on private property. There have been zoning ordinances and that sort of thing but I venture to say that there has never been this sort of an assault on the institution where you are told, not what you can build on your property, but who can come on your property. This, to me, is a matter for the most serious consideration and, to me, would lead to the conclusion that the ordinance ought to be rejected.

What has brought people to Phoenix and to Arizona? My guess is no better than anyone else's but I would say it's the idea of the last frontier here in America. Free enterprise and by that I mean not just free enterprise in the sense of the right to make a buck but the right to manage your own affairs as free as possible from the interference of government. And I think, perhaps, the City of Phoenix is not the common denominator in that respect but that is over on one side, stressing free enterprise. I have in mind, the state of the Housing Ordinance, last year, which a great number of people—you know, the opinion makers, leaders of opinions, community leaders were entirely for it. I happen to favor it myself and yet it was rejected by the people because they said, in effect, "we don't want another government agency looking over our shoulder while we are running our business". Now, I think what you are contemplating here is much more formidable interference with property rights than the Housing Ordinance would have been and I think it's a case where the thousands of small business proprietors have a right to have their own rights preserved since after all, it is their business.

Now, I would like to make a second point very briefly, if I might, and that is on the mandate existing to this Council and this again, of course, is a matter of one man's opinion against another. As I recall, the position taken by the preceding Council, of which I know you, Dr. Pisano, Mr. Hyde, Mr. Lindner were all on, was that there would be no compulsory public accommodations ordinance and as I recall, when this Council ran against the Act Ticket, which I would have thought would be the logical ticket, if elected, to bring in an ordinance like this, nothing was said about any sort of change that the voters might guide themselves by in voting in this particular matter. I don't think this Council has any mandate at all for the passing of such a far reaching ordinance and I would submit that if the Council, in its wisdom, does determine that it should be passed, it has a moral obligation to refer it for the vote of the people because something as far reaching as this without any mandate or even discussion on the thing at the time of election for City Council was held is certainly something that should be decided by the people as a whole rather than by their agents, honorable as you ladies and gentlemen are. I have heard the criticism made by the groups which have favored this type of ordinance in other cities that we don't want our rights voted on but of course, it is they who are bringing forward this bill. The question isn't whether or not their rights will be voted upon but instead, it's a question of whether their rights will be voted upon by you ladies and gentlemen who are the agents of the people or the people as a whole.

Thank you very much for your time.

Mr. RAUH. What was the situation on June 15, 1964? The House of Representatives had included a public accommodations section in the civil rights bill it had passed two and a half to one in February, 1964. Five days before the Rehnquist statement, the Senate had adopted cloture on its bill; thus over two-thirds of the Senate had already expressed satisfaction with a public accommodations provision. Even more important the only argument made against public accommodations legislation in the Congress was that it was a violation of the interstate commerce clause and the 14th amendment.

You didn't have that argument in Phoenix. The police power of the city was adequate to cover the ordinance. In other words, the only argument that was ever put up in Congress was not applicable there. Here was a man so far removed from his times that he opposed the unopposable and he was alone in doing so.

Mr. Mitchell quoted Cloves Campbell as hearing Mr. Rehnquist say: "I am against all civil rights laws." But you didn't need Cloves Campbell to tell you that. Any man who would oppose a city ordinance on public accommodations would oppose any civil rights legislation. I challenge him to find any civil rights law that he could be for. If one could be against a city ordinance on this point, it is impossible to find a law such a person could be for. This was the least of interferences, the least drastic, the least everything; and yet he opposed it.

Well, if I may move on, why did he oppose the ordinance—Senator Cook has got my copy, but I think I remember the statement.

Senator COOK. You can have it.

Mr. RAUH. You may keep it, sir; it was based on some indescribably high values he places on private property. That was the value, he said, that comes first—the right of the owner of the property against the right of the individual seeking service. Since I cannot state our position as eloquently as Mr. Mitchell, I will simply adopt what he said on this point.

Now, Mr. Rehnquist testified on June 15, 1964, and his was the only substantial testimony against the ordinance. The next day the city council passed it unanimously and you would think Mr. Rehnquist would have dropped the subject then. Oh, no; he had already testified; he had already been licked unanimously. You have got to say that this is a man of his convictions, as wrong as they are. He writes a letter to the Arizona Republic saying it all over again. No humility. When I talk about a judicial activist, I know whereof I speak—no humility that the entire city council had rejected his position—no humility that the House and Senate had rejected his position on a much more drastic proposition. He writes the same thing all over again to the Arizona Republic on what was wrong with what the Phoenix City Council had done.

In this letter, which I would offer for the record at this point, Mr. Chairman, in this letter he says, and I quote:

The ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers. By a wave of the legislative wand, hitherto private businesses are made public facilities, which are open to all persons regardless of the owner's wishes.

(The letter to the editor of the Arizona Republic referred to follows.)

## PUBLIC ACCOMMODATIONS LAW PASSAGE IS CALLED "MISTAKE"

(By William H. Rehnquist)

Editor, The Arizona Republic: I believe that the passage by the Phoenix City Council of the so-called public accommodations ordinance is a mistake.

The ordinance is called a civil rights law, and yet it is quite different from other laws and court decisions which go under the same name. Few would disagree with the principle that federal, state, or local government should treat all of its citizens equally without regard to race or creed. All of us alike pay taxes to support the operation of government, and all should be treated alike by it, whether in the area of voting rights, use of government-owned facilities, or other activities.

The public accommodations ordinance, however, is directed not at the conduct of government, but at the conduct of the proprietors of privately owned businesses. The ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers. By a wave of the legislative wand, hitherto-private businesses are made public facilities, which are open to all persons regardless of the owner's wishes. Such a drastic restriction on the property owner is quite a different matter from orthodox zoning, health, and safety regulations which are also limitations on property rights.

If in fact discrimination against minorities in Phoenix eating-places were well nigh universal, the question would be posed as to whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all. The arguments of the proponents of such a sacrifice are well known; those of the opponents are less well known.

The founders of this nation thought of it as the "land of the free" just as surely as they thought of it as the "land of the equal." Freedom means the right to manage one's own affairs, not only in a manner that is pleasing to all, but in a manner which may displease the majority. To the extent that we substitute, for the decision of each businessman as to how he shall select his customers, the command of the government telling him how he must select them, we give up a measure of our traditional freedom.

Such would be the issues in a city where discrimination was well nigh universal. But statements to the council during its hearings indicated that only a small minority of public facilities in the city did discriminate. The purpose of the ordinance, then, is not to make available a broad range of integrated facilities, but to whip into line the relatively few recalcitrants. The ordinance, of course, does not and cannot remove the basic indignity to the Negro which results from refusing to serve him; that indignity stems from the state of mind of the proprietor who refuses to treat each potential customer on his own merits.

Abraham Lincoln, speaking of his plan for compensated emancipation, said: "In giving freedom to the slave, we assure freedom to the free—honorable alike in what we give and in what we preserve."

Precisely the reverse may be said of the public accommodations ordinance: Unable to correct the source of the indignity to the Negro, it redresses the situation by placing a separate indignity on the proprietor. It is as barren of accomplishment in what it gives to the Negro as in what it takes from the proprietor. The unwanted customer and the disliked proprietor are left glowering at one another across the lunch counter.

It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this.

**Mr. RAUH.** Mr. Rehnquist calls this a "drastic restriction" on the property owner. He talks about the freedom of the property owner being "sacrificed." He talks about the "indignity" to the proprietor, and ends—

It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this.

What was the purpose? To allow Negroes to enter a drug store.

What does Mr. Rehnquist say in answer when he was asked about this matter? At page 145 [of the typewritten transcript] of the record,

he said that he had changed his mind. When Senator Bayh gave him a chance at page 255 of the record to say whether he changed it before he was appointed to the Supreme Court, he didn't answer.

Senator BAYH. If I might interrupt there, will you recount why he said he changed his mind?

Mr. RAUH. Yes, Senator Bayh. He said two things: First, the ordinance had worked. That is a wonderful reason to change one's mind; apparently Negroes were so well behaved that no problem arose when they exercised their rights. Probably they were not rich enough to go to the places anyway. But the issue was one of principle, not whether the ordinance worked.

Then he said a remarkable thing. He said that he hadn't realized that minorities really cared about this. That is one of the strangest statements—that anybody would not realize in 1964 that minorities cared about their rights. One might have said that 25 years earlier. But how could he say he had not known that minorities cared after the NAACP had been fighting for these things since the early 1900's, after Dr. King had dramatized these things, after people had died for these rights—and he said that he didn't know they cared.

Finally, I would respectfully suggest that Mr. Rehnquist should be cast with King Henry IV of France who said, "Paris is worth a mass." On that principle he was apparently prepared to change what he had said before—that he was against all civil rights legislation.

Senator HART. Mr. Rauh, I know you are paraphrasing, but if I am looking at the correct page of the transcript, what Mr. Rehnquist said to Senator Bayh was:

I think the ordinance really worked very well in Phoenix. It was readily accepted and I think I have come to realize since more than I did at the time the strong concern that minorities have for the recognition of these rights.

Mr. RAUH. Thank you, sir; that is the exact language I was referring to. I paraphrased it, I think, accurately, sir.

Senator HART. I don't quarrel with your paraphrase, but I thought it was appropriate that we put it in the exact language, too.

Mr. RAUH. Thank you, sir.

The third point on civil rights is the Arizona legislation.

Mr. Tunney said at page 161 of the transcript, "There was no State legislation?" Mr. Rehnquist said, "Right."

Well, I happen to have the statute here. For anybody who wants to look it up, the State legislation was passed on—in 1964 and signed in 1965; it is in Arizona Revised Statutes Annotated. I cannot understand how Mr. Rehnquist would have suggested that there was no such legislation. All the press reported that he had opposed it. Indeed, the statement that Mr. Mitchell has on the confrontation was at the time the legislation was being passed in the State legislature. Now,—

Senator Cook. Do you have the dates of the Arizona statute as to when it was passed and when it was signed into law?

Mr. RAUH. Adopted by laws 1965, chapter 27, section 3, Senator Cook. What I have here, of course, is the Arizona Revised Statutes, but, as I see here, it says, "Article 1 consisting of sections 41-1401 to 41-1403 added by laws 1965, chapter 27, section 3." It sets up an Arizona Civil Rights Commission and provides an Arizona public accommodations statute and an Arizona voting rights statute.

Senator Cook. 1965, not 1964?

**MR. RAUH.** It is my understanding, sir, it was adopted in 1964 and signed in 1965. It was at the end of the year, sir, is my understanding, but it is easy enough to get it. I can supply it. What I have to do is get the original yearly statute book, rather than the compilation I have.

**SENATOR COOK.** I just was not aware of any State legislature that met through the fall and through Christmas and New Year's into the new year.

**MR. RAUH.** I would like the privilege of getting the exact dates from the statute book, whereas what I have here is the compilation which indicates it was added by laws 1965.

Now, certainly this matter should be cleared up. We have now an affidavit that there was quite an altercation on the steps of the Capitol on this statute which Mr. Rehnquist said didn't ever occur. So that ought to be cleared up.

Fourth, the issue of desegregation. Here again we have a letter to the Arizona Republic, a voluntary intervention against desegregation of de facto school segregation.

To me, the most shocking quote is this:

We are no more dedicated to an "integrated" society than we are to a "segregated" society.

How could a man 13 years after *Brown*—for this letter was written in 1967 and I would like to offer it for the record—

**SENATOR HART.** It will be received.

(The letter referred to follows.)

#### 'DE FACTO' SCHOOLS SEEN SERVING WELL

(By William H. REHNQUIST)

The combined effect of Harold Cousland's series of articles decrying "de facto segregation" in Phoenix schools, and The Republic's account of Superintendent Seymour's "integration program" for Phoenix high schools, is distressing to me.

As Mr. Cousland states in his concluding article, "whether school board members take these steps is up to them, and the people who elect them." My own guess is that the great majority of our citizens are well satisfied with the traditional neighborhood school system, and would not care to see it tinkered with at the behest of the authors of a report made to the federal Civil Rights Commission.

My further guess is that a similar majority would prefer to see Superintendent Seymour confine his activities to the carrying out of policy made by the Phoenix Union High School board, rather than taking the bit in his own teeth.

Mr. Seymour declares that we "are and must be concerned with achieving an integrated society." Once more, it would seem more appropriate for any such broad declarations to come from policy-making bodies who are directly responsible to the electorate, rather than from an appointed administrator. But I think many would take issue with his statement on the merits, and would feel that we are no more dedicated to an "integrated" society than we are to a "segregated" society; that we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.

The neighborhood school concept, which has served us well for countless years, is quite consistent with this principle. Those who would abandon it concern themselves not with the great majority, for whom it has worked very well, but with a small majority for whom they claim it has not worked well. They assert a claim for special privileges for this minority, the members of which in many cases may not even want the privileges which the social theorists urge be extended to them.

The schools' job is to educate children. They should not be saddled with a task of fostering social change which may well lessen their ability to perform their primary job. The voters of Phoenix will do well to take a long second look at the sort of proposals urged by Messrs. Cousland and Seymour.

Mr. RAUH. How could a man 13 years after *Brown* say, "we are no more dedicated to an integrated society than we are to a segregated society"? But worse yet is what he tried to do in this chamber when he was asked about this matter.

When asked about that subject, he said he was against busing. That is on transcript page 146. Of course, he would jump on "busing." Busing is not the most popular item in America today, but that isn't the point.

There are many ways to deal with de facto segregation in the schools. Busing is just one of them. Mr. Rehnquist was against each and every method of dealing with de facto segregation. In this letter, which I have offered for the record, Mr. Rehnquist says:

My own guess is that the majority of our citizens are well satisfied with the traditional neighborhood school system, and would not care to see it tinkered with at the behest of the authors of a report made to the Federal Civil Rights Commission.

I have that report here; it has dozens of methods to deal with de facto segregation. Busing is only one of them.

The truth of the matter is that Mr. Rehnquist wasn't opposed to just one means of obtaining desegregation. He was opposed to the goal of desegregation. That is the important point about the quote that I read; not that he was opposing a particular means to obtain desegregation, but that he was opposing the goal of desegregation and his sentence can't be read any other way.

I think it was unfair to this committee for him to try to get away with saying that all he was opposing in this letter was busing. He opposed every means to that end and he opposed the goal itself.

The fifth point on civil rights. In a letter to the Washington Post dated February 14, 1970, Mr. Rehnquist, again I take it volunteering, says:

Your editorial clearly implies that to the extent the judge falls short of your civil rights standards, he does so because of an anti-Negro, anti-Civil Rights animus rather than of a judicial philosophy which, if consistently applied, would reach a conservative result both in civil rights cases and in other areas of the law. I do not believe that this implication is borne out. Thus the extent to which his judicial decisions in civil rights cases fail to measure up to the standards of the Post are traceable to an overall Constitutional conservatism rather than to an animus directed only at civil rights cases or civil rights litigants.

Here Mr. Rehnquist identifies himself with the Carswell positions and tells us, if we will only read, that he, as a conservative on the court, will be, as Mr. Carswell was, an anti-civil rights judge.

Then he was asked twice what he had done for civil rights—once on page 127 of the transcript and once on page 254. On page 127 of the record, when he is saying what he had done for civil rights, he said that he represented some indigents. He didn't list them and he didn't state what he did. Every lawyer in this town knows you had better represent indigents if you get assigned—you do it or else.

And then he said that he was on the Legal Aid Board. That is true in a kind of a strange sense. He was on the Legal Aid Board by virtue of being an ex officio member of the Legal Aid Society because he represented the Bar Association there. The president or the vice president of the Bar Association are automatically ex officio members of the Legal Aid Society in Phoenix. Here he was, making his defense on what he had done for the people on the Legal Aid Society Board, where he was an ex officio member.

Then, I think, in answer to another question (on pages 254 and 255 of the transcript) about what he had done for civil rights, he refers to his Houston law day speech, which I have just read. The only thing that can be said is that this speech ridicules the idea there is anything repressive in America today. Then he referred to his new barbarians speech. Here is the essence of his reference to the new barbarian speech as proving he was for civil rights, and I quote:

He who stands in the door of the southern schoolhouse to defy a court order, he who prostrates himself on the railroad tracks to prevent the movement of a troop train, and he who wrongfully occupies a university building are each in his own way attacking this basic premise.

If a man has to use criticism of George Wallace standing in the schoolhouse door as the only thing he has ever done for civil rights, it is a sad day that he would have been the one chosen for this highest honor in America.

It is sad at this time in history that we should have a man proposed for the Supreme Court who, as Mr. Mitchell pointed out, has stated: "I am opposed to all civil rights laws." It is sad to have a man proposed who has no compassion for the blacks, the browns, and the other minorities.

This is enough. But I respectfully suggest that it is only the beginning.

And I turn now to the Bill of Rights.

As Mr. Rehnquist demonstrated in Phoenix that he had no compassion for civil or human rights, he has demonstrated in Washington that he has no dedication to the Bill of Rights.

First, possibly the most revealing thing of all is Mr. Rehnquist's hostility to the Warren court's dedication to the Bill of Rights. In 1957, as there has been testimony, he wrote in the U.S. News and World Report:

Some of the tenets of the 'liberal' point of view which commanded the sympathy of a majority of the clerks I knew were extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business—in short, the political philosophy now espoused by the Court under Chief Justice Earl Warren.

Note the words, "extreme solicitude for the claims of Communists."

Then he is called on this by another law clerk, William Rogers; and how does he answer? He answers the way every McCarthyite of that day answered such questions. This is Mr. Rehnquist on February 21, 1958, after another law clerk had challenged him on his suggestion of sympathy for communism by the court—and I quote what he said:

The only way to move forward in such a debate would be detailed documentation naming names and explaining the reasons for classification of political views. The obvious unfairness to the people involved of doing this ex parte in a magazine article, coupled with the inevitable in conclusiveness of the result, suggests that no such attempt be made.

It is the straight language of McCarthyism; having accused, you cannot go forward.

Then let's carry on with what he is saying about this Warren Supreme Court which defended the Bill of Rights. In his article in the Bar Association Journal in 1958 he starts out this way; the man has the audacity to start an article with this sentence:

Communists, former Communists, and others of like political philosophy scored significant victories during the October, 1956, term of the Supreme Court of the United States, culminating in the historic decisions of June 17, 1957.

Let me tell you what happened on June 17, 1957, that he is calling great victories for Communists. It was a great day for the Bill of Rights, but it wasn't any victory for Communists.

That day, John Stewart Service was restored to his post in the State Department because the Supreme Court, without dissent, in an opinion written by Mr. Justice Harlan whose seat Mr. Rehnquist seeks to take, said that Service had been wrongfully removed without the State Department following its own regulations.

What is possibly or conceivably Communist about reversing the State Department's firing of a person without following its own regulations? You have to have it in your own mind when you say this decision is a victory for Communists.

What was the second case that day that made the headlines on June 18? It was the *Watkins* case. The *Watkins* case said that a congressional committee had to explain to a witness why they needed the information when they asked for something he didn't want to give them.

What in heaven's name is communistic about fair play at a congressional hearing? I should mention that was a decision by Chief Justice Warren with only one dissent.

The same day was the *Sweazy* opinion. That involved a State legislative committee; and the result was the same. And here there was Chief Justice Warren's decision with two dissents.

The fourth of this notable four-decision day that Mr. Rehnquist was talking about was the *Yates* case. That was the only one that did directly involve communism. What the Court held there was that mere advocacy of a philosophy without advocacy of action was protected by the Constitution. That again was Justice Harlan, with one dissent.

In other words, there was an average of 8 to 1 in these four cases. Only one of them directly related to communism, and yet you get this outrageous sentence that I read at the beginning.

Then you get a little further along in that article, I guess really the conclusion of that article, and I quote:

A decision of any court based on a combination of charity and ideological sympathy at the expense of generally applicable rules of law is regrettable no matter whence it comes but what could be tolerated as a warm-hearted aberration in a local trial judge becomes nothing less than a Constitutional transgression when enunciated by the highest court of the land.

This language—used in the law clerks' articles and in the article I have just read involving the *Schware* and *Koenigsberg* cases—is the language of hostility to a court that did believe in the Bill of Rights. If I may say this, and I measure my words—this was straight McCarthyism if, and I will give him this, if it is laundered McCarthyism.

Again, you get the same thing—I heard it from Mr. Mitchell here this morning. I wasn't very surprised because it brings it all into focus. Mr. Mitchell presented an affidavit that Mr. Rehnquist said to the people coming to the Arizona legislature supporting the statute that "you are communistically inspired." Heavens; the NAACP?

Second, the surveillance testimony. I almost don't believe this happened:

Question. "Does a serious constitutional question arise when a Government agency places people under surveillance for exercising their first amendment rights to speak and assemble?"

Answer. "No."

There is not even—he says—a constitutional question raised by surveillance. No judicial restraint should be had, no legislative restraint; rely on self-discipline.

Third, the May Day events. At the time that Mr. Rehnquist spoke at North Carolina, the papers had been filled with proof that people had been arrested illegally. Indeed, Judge Green had already acted because of illegal arrests to get the people out. Yet, on Wednesday of that week, Mr. Rehnquist could make in North Carolina a general defense of what happened.

Now, the worst thing he said there, and it raises a question of what was meant, was the use of the term "qualified martial law." In answer to a question from Senator Cook, he indicated he had not intended to apply that term to Washington May Day.

I would make this point in response to Mr. Rehnquist's answer: Every newspaper in America treated his statement as applying the words "qualified martial law" to May Day. He made no attempt to clarify that matter until you, Senator Cook, raised it with him. I may be wrong—he may have clarified it partially in earlier testimony here, but it is at this same hearing.

Senator COOK. First of all, I think his speech speaks for itself.

Mr. RAUH. I do not. I wanted to go into that, sir.

In the first place, what you are in essence saying is that the speech was misread by every newspaper writer in America. I do not believe speeches get misread.

Senator COOK. It wasn't that widely covered, Mr. Rauh.

Mr. RAUH. My goodness; I saw "qualified martial law" in the papers of May 6. Those words have stayed in my mind since then because that is a most pernicious doctrine.

Senator COOK. I question in how many newspapers that speech was covered.

Mr. RAUH. Well, I will show you that the New York Times, even after the nomination, and the Washington Post, they were still interpreting his North Carolina speech as saying that "qualified martial law" applied.

Now, what other reason would there have been for Mr. Rehnquist using the term? Was he just having an academic exercise? He was talking about May Day. Did he just bring it in as some happy thought?

Now, where he is wrong on "qualified martial law" is that martial law is initiated by a proclamation of the Governor or the President. To apply this concept to a chief of police making sweep arrests is the most dangerous concept you could ever espouse. You try to restrain chiefs of police, not give them authority in these matters. You may read it as you do; but I say he deliberately let the press call it "qualified martial law" right through until he became a Supreme Court Justice nominee.

Fourth: Wiretapping. Mr. Rehnquist believes in untrammeled tapping for domestic as well as foreign subversion and without any limits.

It would be funny, if it wasn't sad, what happened before this committee. On page 320 of the transcript, Mr. Rehnquist—I don't want to use the word "brags" but, shall we say, puffs the fact that he got a shift in wiretapping theory from inherent power to reasonableness under the fourth amendment. That is, Mr. Rehnquist was saying: "I got the Justice Department to shift in defending this right to tap for domestic subversion without a court order from the proposition they were using, of inherent power, to the proposition that it is not unreasonable under the fourth amendment to tap under those circumstances."

That, I respectfully suggest, is a distinction without a difference. I have here the Government's brief prepared under the Rhenquist theory. It is perfectly clear that what they are saying is that the tapping is reasonable because the President has got the power to do it. For example, this is on page 6 of the Government's brief in No. 70-153, October term, 1971, *United States of America v. United States District Court*, page 6: "We submit that an electronic surveillance authorized by the Attorney General as necessary to protect the national security is not an unreasonable search and seizure simply because it is conducted without prior judicial approval."

In other words, because the Attorney General says it is necessary to protect the national security, because he says this as a matter of security action, therefore, it is not unreasonable and there he says—

Senator BAYH. Excuse me, Mr. Rauh. Are your reading from the brief or interpolating?

Mr. RAUH. No, the second was my interpretation. The first sentence was from the brief, sir.

Senator BAYH. I wanted to be sure.

Mr. RAUH. In "authorizing such surveillances," now reading from the brief again, "In authorizing such surveillances, the Attorney General properly acts for the President."

Now here, taking the two sentences together, what he is saying is that the President, by deciding to tap, is not doing something unreasonable. Therefore, the tap is not an unreasonable search and seizure. But it is predicated on the same basic philosophy that if the Executive wants to do it, he can do it. The whole brief is of that nature.

Now, in addition to that, Mr. Rehnquist, in defending wiretapping, referred to five previous Presidents who had OK'd tapping without a warrant. But there wasn't any procedure for a warrant in those days. The procedure for a warrant was set up in 1968, and the question today is why don't they follow that procedure. Well, Mr. Rehnquist made perfectly clear why they don't in the Brown speech which is quoted at page 131 of the transcript. They don't follow that procedure because they haven't got the proof to get a warrant.

I must say there was some candor in the Brown speech, but that candor was missing here.

Fifth, Mr. Rehnquist favors limitations on freedom of speech of Federal employees.

Sixth, he favors pretrial detention.

Seventh, he favors stopping habeas corpus after trial.

Eighth, he opposes the exclusionary rule.

Ninth, he describes a violation of the search and seizure provisions of the fourth amendment as a technical violation. This appears at

page 317 of the record. The case he is referring to is *Whitely v. Warden*, 91 Supreme Court Reporter 1031. I do not think arresting a man without a proper warrant, without probable cause, is a technical violation of the fourth amendment. Neither did Mr. Justice Harlan who was the writer of that opinion and who is being accused of technical actions.

Tenth, and last on the matter of the Bill of Rights, is Mr. Rehnquist's letter defending Mr. Carswell, but a different sentence from it. This is the letter to the Washington Post by Mr. Rehnquist on February 14, 1970:

In fairness you ought to state all the consequences that your position logically brings to train, not merely further expansion of constitutional recognition of civil rights but further expansion of the constitutional rights of criminal defendants, of pornographers and of demonstrators.

Any human being who would put demonstrators—idealistic young people—in a category of criminal defendants and pornographers, has no devotion to the Bill of Rights.

This long list might not be so damning if there had been some slight deviation, if for just once in his life Mr. Rehnquist had come out on the side of the Bill of Rights. But with a record like this and not a single redeeming statement, how could the Senate possibly say he meets the standards of this great Court?

I come now to what I promised, which was a demonstration that Mr. Rehnquist's testimony before this committee was evasive and lacking in candor.

Mr. Mitchell already has given you one example—on voting harrassment. I shall not repeat what Mr. Mitchell said, but I shall give you nine other examples of evasion and absence of candor.

As I was saying, Mr. Chairman——

Senator HART. Mr. Rauh and Mr. Mitchell, and for the benefit of others who may be interested, it is the feeling, given the schedule problem that may be yours and certainly is for certain members of the committee, that we receive your testimony to its completion and at that point recess for lunch; and assuming you conclude in time to permit this, return at 2, at which time questions can be addressed to you and to Mr. Mitchell.

Mr. RAUH. Thank you, sir. We shall return.

Listing 10 examples of the lack of candor and evasiveness, Mr. Chairman, I referred to Mr. Mitchell's testimony on voting harrassment as the first item.

The second item I would refer to is the claim of attorney-client privilege. That claim in this circumstance was built out of whole cloth. Mr. Mitchell and Mr. Nixon are not Mr. Rehnquist's clients; they are his bosses.

Mr. Mitchell here wants me to make clear I was referring to the other Mr. Mitchell. [Laughter.]

Mr. RAUH. There is nothing confidential about Mr. Rehnquist's present views. He goes out and makes speeches; what's confidential about that? You ask him what his real view is; what's confidential about that?

What he is saying is: "I am using the attorney-client privilege, but I really don't want to embarrass the administration by saying what I really believe."

Well, I think Mr. Rehnquist is like everybody else; I think he said what he believed. It was too rough against civil rights and civil liberties, so he is now saying that he has a privilege not to tell this committee what he really believes. Of course, he did tell the committee his views when he wanted to. He made a very selective use of the privilege. When he wanted to puff about the wiretapping change, why, he happily waived the privilege. When he didn't want to say something, then he didn't waive the privilege.

I have talked to a number of people who are experts in this field and I think one can sum up the attorney-client privilege as one that relates to the sphere of confidential information. Mr. Rehnquist's situation was not within the privilege because he was not talking about information but personal views; and the personal views were not within the sphere of confidence or business relations but what he thinks himself.

Mr. Rehnquist's situation is really not attorney-client privilege; he is invoking it to avoid talking about views that might embarrass the administration. I respectfully suggest Mr. Rehnquist was not being frank when he said he could not talk about administration policies, for, back in 1957, he freely talked about the innerworkings of another institution of which he was a part, the U.S. Supreme Court.

It seems to me what he is doing is abusing the attorney-client privilege. When Attorney General Mitchell this morning or yesterday answered Senator Bayh's request with a statement that there was confidentiality, I would respectfully ask the Attorney General what is confidential about Mr. Rehnquist's present views on anything.

Third, at page 152 of the transcript, Mr. Rehnquist says that he was not suggesting in his writings that the Supreme Court sympathizes with communism. Then what in heaven's name did he bring this subject up for? You don't bring a subject up about—you don't start an article in the American Bar Association Journal with the statement—Communists and former Communists had a field day in the Court, if you are not trying to imply something. These things were written, as I said before, by a laundered McCarthyite who was trying to suggest that the Supreme Court's dedication to the Bill of Rights was somehow ideologically sympathetic to an obnoxious and abhorrent doctrine. He was not frank with the committee. I would admire him more if he had simply said, yes, that is his view and stood by it.

Fourth, he contends in testimony at pages 105 and 106 of the transcript that all he had suggested in the letter to the Post about Carswell was that the Post was at least in part in error. If I have ever seen a letter which addressed itself to totality of error, it was that one. When Senator Kennedy sought to get some answers on the letter, Mr. Rehnquist went back to privilege.

Fifth. This was most revealing. I read you the question that was asked by Senator Ervin: "Does a serious Constitutional question arise when a government agency places people under surveillance for exercising their first amendment rights to speak and assemble?"

Answer: "No."

When the Senators questioned Mr. Rehnquist about this, listen to what he says at page 51: "Surveillance is not per se unconstitutional." He didn't testify before Senator Ervin anything about surveillance not being per se unconstitutional. What he talked about was that surveillance didn't even raise a constitutional question.

And then, on page 137, he said surveillance is not a violation of the first amendment. What he testified was that it doesn't even raise a constitutional question. Here a man is seeking to go on the U.S. Supreme Court who thinks governmental surveillance of the people does not even raise a constitutional question.

Sixth, his suggestion at page 83 and again later with Senator Cook, that his "qualified martial law" statement had nothing to do with May Day runs in the face of the fact that it was given in the context of May Day, was interpreted by everyone as referring to May Day and was never repudiated until the hearing here.

Seventh, when asked what he had ever done for civil rights, he referred to the indigents he had represented with no specifics whatever. And he referred to his membership on the Board of the Legal Aid Society as though it was something he had sought, whereas it was an ex officio membership of the Bar Association of Phoenix.

Eighth, on wiretapping, Mr. Rehnquist showed what he really thought of the attorney-client privilege. He didn't think anything of it. He wanted to get in the record the fact that he had shifted the reasoning of the Government in support of wiretapping in domestic subversion cases without a warrant, so he just waived the privilege and did it.

Furthermore, as I indicated earlier, in the brief which I have here, if anybody would like to study it, the distinction is entirely meaningless.

Ninth, when Mr. Rehnquist wrote in the Harvard Law Record about stare decisis, this is what he said, and I quote:

"There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt."

Over and over again here he referred to the importance of stare decisis even in constitutional law, a total negation of what he had said there.

Finally, No. 10: Mr. Rehnquist said that there was no State civil rights legislation in Arizona. I have it here.

I thank you for your courtesy and your patience and I would just like, in conclusion, to make this very short comment:

What is this man whose record you are considering? Here is what he is: (1) A lawyer without compassion for blacks and other minorities; (2) a lawyer who never once spoke up for the Bill of Rights; (3) a lawyer who believes in unchecked Executive power, whether it is security wiretapping, surveillance of individuals, executive privilege on information for Congress, delegation of functions to the SACB or the Cambodian invasion; (4) a lawyer who fenced with the committee rather than speaking with candor.

Members of the committee, there is a generation of young lawyers watching this committee and the Senate. Many of them, most of them, are idealistic young men to whom the Court is the highest body to which one can aspire, the highest post any lawyer can hope for. You must not fail them. You owe it to them to insist on Supreme Court nominees dedicated to human rights and the Bill of Rights. You owe it to the whole generation of young lawyers coming up in this country to say "No."

Thank you, Mr. Chairman.

Senator HART. You indicated that it would be possible for you to return for questioning. I suggest, then, a recess until 2 o'clock.

(Whereupon, at 12:40 p.m., the hearing was recessed, to reconvene at 2 p.m., this date.)

## AFTERNOON SESSION

Senator HART (presiding). The committee will be in order.

At our recess, it was indicated that as we resumed this afternoon the two witnesses, Mr. Rauh and Mr. Mitchell, would return in order that any questions the committee members might have would be addressed to them.

**TESTIMONY OF CLARENCE MITCHELL AND  
JOSEPH L. RAUH, JR.—Resumed**

Senator HART. Senator Mathias?

Senator MATHIAS. Mr. Chairman, I would like to direct the attention of Mr. Mitchell—let me say it is a pleasure to welcome you to the committee, along with Mr. Rauh—I would like to direct Mr. Mitchell's attention to page 2 of his written statement, the paragraph on page 2 which is numbered 4, in which he said that: "During some of the elections in Phoenix Mr. Rehnquist was part of a group of citizens who engaged in campaigns to challenge voters and thereby prevent them from casting their ballots. Most of such voters were the poor and black citizens of Phoenix."

That does concern me, of course. Mr. Rehnquist testified on Wednesday directly on this point in his testimony which appears on page 149 and 150 of the transcript, to the effect that his responsibilities were never those of challenger but as a group of laywers working for the Republican Party in Maricopa County to attempt to supply legal advice to persons who were challenged.

I think there is an ambiguity here, and I know Clarence Mitchell well enough to know that he wants the record to be in as good a state as it can be.

You have said, Mr. Mitchell, that Mr. Rehnquist "prevented" the casting of ballots. In the boldest construction of that, that would be a serious crime. On the other hand, if in fact he was acting as counsel for those who were properly and lawfully commissioned as challengers on the part of the Republican Party, that would be within the scope of a legal political activity.

I wonder if you can clarify that?

Mr. MITCHELL. I would like to, Senator Mathias, in this way: Apparently this was a well organized effort, going back to 1958, and as described to me, Mr. Rehnquist started off working in the ranks as a person who actually sought to challenge voters. The statement given to us asserts that he went first to the Granada precinct, he and another man. They didn't go as arbitrators but as people to challenge the right of voters to vote.

Senator MATHIAS. I am not personally familiar with the law of Arizona. As you know, the law of Maryland requires that a challenger be someone who is so designated by the organized political parties.

Mr. MITCHELL. That is correct.

Senator MATHIAS. Within the State of Maryland.

Mr. MITCHELL. Well, I do not know whether he had such credentials, but—

Senator MATHIAS. Do you know if such credentials are required in Arizona?

Mr. MITCHELL. I do not. But I do know when he was asked he presented sufficient information that the person who talked with him knew who he was; and as I understand it, instead of raising questions about whether a person lives at the address where he purports to live, and whether he is a member of a party or whatever the requirements were, Mr. Rehnquist personally began asking for interpretations of the Arizona constitution. Then, this occurred over an extensive period of time and with so many voters being held up that the officials in the polling place asked him to leave on the ground that his activities were preventing people from voting.

Then, as I understand it, he went around to another precinct, known as the Bethune precinct, which is at a school named for the late Mary McCloud Bethune, a very prominent colored leader, and in that school Mr. Rehnquist began doing the same thing.

I, in the lunch hour, called Senator Cloves Campbell on another matter which I will refer to at the appropriate time, and Mr. Campbell assured me that a Mr. Robert Tate was present at the time that Mr. Rehnquist was engaging in these activities which prevented people from voting.

The gentleman at the Granada precinct is white and he is a State employee. I have done everything that I could do to persuade those who know him to ask him if he would make a statement and he says he is not going to take a chance on losing his job and isn't going to talk. But I understand from Senator Campbell that Mr. Tate will present information on this. I tried to reach him by long distance phone and I was unable to.

I will continue to try and I will try to get substantiation of what Senator Campbell told me.

Senator MATHIAS. Is it your statement, and is it your understanding, that the purpose of these activities was, in fact, to obstruct persons who were trying to vote? Or is it your understanding that the consequential result of these activities happened to be obstructive? This is a very critical question.

Mr. MITCHELL. I agree; it is; and I think the answer merits exploration of facts by the committee by questioning Mr. Rehnquist. That is why I urged that he be called back because Senator Campbell states that this was a concerted effort to prevent Negroes from voting. He said that the only reason he wasn't present when Mr. Rehnquist was operating is that he was trying to handle another similar problem in another precinct himself.

He says this goes on in almost every election and, as I said in my earlier testimony, Mr. Merritt who was the president of our NAACP told me that a Federal judge down in the area had indicated to him that at one point it had been necessary to call in the FBI. That is the reason I suggested that the committee, I would hope, respectfully, would ask the FBI just what kind of investigation they carried on and what did they find, because it is indeed serious to the point of being a conspiracy to deprive people of their right to vote; and it seems to me that is a serious enough thing to warrant the fullest exploration.

Senator MATHIAS. But at the moment the only evidence that you can point to is the statement that Senator Campbell has given you and which you have submitted to the committee?

Mr. MITCHELL. Well, the story was also published in a local newspaper in Arizona, and that story sets forth essentially the same things.

But it seemed to me that as long as we had people who were making the assertion, I would give their names.

I would like at this point, if you will indulge me, Senator, to call attention to another technicality.

Senator Cambell, whose name I mentioned, provided us with an affidavit. At the luncheon break Senator Cook indicated that he had seen a copy of that affidavit which I submitted, and that it did not have a seal on it; it was not a notarized document. It becomes important for me to do this because Senator Campbell has volunteered to come up to testify in person. I have asked him to send to you and Senator Cook, Senator Hart and all the others who were present, telegrams saying that he is willing to come up, he is willing to testify. But, in the interim, I would like to offer you the notarized copy of his statement which I submitted this morning, and as you can see by feeling the seal, there is a bona fide notary seal on that document; and I think it is important to do that because I would not want this committee to think that I would try to come up here in a spirit of duplicity and allege that something is a notarized document which is not in fact a notarized document.

Senator MATHIAS. I will say, speaking for this member of the committee, he wouldn't entertain such a thought.

Mr. MITCHELL. And if it pleases the Chairman, I would like to submit the original for the record.

Senator HART. The original will be received. I have seen it and it does have the seal and it is in fact a notarized document; and any committee member who has any remaining doubts is free to look at it.

(The affidavit referred to follows:)

AFFIDAVIT

ARIZONA STATE SENATE,  
Phoenix, Ariz., November 4, 1971.

I, Senator Cloves Campbell, do hereby testify that on or about June 16, 1964, a city council meeting was held in the city of Phoenix for discussion of an ordinance dealing with public accommodations for all citizens in the city.

At that council meeting Mr. William Rehnquist, the present nominee for the United States Supreme Court spoke in opposition to the proposed ordinance.

After the meeting I approached Mr. Rehnquist and asked him why he was opposed to the public accommodations ordinance. He replied, "I am opposed to all civil rights laws."

(Signed) Senator CLOVES CAMPBELL.

[SEAL]

THELMA HENSEN,

*Notary Public, my commission expires Jan. 8, 1974.*

City of Phoenix, Maricopa County, Ariz.

Senator MATHIAS. I would like to ask Mr. Mitchell one further question.

You say this incident was covered by the press at the time. Was there any complaint made to any election official or any other appropriate official at the time?

Mr. MITCHELL. Apparently the complaints were made to election officials and, as I understood it, in some way this was brought to the attention of the U.S. district judge in Arizona who asked for or in some way caused to be made an investigation by the FBI.

Senator MATHIAS. Is this a matter of record in the U.S. court there?

Mr. MITCHELL. I do not know. I asked Senator Campbell if he would check that out, and when he comes up, if the committee is willing to hear him, that he be prepared to testify on that point.

But as you know, Senator Mathias, it has for some time been a policy of the Justice Department on election day to have members of the judiciary in their offices available to give almost instant decisions in voting rights disputes. I don't believe that those are necessarily matters of record; but I do know it is an extensive practice. I believe that the judge would certainly verify that he was aware of such a matter; and I respectfully urge that the committee, at least, write him a letter. I didn't think it was proper for me to ask a Federal judge to make a statement for the benefit of this committee, but I would earnestly hope that the committee would address such a letter to him to seek a reply.

Senator MATHIAS. Mr. Rauh, did you want to comment?

Mr. RAUH. I was going to make a comment in support of our position. It seems to me we now have a *prima facie* case on the voting rights matter and it would be unthinkable that the committee would leave it rest at this point. Without overstating what happened, there are at least charges that are not wholly answered that Mr. Rehnquist did himself deal with voting rights in an illegal way.

You have at least five people who have given information about this: Mr. Campbell, Mr. Tate, the official who doesn't want to be revealed, the State judge and the Federal judge. In other words, with this many people to go to, it would seem to me that some investigation would clearly be in order.

Now, we are in a funny position. The staff of the committee is largely, I suppose, working for a Senator who has already said he has made up his mind and is going to vote for the nominee. I think, nevertheless, that some staff member who is totally independent of one who has made up his mind, ought to be assigned to get this information. So I would hope you would treat our testimony not as an effort to say we know all the facts, but as a sufficient statement of facts that the committee would itself go and make certain what the true situation really is.

Senator MATHIAS. Mr. Rauh, if that air of complacency ascended to such a degree on this committee that it was impeding our effort to find the right answers, I would never bother to make the inquiry of Mr. Mitchell in the first place.

Mr. RAUH. I want to make clear that you have certainly done yeoman service on the civil rights front and I accept that exactly as it was said.

Mr. MITCHELL. Senator Mathias, I would just like to say I have had a lot of trouble with my conscience in deciding whether to give another bit of information that I know because it was a question about whether I should, but I think now that I have got even someone from Arizona to indicate that he knows this individual, I would like to say that I am advised that the gentleman who was with Mr. Rehnquist at the time Mr. Rehnquist said that he and a Democrat were working together, is a State judge in the superior court in the State of Arizona, in the city of Phoenix. His name is Judge Charles

Hardy. I didn't give his name before but I feel, after my conversation with people in Arizona, that I have—I am free to do that and I would respectfully urge that Judge Hardy also be included in the inquiry to determine what his version is of the things that were going on at that time.

Senator MATHIAS. Thank you very much.

The CHAIRMAN (presiding). Senator Bayh?

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

Mr. Mitchell and Mr. Rauh, I listened with a great deal of interest to your testimony this morning. It covered a great deal of the territory that I had covered or tried to cover with Mr. Rehnquist, much of which was to no avail.

I interrupted your thoughts, Mr. Rauh, this morning to ask you to further explain the reason given for Mr. Rehnquist's change of position on that one particular matter of the equal accommodations, the access of minority groups to the drugstores of Phoenix. I was disturbed at the thrust of his testimony both in opposition before the council and particularly in the letter to the editor in which he stressed the fact that we dare not violate property rights and seemed to weigh the property rights and come out ahead of personal and individual rights.

Would it be fair to say that at least as far as the testimony that is now before us, as you read the response to my question from Mr. Rehnquist, he has not said really that he is willing to make a different determination on the merits of the issue, that he now feels that it was wrong to keep black people out of drugstores but that he feels that from a technical standpoint he was sort of surprised to see that it worked so well and there wasn't a great deal of disturbance? Is that a fair summary of what he has said?

Mr. RAUH. I think that is exactly right, Senator. It is what I was trying to point out—that he hadn't changed his views that property rights stand above human rights; he simply found out in this case that the ordinance worked so there wasn't any real clash between the two.

I think Mr. Rehnquist still holds firmly to a scale of values which most people reject. I think everything was corroborated by Mr. Mitchell's affidavit which he just showed Senator Mathias. I think that sentence that, "I am against all civil rights legislation" is really the key to the whole thing. He just doesn't feel that the rights of minorities ought to be protected. "I am against all civil rights legislation." Well, I deduced he was against all civil rights legislation by logic. If you are against the Phoenix ordinance, which is the simplest of all civil rights legislation, you would be against all others. But Mr. Mitchell has an affidavit that he actually said he was against all civil rights legislation.

Senator BAYH. That is the affidavit from Senator Campbell?

Mr. MITCHELL. That is true, Senator Bayh and, as I indicated, I had submitted a xerox copy which didn't show the notary seal. When the committee reconvened I gave the original and the committee now has it. I also have talked with Senator Campbell and told him that Senator Cook had indicated to the television people that Senator Campbell ought to be here himself. Senator Campbell said he would be delighted to come and is sending telegrams asking for an opportunity to be heard, to say in person what he has stated in his affidavit.

Senator BAYH. He has heard the nominee say he is against all civil rights legislation?

Mr. MITCHELL. His statement is that following the nominee's presentation to the city council in 1964 he, Senator Campbell, approached the nominee, talked with him, face to face, and the nominee made the flat assertion that he was against all civil rights legislation.

Senator BAYH. One of the other items that concerned me in the nominee's past record in the whole human rights area was the letter to the editor and the position he had taken vis-a-vis the superintendent of schools in Phoenix with respect to the effort that was being made to integrate the Phoenix school system.

In your study, has your organization tried to decide whether to be for or against or neutral on the nominee? Did you investigate the issue? What was the thrust? What was the issue at that time? And could you give us a further interpretation of what you feel Mr. Rehnquist's position was vis-a-vis that issue?

Mr. MITCHELL. I can, Senator Bayh.

All the information on Mr. Rehnquist that we have presented has come from our people in Arizona. They indicate that at that time, which was in the early days of the school desegregation effort, there were school officials who were trying to find ways to comply with the 1954 decision and to eliminate conditions of segregation which are popularly described as de facto conditions. This, of course, sprang out of the good will of the people of that community who were apparently trying to make an honest effort to be ahead of the courts, not to wait until somebody served a subpoena on them; but, as a matter of good will and civic responsibility, to attempt a good faith effort to desegregate the schools. This is what prompted Mr. Rehnquist's attack. So it was a purely gratuitous attack on people who, as responsible officials, were seeking to act in good faith and with good will.

Senator BAYH. Now, in trying to get Mr. Rehnquist's present thoughts on the importance of quality education, and the importance of desegregating schools and an effort to get quality education for all of our children, the best I could get from him on two occasions was that he was opposed to busing children long distances. I suppose if you took a poll of this committee you might get a unanimous vote on that—although, as a kid I was bused long distances to get from the farm to our township school and maybe that is the reason I am like I am—but was that the only issue involved in the Phoenix school battle at that time, busing children long distances?

Mr. MITCHELL. No; as a matter of fact, busing was not an issue of any importance, as I understood it. This was an effort to achieve a condition of desegregation which would not have involved any great degree of busing; and so far as I know, Mr. Rehnquist, in his letter, addressed himself to some of the recommendations which had been made by the Civil Rights Commission.

As Mr. Rauh pointed out this morning, busing was only a minor aspect of the desegregation attempt, that it really was like the old question, you know, do you want your daughter to marry a Negro or do you believe in social equality and that kind of stuff which is not addressing itself to the issue.

But it is clear that if you raise a question of busing, you immediately get the emotions going and get everybody upset; so this was a contrived attempt to divert attention from the real issue which was

orderly desegregation and to make it appear that it was an issue of busing children.

Senator BAYH. I don't want to put words in your mouth, but inasmuch as my question was directed at why the nominee would oppose the efforts to desegregate the Phoenix school system, and the only response I received on two occasions was that the nominee was opposed to busing children long distances, you would suggest that perhaps that answer was not responsive to the question?

Mr. MITCHELL. I would go further, Senator, and say—

Senator BAYH. Please do.

Mr. MITCHELL. I think it was deliberately evasive and the reason I say that is I have read a law review article that Mr. Rehnquist wrote in discussing changes of policies in the Justice Department. The clear thrust of that article with respect to school desegregation is concurrence with the present administration's policy. That policy was best evidenced when the NAACP was attempting to get immediate implementation of desegregation before the Burger court, and the Justice Department, for the first time, was in there opposing us.

I am happy to say that the Burger court unanimously upheld the position of the NAACP.

Mr. RAUH. Senator Bayh, I would like to say I gave 10 examples of evasion this morning, and I left that one out. I think that was a mistake.

Senator BAYH. We will revise the record and let you add an 11th one.

Mr. RAUH. So I guess there are 11.

I would like to make the additional point that the desegregation answer was so tremendously evasive because what you were asking was something that had to do with the goal. Why was he opposed to the goal of desegregation, and he comes back and says he was against one of literally a plethora of means. As Mr. Mitchell says, a man this smart could only have been deliberately evasive.

Senator BAYH. May I proceed a bit further on the voting practices. I think I raised that question in talking to Mr. Rehnquist. On page 149 [of the typewritten transcript] in response to a series of questions that I posed, he said, and I quote:

My right and responsibilities, as I recall them, were never those of challenger.

In the previous sentence he said, "My recollection is I had absolutely nothing to do with any sort of poll watching."

Now, as I understand the affidavit from Senator Campbell, it relates to hearing him say he was against any kind of civil rights legislation. Did he go further to say—or was that—someplace in your testimony, Mr. Mitchell, I think you referred to someone who witnessed the nominee in the process of challenging at the polling place?

Mr. MITCHELL. That is correct.

Senator BAYH. As I recall, you said you were unable to provide us with the man's name because of fear of retribution or something. Is there any way that we can have tangible evidence? This is sort of a hearsay situation.

Mr. MITCHELL. I am aware of that. As I said—

Senator BAYH. It doesn't at all diminish your credibility but certainly I would feel more comfortable about this if I could look the man in the eye and be able to judge for myself his credibility. I have no concern about yours.

Mr. MITCHELL. I thank you, Senator Bayh. I was acutely aware of it. It is a question of the balancing of an individual's fear, which may be justified, that he would lose his job if he comes forward, and furnishing the committee with information. So, being concerned about that, I called down to Arizona in the lunch break, talked with Senator Campbell who gave me the name of a Mr. Robert Tate, and he said that Mr. Robert Tate did witness Mr. Rehnquist at work, and he expects that Mr. Tate would be willing to come forward and make a statement.

Now, I think that this is bigger though than just the incident which involves Mr. Rehnquist because Senator Campbell says this is a consistent practice in that area of Arizona, where they try to keep the Negroes from voting. And, accordingly, I suggested—I guess you might have been out of the room at the time—that I would hope the committee would check with the U.S. district judge in the city of Phoenix who, as I understand it, had this matter reported to him and did ask for a Federal Bureau of Investigation inquiry.

I also suggested that Judge Charles Hardy, who is in the Superior Court in Phoenix, Maricopa County—

Senator BAYH. Has anybody in your organization talked to him down there? Do you know what his thoughts are?

Mr. MITCHELL. I would stop at saying that I know that our people have talked with the Federal judge. I wouldn't think it would be quite fair for me to say what he would be prepared to testify or give information on, but I think it would be enlightening and probative if he had a communication from the committee.

Senator HRUSKA. Mr. Chairman, may I ask the Senator from Indiana if he would yield briefly for the purpose of inserting a letter in the record?

Senator BAYH. Please.

Senator HRUSKA. Mr. Chairman, this morning my attention was called to an incident which occurred during a jury trial held in the Federal district court in Phoenix, Ariz., some 12 years ago. Judge Boldt of Tacoma, Wash., Federal district judge from that State, was presiding over this particular trial as a visiting judge in Phoenix and one of the attorneys in the case was Mr. Rehnquist.

There were comments made by Judge Boldt during the course of that trial directed to Mr. Rehnquist in regard to some of his conduct during the trial which reflected unfavorably on Mr. Rehnquist. This morning I telephoned Judge Boldt, who happens to be in Washington, and asked him if he recalled the incident. He did, and he proceeded to give me an account of it.

At the conclusion of that verbal account, Mr. Chairman, I asked the judge if he would be willing to set down that account in a written form that could be submitted to the committee and released to the press and to the public.

He agreed to do so and about an hour ago there was delivered to us this letter which is addressed to me, Mr. Chairman, and dated November 9, 1971, and it reads as follows:

Dear Senator Hruska: I do recall the incident in court involving Mr. Rehnquist and myself. It occurred about 12 years ago when I was holding court on a temporary assignment at Phoenix, Arizona. I remember that it occurred during a proceeding in a civil case in which a stockholder of an insolvent Arizona insurance company was suing officers to recover for the company substantial amounts of company assets allegedly misused or misappropriated to the loss of the company.

My recollection is that, as a result of my own misunderstanding of what Mr. Rehnquist said or did during the proceeding, I sharply reprimanded him for what I considered disrespect to the court or something of that kind. After adjournment of the proceeding, other lawyers in the case came to my chambers and told me they thought I had misunderstood Mr. Rehnquist and that he was not chargeable with any impropriety. After their explanation, I was satisfied that the incident arose entirely through my misunderstanding or that of Mr. Rehnquist, or both, and I so informed the lawyers and asked them to extend my apology to Mr. Rehnquist, and if anything more were required to correct the situation I would be glad to do it. From that day until now I have heard nothing further about the incident from either Mr. Rehnquist or anyone else.

In my judgment, it would not be accurate or fair to draw any unfavorable inference whatever concerning Mr. Rehnquist's professional integrity or ability from that incident. Signed Geo. H. Boldt.

Mr. Chairman, I ask consent that this letter be placed in the body of the record at this point.

The CHAIRMAN. Yes.

(Letter from Judge Boldt follows:)

U.S. COURTHOUSE,  
Tacoma, Wash., November 9, 1971.

HON. ROMAN L. HRUSKA,  
U.S. Senator,  
Washington, D.C.

DEAR SENATOR HRUSKA: I do recall the incident in court involving Mr. Rehnquist and myself. It occurred about 12 years ago when I was holding court on a temporary assignment at Phoenix, Arizona. I remember that it occurred during a proceeding in a civil case in which a stockholder of an insolvent Arizona insurance company was suing officers to recover for the company substantial amounts of company assets allegedly misused or misappropriated to the loss of the company.

My recollection is that, as a result of my own misunderstanding of what Mr. Rehnquist said or did during the proceeding, I sharply reprimanded him for what I considered disrespect to the court or something of that kind. After adjournment of the proceeding, other lawyers in the case came to my chambers and told me they thought I had misunderstood Mr. Rehnquist and that he was not chargeable with an impropriety. After their explanation, I was satisfied that the incident arose entirely through my misunderstanding or that of Mr. Rehnquist, or both, and I so informed the lawyers and asked them to extend my apology to Mr. Rehnquist, and if anything more were required to correct the situation I would be glad to do it. From that day until now I have heard nothing further about the incident from either Mr. Rehnquist or anyone else.

In my judgment, it would not be accurate or fair to draw any unfavorable inference whatever concerning Mr. Rehnquist's professional integrity or ability from that incident.

GEO. H. BOLDT.

Senator BAYH. Mr. Chairman, I appreciate the fact that the Senator from Nebraska made this insert. I want the record to be unequivocally clear that so far as I am concerned nobody has made an issue of this. I don't know where the information came from. I don't know why the Senator from Nebraska considered it pertinent to the questioning because nobody had raised that one issue.

I may say that specific issue had been brought to the Senator from Indiana and I thought it was so irrelevant that I hadn't even brought it up, had no intention of bringing it up, because it involved a specific case, the nuances of which I was not appraised, and thought this would be very unfair to the nominee to bring it up.

Senator HRUSKA. The Senator from Indiana is one of the most steadfast and persistent advocates of having all the facts brought before this committee. I had it on reliable information that on issue

would be made of it, that disclosure would be made of it, and in order that we could get all the facts pertaining to this incident, I requested this letter.

Now, if that criticism is not raised this letter will not in any way hamper our consideration of this nomination. At any rate, does the Senator object to the letter being put in the record?

Senator BAYH. Not at all, I thought if you have any more letters like that, I would be glad to have them read into the record, too; they make interesting reading. I just think it is important for us to keep our focus and each member of this committee has the responsibility of determining what is important and what is not. But I don't want us to be deterred from some issues that I think that are before us that are of a rather critical nature. This is just one matter of one incident in a case, at least, as brought to my attention, was not even important enough to deserve bringing before the committee.

Senator HRUSKA. I did think it was that important and I recall that only last Thursday the Senator from Indiana brought a letter of his own into the committee hearing and had it put into the record and distributed to the press. Mr. Chairman, there are extra copies of Judge Boldt's letter available and Mr. Holloman can distribute them if he will to each member of the committee and to the press.

Senator Kennedy. Is this the same George Boldt who has just been appointed to the Pay Board?

Senator HRUSKA. That is the same George Boldt and he is presiding over that board.

Senator BAYH. We can reconvene as a Ways and Means Committee here.

Mr. MITCHELL. Senator Bayh, on the question of fact, and exploring allegations, I would be the last person to want to offer something that is not supportive of facts. But this morning on a national television network there was an allegation made concerning the nominee. I talked with our people in Arizona and, as I understand it, an Arizona newspaper, a respectable newspaper, has also published this same allegation. I have no knowledge whatsoever myself on it. I do not undertake to vouch for its credibility, but it does seem to me if a national television network and a newspaper in the home State of the nominee have both today made this statement, it ought to be a matter of which the committee would at least take notice.

Senator BAYH. Mr. Mitchell, may I ask us to stop playing games; are we talking about the allegation that the nominee was a member of the John Birch Society?

Mr. MITCHELL. I am talking about that and I am respectfully saying I am not playing games. I was prefacing my remarks with the language that I used for the purpose of making my own position clear. I am no character assassin.

Senator BAYH. I know you are not.

Mr. MITCHELL. But I believe that when a Supreme Court nomination is at stake, and a television network, plus a newspaper makes such a statement, it does seem to me that this is a matter on which inquiry should be made.

The CHAIRMAN. You mean the John Birch Society?

Mr. MITCHELL. That is the allegation, Mr. Chairman.

The CHAIRMAN. Yes, sir.

Senator BAYH. I understand there is an affidavit coming from the Justice Department from Mr. Rehnquist avowing that—has that been received by the committee?

The CHAIRMAN. Just a minute. "William H. Rehnquist being first duly sworn on his oath deposes and says that:

"He is not now, nor has he at any time in the past, been a member of the John Birch Society. William H. Rehnquist."

That will be placed in the record. There goes that bunch of stuff. [Laughter.]

(The affidavit referred to follows:)

**AFFIDAVIT**

William H. Rehnquist being first duly sworn on his oath deposes and says that: He is not now, nor has he at any time in the past, been a member of the John Birch Society.

WILLIAM H. REHNQUIST.

Subscribed and sworn to before me this ninth day of November, 1971.

ANGELINE JOHNS,

*Notary Public.*

My commission expires April 14, 1972.

Senator HART. I think I will inquire on behalf of one of my colleagues on the committee whether that had a seal on it.

The CHAIRMAN. It is properly sealed.

Mr. MITCHELL. I would like to say, Mr. Chairman, right very respectfully, in the light of the evasive tactics of the nominee, I would not assume myself that a mere disavowal on his part was a sufficient puncturing of whatever this is described as being.

Senator BAYH. Let me say this, as one member of the committee who has had a good bit of his staff involved in trying to find answers to questions and trying to differentiate fact from rumor, it is awfully difficult and none of us want to become involved in the character assassination of someone just because we disagree with him. That is why I want to get it all out on the table. I heard this morning this affidavit was forthcoming and I was not totally surprised to see our distinguished chairman had it as of this time. But I have investigated with the greatest care from a number of sources the rumor that the nominee has been a member of the John Birch Society. I have not found any evidence to substantiate this myself. I say that very frankly. I am alarmed about the philosophical difference we have. He has appeared and made speeches before a number of rather extreme rightwing groups. I have not found any evidence that he belongs to any of them.

Now, if anybody has any records to the contrary, I am sure the members of the committee would be glad to have them.

Let me say I think that your request that this be investigated is proper and I don't hold out our investigation as infallible, but we did make a good faith effort to deduce whether there was any fire as well as the smoke there.

Mr. MITCHELL. I would say, Senator, it is not customary for people who are members of organizations like that to leave a clear and available record of their identification and activity and, as I said, I do feel that mere disavowal is not necessarily the whole story.

Senator BAYH. Just a matter of mere speculation does not prove the contrary to be the case; I am sure you would be the first to say that.

Mr. MITCHELL. No.

Mr. RAUH. Senator Bayh, I never thought much of this Birch thing.

Senator BAYH. Would you please say John Birch, Mr. Rauh?  
[Laughter.]

Mr. RAUH. I never thought much of this John Birch stuff until I heard that affidavit. I have been in this field for a long time where people are accused of right or leftwing activities.

The normal answer to a charge of extreme right or leftwing activities is much different from that. Usually if you are denying that you were in an organization of the extreme right or left you would not only deny membership but you would also deny any connection with it. I previously had not thought much of the charge but I think that affidavit is one of the most potentially revealing documents. The real point isn't a simple statement of nonmembership; the question is what was the connection. From the failure to say anything about the connection, I for the first time think there might be something in the charges. All morning I have been saying I didn't think there was anything in it, but that affidavit is the weakest denial I have ever heard. It says he wasn't a member. What about all the relationships that are possible short of that? I am absolutely flabbergasted that a man who is trying to get on the Supreme Court of the United States should send up an affidavit so limited in its denial of relationships.

Senator KENNEDY. Now, Mr. Rauh, if you would yield, I think your suggestion here is completely unwarranted and completely uncalled for; and I reject that suggestion as one who has been very seriously concerned about it. I may be proven wrong. I talked to Mr. Rehnquist myself about this question and I am completely satisfied with it and I don't think it serves the cause for those of us who have some very serious reservations to have this kind of a charge to leave the atmosphere as suggested by you and Mr. Mitchell, by this kind of an association. So I just want you to understand very clearly my position on it, and I don't feel that you are serving the cause of enlightenment with regard to the nominee by this kind of suggestion.

Mr. RAUH. I have made no suggestion. I said I didn't consider a denial of membership—

Senator KENNEDY. You have commented on this—

Mr. RAUH (continuing). A total denial.

Senator KENNEDY (continuing). Very adversely and left an atmosphere which I think is rather poisonous in terms of the nominee. And if he has made that statement and anybody is able to rebut it, then we obviously ought to have that information. But to try to suggest from it any kind of question in terms of—I have questioned a lot of his positions, but I don't think there has been a fundamental question in terms of his basic integrity, in terms of this type of misleading suggestion, and if there is then I think you ought to have a good deal more to go along with it than the kind of suggestions you are making here.

Senator BAYH. I would just like to reiterate what I said before: I think it is a fair question to be raised. Having been raised and having

the nominee's opinion and the result of a rather extensive investigation which I personally have made, I have not found any evidence to sustain this allegation. I did find that he made a speech before one very ultra-rightwing organization. Beyond that, we have no evidence of membership.

Let me move on, if I might, please, so that some of my colleagues can have an opportunity to share their views.

Are either one of you gentlemen familiar with Judge Walter Craig?

Mr. MITCHELL. I am not.

Senator BAYH. He is a former president of the American Bar Association, now a Federal judge in Phoenix. Judge Craig testified in support of Mr. Rehnquist. He happens to be a Democrat, as I recall, and I asked some of these same questions of him that I would ask of Mr. Rehnquist in trying to explore Judge Craig's knowledge, as one of the leading members of the Phoenix bar as well as the American Bar Association and now on the Federal bench, if he had personal knowledge about any bias or prejudice that Mr. Rehnquist may have, and he said quite the contrary. I just wondered if either of your gentlemen would care to comment on that? I thought Judge Craig made a very strong witness in behalf of Mr. Rehnquist.

Mr. MITCHELL. Well, you know, Senator Bayh, I don't want to sound like a racist, but as I have listened to the committee's reaction to some of the testimony that we have presented, the reaction to Mr. Rauh's position, and the assertions made by Senator Cook after the hearing, the trouble with all this is that for some reason the white people that I know and have worked with or who come up and testify before these committees, just don't seem to see this thing in the same light that we who are the victims of injustice see it. So I am not surprised if a judge, who is a Federal district judge, were to come up and say that so far as he knows this is a very wonderful gentleman, and that he is the epitome of fairness, and that kind of thing.

But against that statement which the judge has made, there is a whole body of information by the black community, and it really boils down to a question of whether, in a Senate Judiciary Committee, and in the U.S. Senate, the testimony of a large number of black people against the nominee will have sufficient weight to influence the statement of one white person from the community who happens to be a Federal judge?

I am sorry to say that in my experience in dealing with a great many people who are in important positions in this country you can have 100 black people who are eye witnesses, and stated unequivocally what happened, but one white person can come up and say to the contrary and the testimony of 100 black people will be discredited.

So I would say I think it ought to stand on its own feet. We have said what the people down there who were black think of him, and against that is the statement of a judge.

It would be interesting to see whether the Senate of the United States attaches more weight to the testimony of that one white man than it does to all these other colored people who have expressed themselves as they have.

Senator BAYH. Well, Mr. Mitchell, it has been my good fortune to know you for some time, and we have had some rather intimate conversations on a number of legislative issues. From hearing of your

personal experience I must concur, although I wish it were otherwise, and it probably would be absolutely impossible for anybody who has not walked in your shoes and been subjected to the type of abuse that you have over the years to look at every issue with the same kind of perception that you do, since you have been there.

Do you really think it is fair, let me ask you, in light of some of the battles that have been fought before this committee over the last few years concerning this very subject, a Supreme Court nominee, to say this committee and some of its members have not been sensitive to what the black people of a given constituency have said about a proposed nominee?

Mr. MITCHELL. I would not say that the committee members have not been sensitive. But I would say, with a few notable exceptions, when a statement is made which a black man considers devastating in its impact it just does not seem to have the same credibility and attention that a white person making a counterstatement has.

For example, how could we possibly in the Carswell nomination have been insensitive to the fact that the judge had, as a candidate for office, made an open declaration of his belief in white supremacy? But there were many people who did not think that in itself was sufficient to be against him, and they were prepared to forgive it on the ground that he was young.

But then, as I said this morning, after the nomination was rejected, on the record, in his Florida campaign, the judge went back and did what we had figured he would do all along.

The same thing is true in the Haynsworth nomination. It was our contention that Judge Haynsworth in his interpretation of the Constitution was going to do it in a way that was against the civil rights of Negroes.

It was only a few days ago that there was a case before the Fourth Circuit Court of Appeals in which a majority held that a place of recreation which anybody with a scintilla of eyesight and common-sense could see was being operated under the guise of a private club when in fact it was public but operated under the guise of being a private club for purposes of evading the law, Judge Haynsworth was one of the judges who said it was a private club and there was a very good dissent in that by Judge Butzner, pointing out that to reach that kind of conclusion it was necessary to fly in the face of precedents.

Well, this did not surprise me on Judge Haynsworth's part but I am sure if we had said at the time we were up here testifying that we expected that kind of thing would happen there would be a whole lot of people who would have said no; that just could not happen.

Senator BAYH. Well, you are not looking at one Senator who would have said that, are you?

Mr. MITCHELL. No; I hope I am making it clear that I certainly am not.

Senator BAYH. Your statement was rather sweeping and I wanted to make sure that I was not included.

Mr. MITCHELL. As I remember in that effort, to me the only thing that was needed for the purpose of defeating those nominees was the question of whether they had been faithful to equality under the law as a legal principle, and that, of course, in the judgment of many other people, was not sufficient, and other extensive matters were brought into the picture.

But I said then and I say now and I will always believe that anybody who publicly at any time in his adult career takes a position that the black citizens of the United States are not entitled to equal treatment under the law is unfit to sit on the U.S. Supreme Court and that ought to be the rule.

Senator BAYH. Unfortunately, there are not as many people who share that specific judgment as you would want, and thus it seems to me the responsibility we have for a true test of the quality of the nominee or nominees is to see what their judgment is now and the fact that you are here and I think are making such a credible record indicates that one man with a black face would be received with open arms and with great consideration by this committee.

I am concerned about what white people or black people have said about the nominee, and I am also concerned about what the nominee himself has said.

Mr. MITCHELL. That is what I tried to develop.

Senator BAYH. We developed this on the accommodations and the school matters, we tried to get at it, and I hope we will get testimony from those who have first-hand information on the voting matter. But let me deal just one other question as far as what the nominee himself believes.

I did send a letter referred to by our distinguished colleague from Nebraska to the Attorney General. I have received a reply and since there are no objections, I do not think there is any lawyer-client relationship between the two of us, I would like to put it in the record at this time so everybody would have the opportunity to examine it.

Senator HART. Without objection, it will be received.

(The letters referred to follow.)

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C., November 4, 1971.*

Hon. JOHN MITCHELL,  
*Attorney General of the United States,*  
*Department of Justice, Washington, D.C.*

DEAR MR. ATTORNEY GENERAL: When President Nixon announced the nomination of William Rehnquist to be a Justice of the Supreme Court, he stated that one of the criteria he used was "the judicial philosophy of those who serve on the Court." The President has said that these nominees share his judicial philosophy, "which is basically a conservative philosophy."

The Members of the Senate Judiciary Committee have been attempting for the last two days to explore for themselves the judicial philosophy of William Rehnquist. Many Members of the Committee appear convinced that this is a fit subject for inquiry by the Senate. Indeed, Mr. Rehnquist has stated at the hearings that he believes that the Senate should fully inform itself on the judicial philosophy of a Supreme Court nominee before voting on whether to confirm him. See also William H. Rehnquist, "The Making of a Supreme Court Justice," Harvard Law Record, Oct. 8, 1959 p. 7; C. Black, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 Yale L. J. 657 (1970).

Unfortunately, the Committee has been unable to inform itself fully regarding Mr. Rehnquist's judicial philosophy because he has felt it necessary to refrain from answering a number of questions. Some of the questions at issue involve Mr. Rehnquist's refusal to respond based upon his claim of the lawyer-client privilege arising out of the work as Assistant Attorney General since 1969. In my view, the lawyer-client privilege does not require Mr. Rehnquist to remain silent concerning his own views on questions of public policy and judicial philosophy merely because he has advised the Department of Justice on these matters or because he has publicly defended the Department's position. As one scholarly observer has noted:

"The protection of this particular privilege is for the benefit of the client and not for the attorney, the court, or a third party. The client alone can claim the

privilege, and in fact the client must assert such privilege, since it exists for his benefit." E. Conrad, *Modern Trial Evidence* § 1097 (1936).

And as Professor McCormick has noted (*Handbook of the Law of Evidence* § 96 (1954)), "it is now generally agreed that the privilege is the client's and his alone."

Despite my view that the privilege is inapplicable here, I am writing to urge you—in the interest of the nominee and of the nation—to waive the lawyer-client privilege in this situation. I have made a similar request of the President. This would release Mr. Rehnquist from any obligations he might have under Canon 4 of the American Bar Association Code of Professional Responsibility, see Code of Professional Responsibility, DR 4-101 (c)(1), or any other obligations he may have to refuse to answer questions involving his own views on questions of public policy or judicial philosophy. It is essential that the Senate, which must advise and consent to this nomination, have the fullest opportunity to determine for itself the nominee's personal views of the great legal issues of our time. I hope you will be able to cooperate to this end.

Sincerely,

BIRCH BAYH, *United States Senator.*

OFFICE OF THE ATTORNEY GENERAL,  
Washington, D.C., November 5, 1971.

Hon. BIRCH BAYH,  
U.S. Senate,  
Washington, D.C.

DEAR SENATOR BAYH: As I understand your letter of November 4, 1971, you are requesting that I, as Attorney General of the United States, waive what you refer to as the "lawyer-client privilege" with respect to matters on which William H. Rehnquist, as an Assistant Attorney General in the Department of Justice, has advised me and with respect to which he has taken a public position on my behalf. I further understand that this request is made by you individually rather than by the full Senate Judiciary Committee before whom Mr. Rehnquist has appeared as a nominee as an Associate Justice of the Supreme Court of the United States.

The issue raised by Mr. Rehnquist or any Supreme Court nominee's refusal to respond to certain questions during confirmation hearings is far broader than the scope of the lawyer-client privilege. There are other considerations which prompt a refusal to comment. For example, a nominee may feel that it would be improper for him to respond to the kind of question that might come before him as a Justice of the Supreme Court. Past nominees have confined themselves to fairly general expressions, declining to provide their view of the Constitution as it applies to specific facts.

Even in those few instances wherein Mr. Rehnquist, relying on the lawyer-client privilege, declined to answer questions concerning what advice he may have rendered me, I feel constrained to say that a waiver would be entirely inappropriate. As Attorney General of the United States, I am acting on behalf of the President. In such a capacity as a public official, I do not consider the same factors the private client considers in deciding whether to waive the lawyer-client privilege.

I can well appreciate your personal, intense interest in probing into all aspects of Mr. Rehnquist's work while at the Department of Justice. I am sure you appreciate, however, that it is essential to the fulfillment of my duties and obligations that I have the candid advice and opinions of all members of the Department. Further, I am sure you realize that if I should consent to your request or other requests to inquire into the basis and background of advice and opinions that I receive from the members of my staff, it would be difficult to obtain the necessary free exchange of ideas and thoughts so essential to the proper and judicious discharge of my duties. It would be particularly inappropriate and inadvisable for me to give a blanket waiver of the lawyer-client privilege in this situation. Ordinarily, a waiver should only be considered as it may apply to a specific set of facts. The range of questions which may be put to a nominee is so broad that it would be difficult, if not impossible, to anticipate what a general waiver would entail. Because Mr. Rehnquist, as Assistant Attorney General in charge of the Office of Legal Counsel, renders legal advice to others, including the President and members of the Cabinet, obviously I cannot waive the privilege that may exist by reason of those lawyer-client relationships. And determining the limits of each relationship cannot be done with precision.

I have received a letter from Chairman Eastland and Senator Hruska stating, in their experience, that the Senate Judiciary Committee has never gone behind a claim of the attorney-client privilege or made an effort to obtain a waiver of the privilege from a client of the nominee. While ordinarily I would defer a decision until a request had been received from the Committee, I felt it necessary and desirable in this case to explain to you why I considered your request, or any similar request, inappropriate.

This letter may be considered a response by the President to you with respect to your letter to him of the same date and with respect to the same subject matter.

Sincerely,

*JOHN MITCHELL, Attorney General.*

**Senator BAYH.** To capsulize the very thoughtful 2-page letter, the Attorney General refused to waive the attorney-client relationship. I will read excerpts from it. For example—

There are other considerations which prompt a refusal to comment. For example, the nominee may feel it would be improper for him to respond to the kind of question that might come before him as a Justice of the Supreme Court. Past nominees have confined themselves to fairly general expressions declining to provide their view of the Constitution as it applies to specific facts.

I suppose it is fair to say that that is a legitimate hypothesis on the part of the Attorney General that we should not require a prospective nominee nor should he reply to questions in this regard that cause him to prejudge a cause.

**Mr. Rauh.** as a learned attorney, would you concur with that assessment?

**Mr. RAUH.** Precisely. It was exactly because of that point that I said the lawyer-client privilege did not apply. The right not to comment on cases that are coming before the Court obviously is correct, and we would make no challenge to his refusal on that ground, Senator Bayh.

**Senator BAYH.** Well, I want to say that this was not the request that I made. I do not see how I could ask a nominee—or the Attorney General to force a nominee or make it possible for a nominee—to answer such questions. That would be totally inappropriate. But contrary to a letter sent by our two distinguished colleagues, Senator Eastland and Senator Hruska, that in their experience the Senate Judiciary Committee has never gone beyond the claim of attorney-client privilege, I do not recall in the 9 years I have been in the Senate a prospective nominee to the highest Court of the land invoking a client-lawyer relationship. Now, I do not recall that ever happening. There are grounds for where a man should refuse to testify, but it is difficult for me to determine what William Rehnquist himself feels in general terms about the critical problems that confront us today unless he can separate himself from the statements that he has made which he now says were made totally as a representative of the Justice Department, which concern me very much.

Do you have any specific suggestions as to how we can get around this lawyer-client relationship, and the prohibition of the Attorney General to waive it?

**Mr. RAUH.** No; I guess I feel as defeated as you do. I do not think there was any lawyer-client privilege in any situation about which you asked him. I think some of the questions to which he pleaded lawyer-client privilege might, carefully analyzed, have included some possibility of a case before him later on. If he had then said, "I do not want to answer this because it may come before me," I think you would have

stopped right away. In fact, you always did stop when that point was raised, so I do not see that problem.

I think the Attorney General made a terrible error of law. First, he assumed that there was a privilege that does not exist and then he said he would not waive it. I do not know who is acting as his lawyer now; Rehnquist was supposed to be his lawyer and obviously could not act in this matter. So I do not know who is acting as the lawyer for the Attorney General at the moment. But what he is saying is, "There is a privilege that does not exist and we will not waive it anyway."

Senator BAYH. It concerns me, I do not know what to do about it and I thought maybe you could tell me what to do.

Mr. RAUH. I can tell you what you have to do about it. In the absence of any other answer, one has to assume that he meant what he said. In other words, when he went out on the hustings and made a statement, one has to assume that that is what he believes just as you would assume that Mr. Mitchell and I, although we stand here representing more than a hundred organizations, are saying what we believe, not what the organizations believe or what somebody else would tell us. Roughly, we are trying to describe their position, but when we say something we believe it.

I think the only thing the Members of the Senate can do, in the absence of his willingness to amplify his position, is to assume what Rehnquist said is what he believes. And on what he has said, he is not fit to be a Supreme Court Justice.

Senator BAYH. On a number of these occasions, and this will be my last question—you have been very patient and so have my colleagues—on a number of these questions that I posed to him, as you recall from what you said, you read the transcript of the record, I have taken specific quotations and have asked him if these represented his views, his views on human rights, or the administration position. Very frankly this concerns me. I have asked him one basic question: "Did you say this and does this now represent your point of view?" Is that a fair question?

Mr. RAUH. Certainly. I do not see how there can be any question about it or any assertion of confidentiality necessary for the lawyer-client privilege. I think the whole lawyer-client privilege thing before this committee is just like the emperor walking down the street without his clothes on. Nobody knew it until the child said the emperor did not have his clothes on. It is just simply that. There is not a lawyer-client problem here.

Senator BAYH. Thank you.

Senator HART. Senator Hruska.

Senator HRUSKA. Would the Senator yield?

Senator BAYH. I yield completely.

Senator HRUSKA. Even partially would be all right, temporarily. In this committee room not many years ago, the first black man who was ever appointed to the Supreme Court appeared and was questioned. He was subsequently confirmed, and is serving well and creditably across the street.

Time after time after time he was interrogated by some Senators who sat to the right of the chairman, and time after time after time he said, "I decline to answer that question," not only as to his views past and present, but as to comments on cases that had in the past or might in the future come before the court.

Now, I can hardly differentiate that from the situation here where a question is asked of a nominee, and he says, "I do not choose to answer that question; I do not think I should answer it; I think it is an improper question." We have never in the past gone beyond this type of answer of the nominee in this committee to my recollection.

Now insofar as the law on waiver of privileged communications is concerned, my own belief, and I have done some reading and have had some personal experience in this area, is that a lawyer representing other people has no business nor has he a right to waive privileged communications without consulting with those whom he represents. In many instances, as the Attorney General has indicated in his letter, Mr. Rehnquist has served as lawyer and counselor to many officials of the executive branch. It would be impossible to contact all the people he has represented for the purpose of asking their permission to waive the privilege.

But I come back to this proposition: we sat here for 2 or 3 days when Mr. Thurgood Marshall was before us, and we respected his answer when he said, "Mr. Chairman, that is an improper question to ask of one who has been nominated to the bench," because of the many reasons which he recited.

Senator BAYH. If the Senator will yield, or if I have not yielded totally and may reclaim the part I did not yield.

Senator HRUSKA. I will yield.

Senator BAYH. I just want to make one statement because as we look through the record before us we will find the nominee respectfully, very respectfully, and I am not at all concerned about the demeanor or the way he approached this, I think he has legitimate concern, conscientious concern, but in this particular instance he relied on two different and distinguishable grounds. One was that he did not want to put himself in the position where his opinion and his articulating it before the committee would prejudge a case which might come before him as a Supreme Court Justice. That was the answer that has been used on several occasions by almost every nominee that I have had the good fortune to sit on this side of the table to listen to. That was the basis of the refusal of Justice Marshall.

I do not recall anybody relying on another type of reason for not answering. Indeed, the lawyer-client relationship which, as we read through the record, Mr. Rehnquist often involved—he did this not on the basis that he did not want to prejudge the case but that he did not want to disclose any confidence he might have with the Attorney General. He said he did not want to embarrass the administration or something like this, and that is why I think it is entirely proper to ask for a waiver of the privilege. It would be helpful if the Attorney General had sent back a different answer than he sent back to us so we could get not the administration's position, not the Attorney General's position, but get Mr. Rehnquist's position, his thoughts on these critical issues in a general way so we could know whether he indeed did believe the words that came out of his mouth concerning these important matters that we have discussed.

Now, that is the difference I have with my distinguished colleague from Nebraska and the distinguished Attorney General.

Senator HRUSKA. May I suggest that the Senator from Indiana recall that Thurgood Marshall served on the bench before he became

Solicitor General, that he was Solicitor General when he testified to this committee, a highly comparable situation to that of an Assistant Attorney General who is in charge of the Office of Legal Counsel. If he had been asked questions similar to those asked Mr. Rehnquist regarding internal Justice Department affairs his refusal to answer would have been totally justifiable because there are many situations in which the Attorney General requires complete candor from his associates in setting departmental policy and in serving as lawyer for the executive branch. If advice given, and possibly rejected, is to be made public, this candor will be lost.

Mr. MITCHELL. Mr. Chairman, I would like to say I was, of course, present at all of the hearings and I recall distinctly that on one occasion when Mr. Marshall was being considered as an appointee to the Second Circuit Court of Appeals, the only way that it was possible to conduct a hearing was because you, although you were a member of the minority party, convened the hearing and did conduct it.

I recall distinctly also that there were many questions which it seemed to me if Mr. Marshall answered it would raise a lot of additional questions, and to me it seemed that it was not necessary to do it. But I must say he performed in a manner of disclosing everything that anybody could conceivably think of as relevant, and my recollection is that in those hearings you personally commended him for his willingness to try to tell the committee everything within reason that it wanted to know.

I think the problem with the contrast between the Marshall hearings and the Rehnquist hearings is here are matters of great moment which affect the country no matter which administration is in power, and it does seem to me that everybody ought to bend over backward in that kind of a situation to make a full disclosure of the public business.

We have laws which make disclosure mandatory with respect to the ordinary citizen, and I think when something so vital as the Supreme Court is involved there ought to be a full disclosure and the administration itself ought to be willing to bend over backward.

Of course, I agree that nobody ought to be asked to predict how he is going to rule on a question that comes before him in the Court. But I do think that his general philosophy ought to be spread on the record so that the public may know in minute detail just what he stands for.

Senator HRUSKA. During the hearings last week, the witness will remember that it was my suggestion that Mr. Rehnquist was guilty almost to a fault in trying to express himself by way of answering on general personal philosophy. But when he was asked as to matters that came to his official attention as counsel to the President and the Attorney General he respectfully refused, and regretted that he could not answer. I submit that refusal was proper and mandatory.

Senator BAYH. If the Senator would yield.

Senator HRUSKA. I thought that was very fair and it is in keeping with the privilege, confidential privilege, of communication between lawyer and client.

Senator BAYH. If the Senator would please address himself to the question he just raised, that issue was not brought before this committee when Mr. Marshall was here.

Senator HRUSKA. Which question?

**Senator BAYH.** The relationship he had had with certain administration officials. The concern some of us have is that out of Mr. Rehnquist's mouth have come some statements in support of the administration position concerning the Bill of Rights that are of great concern to us. We simply want to know whether they are his opinions or whether they constitute the Justice Department's, for whom he was serving as a lawyer, as an agent or whatever, and he has refused to disclose whether this is the case or not. I do not see how that bears on the questions directed at Justice Marshall when he refused to answer not because of any secrecy that was necessary between him as Solicitor General and the administration but because he did not want to prejudge a case that might come before him.

Cannot the Senator from Nebraska make a distinction between those two?

**Senator HRUSKA.** The record will show the nature of the questions which Senator Ervin asked as well as some questions which Senator McClellan asked of Thurgood Marshall. Some of them did bear upon situations that arose while he was the Solicitor General and concerned the discharge of his duties and the Supreme Court cases decided while he held that high office. He declined to answer them, and very properly so, and the same thing is true in regard to the answers given by Mr. Rehnquist.

**Mr. RAUH.** May I make two points, Senator Hruska, in answer to what you have been saying? First, I do not believe Thurgood Marshall at any time pleaded the privilege of lawyer and client.

Secondly, I do not believe that Senator Bayh in any way is suggesting that he wants any privileged communications. You keep using the words "privileged communications." That means a confidential relationship between lawyer and client. When Mr. Rehnquist went to Brown and made a speech on wiretapping and Senator Bayh now wants to ask him whether that is his view or not, that is not a question based on a privileged communication. Therefore, the lawyer-client relationship does not apply.

If he wants to say, "I intend to sit on that case and, therefore, I will not answer," it would be a proper answer.

Now, he cannot say that because he does not intend to sit on that case as he has already worked on the brief.

**Senator HRUSKA.** And he frankly said so and he said he would disqualify himself on that particular case.

**Mr. RAUH.** That is exactly why the lawyer-client privilege does not apply.

**Senator HRUSKA.** Not privileged communication in that particular instance, perhaps, but in the other instances it did apply. The Senator from Indiana asked the Attorney General to wave some kind of a magic wand and say, "This privilege has now disappeared, you may testify." It does not work and it cannot work that way if the sanctity of privileged communications is to mean anything at all.

**Senator HART.** Senator from North Dakota.

**Senator BURDICK.** I would like to thank Mr. Mitchell and Mr. Rauh for their contributions here. I am disturbed by a contradiction in testimony. We will put the two together and perhaps Mr. Mitchell can clarify it for me. On page 4 you talked about the letter from Mr. Moses Campbell, and in the letter it states, and I will quote: "I was

present at the time our Past President"—that was of the NAACP—"Reverend George Brooks and Mr. William Rehnquist exchanged bitter recriminations concerning the group's purpose for marching, intimating that the march was communistically inspired." Mr. Campbell further asserts that Mr. Rehnquist's conduct, "brought irreparable harm and insult to the blacks of Phoenix, Ariz." You say "He opposes the nomination of Mr. Rehnquist. I offer a copy of Mr. Campbell's letter for the record."

On Monday of this week, at page 297 of the record, we find the following language, question put by Senator Hruska—

Judge Craig, in regard to the first whereas of the resolution of the southwest area NAACP I would like to read you an excerpt from yesterday's Washington Post. "When Rehnquist was nominated for the Supreme Court the former Reverend George Brooks"—

I presume the same one mentioned in the letter—

charged in 1965 Rehnquist confronted him outside the State Capitol and argued in abusive terms that a Civil Rights Act later passed by the State legislature should be opposed.

Further quoting from the record—

The Arizona NAACP promptly passed a resolution and the text of the resolution and the whereas read by the Senator from Indiana a little bit ago, now getting back to the story of the Washington Post. By the end of last week Brooks was telling a different story. He now says that the discussion with Rehnquist was calm, the tone was professional, constitutional, and philosophical.

Have you any idea when Mr. Brooks was right?

Mr. MITCHELL. I would say that on two occasions Mr. Brooks had indicated that the conversation was heated and there were recriminations. On one occasion, if he is correctly quoted in the Washington Post, he takes the opposite position. The first time he made that assertion was when Mr. Rehnquist was under consideration for his present position of Assistant Attorney General. In fact, Mr. Brooks was one of the leaders of the group which tried to prevent the confirmation of that nomination by writing to various people and nothing came of it but one of the principal points in the argument against Mr. Rehnquist was his performance up there at the State capital.

Then, subsequently Mr. Brooks made a similar statement which, I think, was published in the New York Times. After that publication I talked with him on the telephone and said I hoped very much that he would come here to testify. He said he would not do so. I subsequently learned that Mr. Brooks' status has changed, that he is now in a position which I think has some connection with either the Federal or the State government, and apparently, like other persons who have information, he is unwilling now to describe the incident in the same fashion as it was described then.

I do not say that to be derogatory or to disparage Mr. Brooks. It is an ugly fact of life in this country, and I guess in many places that when your economic circumstances are at stake it requires a great deal of courage to be willing to come out and make a statement which might cause you to lose that status, so I would think on the basis of all the information that has been given to us that the Campbell description of that is correct, and that the first two Brooks descriptions are correct, but that the more temperate description is not correct.

Senator BURDICK. Is Mr. Brooks still president of the local chapter?

Mr. MITCHELL. No; he is not the president now.

Senator BURDICK. That is all. Thank you.

The CHAIRMAN. Senator Tunney.

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

Mr. RAUH and Mr. Mitchell, I want to thank you for your contribution here today for having highlighted before the committee your reasons for opposition to Mr. Rehnquist.

I would like to determine more precisely the parameters of your objections to Mr. Rehnquist. First of all, does either one of you think that he is not qualified on the basis of professional competence?

Mr. MITCHELL. May I say I think he is not qualified on the basis of professional competence for the reason that I cannot separate from professional competence the duty of a lawyer to be fair and impartial or a judge to be fair and impartial. This is where I part company with so many people, and I am awfully reluctant to say this because I do not want to offend anybody, but as a black man, and a lawyer, I cannot believe that an individual who is blind to the requirements of the 14th amendment, who believes that it is some kind of imposition on a drugstore owner because you ask him to open the doors so somebody can buy an aspirin tablet, I cannot believe that this represents legal competence.

Senator TUNNEY. Mr. Rauh, do you wish to make a statement?

Mr. RAUH. I think we have a little bit of a semantic problem here. I subscribe to everything that Mr. Mitchell said. I, too, feel a person is not competent who does not have equality in his heart.

If you are giving me the specific question whether I think he had a good record in law school, and so forth, I have to answer that, in all honesty, yes. But I think that, in truth, Mr. Mitchell comes closer to it than a more legalistic answer. Had he not spoken first, I might have given too legalistic an answer to you. I suggest that competence means more than the ability to pass an exam or try a case. Competence, as Mr. Mitchell and I are using the term, means in its broadest sense a lawyer loyal to the community, a lawyer making a better world. In that sense I wholly subscribe to Mr. Mitchell's suggestion that this man is not competent.

Senator TUNNEY. You would be referring perhaps to judicial temperament, that he did not have the judicial temperament?

Mr. RAUH. I think it is obvious that he is an activist of the most amazing type. That is clear from his statement, his actions. If he gets on that Court, heaven help the lawyer who tried to argue his own case. This is one of the most intermeddling of lawyers—rushing out when nobody else in Phoenix wants to stop this ordinance, rushing in to fight for de facto segregation, saying that store decision does not apply in constitutional cases. If there ever was an activist, Mr. Rehnquist is it. For President Nixon to call him a judicial conservative is absolutely 180 degrees wrong. This will be the most judicial radical for reaction that we have ever had.

Senator TUNNEY. Do you feel that President Nixon was attempting to politicize the Court and, if so, do you feel that the Congress, the Senate, would be escalating the politicization if we should turn down Mr. Rehnquist?

Mr. RAUH. I did not get one of the words.

Senator TUNNEY. Was the President trying to politicize the Court, and would we be escalating that politicization of the Court if in fact we should reject Mr. Rehnquist's nomination?

Mr. RAUH. Again, I think there is a problem of semantics in the words "politicization of the Court." I think President Nixon has been trying to put on the Court people who share his views of criminal law. I think he has had some bad luck, if you want to know the truth. I think he really thought Mr. Rehnquist was his kind of man on criminal law who was against all these frills of the Warren court like *Miranda* and *Escobedo*, and these other things that the Warren court has done. I think Mr. Nixon is the most surprised man in America to find out that Clarence Mitchell has a case against him on civil rights that is overwhelming.

I do not think the administration realized that they were getting an anti-civil-rights nominee. I think what they were looking for was a nominee who would reverse the Warren decisions on the Bill of Rights and they did not figure that they were getting this man who was so extremely reactionary on Negro and brown and other rights like that. I think they just made another blunder.

It seems to me that Rehnquist is the same type of administration blunder that Haynsworth and Carswell were. It is not really a question, it seems to me, of politicizing the Court so much as the fact that they have again made a blunder by inadequate investigation. And I can see how this happened.

On Wednesday, October 20, they were planning to appoint two other people. Then Wednesday night comes the "no" from the Bar Association. Within 24 hours they have to have two Supreme Court nominees. They were unable to do any adequate research into Mr. Rehnquist's civil rights record. They found his anti-Warren court record exactly what they wanted, and they never looked for the other.

For you to accept that nomination, it seems to me, whether you call it politicization or not, would simply be acceptance of someone who has no qualifications in the sense in which Mr. Mitchell so eloquently put it.

Mr. MITCHELL. My I comment on that, too, Senator Tunney? I think you have to look at the whole picture of this administration on civil rights questions to understand that this is, in fact, a political appointment, and an attempt to politicize the U.S. Supreme Court.

If you start back with the Republican National Convention, you will remember that the President in his acceptance speech made some reference to the fact that one of the first things he was going to do as President of the United States was fire the Attorney General. Now, everybody knows that the Attorney General would not serve under the administration, and this was one of those things that appeals to the gut reactions of crowds.

Then he made some reference to the fact that he was not going to have a Supreme Court—

Senator KENNEDY. Do you think if we fired this Attorney General that that would cause a gut reaction?

Mr. MITCHELL. I did not hear that.

Senator KENNEDY. Do you think if we fired this Attorney General it would cause a gut reaction in the crowd?

Mr. MITCHELL. I think upper or lower depending on your point of view. [Laughter]

He referred to the Supreme Court as sitting in the capacity of a school board. This again was one of those things that causes a crowd to get emotional.

Now this, you could say, is just politics. But what happened when the administration was called on to take a position with respect to school desegregation? The first thing that the administration did was to get one of the beloved and highly respected Solicitors General, who as dean of Harvard had always been on the side of civil rights, and it was a very painful experience for me to sit in the Supreme Court and to find the dean, now the Solicitor General of the United States, acting on the advice of the administration, taking a position against the acceleration of school desegregation; and the two appointments of Mr. Nixon that he made did not pay any attention to that so he is continuing to try to get on the Court somebody who will please that element of this country which somehow believes that the Supreme Court is the great advocate of racial mixing, busing, and all that kind of thing, and if you put people on there who will stop that then you are going to have a different situation.

Now, as to the second part of your question with respect to the politicizing of the issue if the Senate rejects him, I think the Senate in this case is the only bulwark between the people of this country and a demeaning of the U.S. Supreme Court, and I would say that if the Senate of the United States concurs in this nomination it will never be able to explain to the people of this country that it was not a party to the demeaning politicizing of the U.S. Supreme Court.

Senator TUNNEY. Mr. Mitchell, as I understand your arguments against the confirmation of Mr. Rehnquist, as contrasted to Mr. Rauh's, your objections are purely on civil rights, whereas Mr. Rauh goes into civil liberties in his statement, is that a fair analysis?

Mr. MITCHELL. This was a division of labor, and he has a greater love for that, although mine is amorous.

Senator TUNNEY. I would like to ask you, you have read the record and you have read, I am sure, most of the published statements of Mr. Rehnquist in the past 10 years. Do you feel that Mr. Rehnquist' civil rights attitudes have changed within the last 7 years?

Mr. MITCHELL. I do not believe that there has been the slightest change, Senator Tunney, and I reject wholly his present statement—it is very interesting if you listen carefully to what he said, one of the statements that Senator Hart read this morning, I believe he said, "I think that I would probably have a different position now." It seems to me if he does not know as distinguished from thinking then he probably has not changed.

Senator TUNNEY. Do you think anyone who is not in favor of making public accommodations open to all races should be, on that basis alone, excluded from consideration for the Supreme Court?

Mr. MITCHELL. I would say emphatically yes; because if a person is so insensitive, and so contemptuous of the feelings of his fellowman that he does not believe a mother with a child has a right to go in and get a meal at a lunch counter, or a person shivering and cold does not have a right to go in and get a cup of coffee to warm himself up, then that person has no business on the Supreme Court.

I will just mention this: Senator Thruston Morton once told me, he was a Senator from Kentucky, he told me one of the reasons he

had decided to vote for the public accommodations legislation in 1964 was because he was a friend to a Negro who was in the Kentucky Legislature, Mr. Anderson, and he said, "You know, I would think about Anderson's wife going downtown with that child of theirs and if the child", as he put it "wanted to tinkle, there was no place for that child to go because it was black." He said that kind of humiliation just ought not to exist in this country.

Well, I think that is an evidence of a sensitive person reacting. But to somebody who just feels, "Well, it is too bad, let him go somewhere else," I do not see how he has any place on the Supreme Court.

**Senator TUNNEY.** Do you feel, Mr. Rauh, that Mr. Rehnquist's attitudes on civil liberties have changed in the last few months, particularly since the time that he was nominated by the President to the Supreme Court, from his record?

**Mr. RAUH.** I do not think Mr. Rehnquist's attitudes have changed. As I said, he gave certain evasive answers which were for the purpose of possibly mollifying those who believe in civil liberties. But I do not see any change over a long history. The history goes back to 1957 when he suggests that the Supreme Court, to which he should have been loyal, had an ideological sympathy with communism. I should point out here something that I did not make clear this morning. When he later was trying to explain what he meant, he said the Court had an ideological sympathy with the underdog. But that word "ideological" is evidence that he was trying to imply that the Supreme Court, to which he should have been loyal, had an ideological sympathy with something bad. From the moment in 1957 and 1958 when he wrote the articles trying to imply that there was something wrong with the Warren court, through the civil rights period, his actions were all part and parcel of the same thing.

Let me say very frankly that the same people usually oppose civil rights and civil liberties. It is not strange that you find the same people opposing both. So you get Mr. Rehnquist in 1957 accusing the Warren court of ideological wrongs; in 1958 saying the same thing in his article in the ABA Journal; in the 1960's, back in Phoenix, attacking all along the civil rights front; then down here as the architect of the Mitchell anticivil liberties front. You get a picture of 13, 14 years in this thing. I think that a man who has lived roughly his whole adult life in the milieu of anti-human-rights and anti Bill of Rights is incapable of change.

Incidentally, there was a very good article in the Washington Post on Sunday making the point that most Supreme Court Justices have not changed on the Court. In other words, the Justices have largely carried out the views with which they went on the court. It is a myth, even if it was said by great men, that there is a change when one puts on robes. The fact of the matter is that that has not been proven by history. History shows us that the record of the past is what the man takes to the court and what he is on the court. Especially is this so with an outspoken and aggressive a man like Mr. Rehnquist who has fought all the advances in civil rights and civil liberties of the last decade and a half. I think the chance of change is very limited, and I say that we certainly see in these hearings no evidence of change. What you see is an evasion of the record, an effort to try to rewrite the record, not a showing of change.

**Senator TUNNEY.** I have two last questions that I would like to ask: One, Mr. Rauh, would you more fully describe the evidence on which you conclude that Mr. Rehnquist was merely participating in legal aid activities in Arizona as an involuntary *ex officio* duty?

**Mr. RAUH.** I did not use, Senator Tunney, the term involuntary or at least I did not mean to use it because I do not know that much about it.

I do have the record of the Maricopa County Legal Aid Society for the period that I understand that Mr. Rehnquist was on the board, and he is listed this way: "Ex officio, William H. Rehnquist, Maricopa County Bar." So it appears that he was there as an *ex officio* member.

I could not say that he did not want to be there. I simply am saying that for him to raise that *ex officio* membership as his great contribution to civil rights, I think that is to overstate the case on his own behalf.

**Senator TUNNEY.** The last question is, do you note any distinctions between Mr. Rehnquist and Mr. Powell and, if so, what are those distinctions?

**Mr. RAUH.** Well, obviously, Mr. Mitchell and I do draw a distinction.

The Leadership Conference on Civil Rights is not opposing Mr. Powell. We would, I suppose, not have appointed him; maybe as Senators we would vote no. But, when you take an organization as important as this one into a struggle, you must have overwhelming proof that you are correct. You must have it black and white, if I may use the expression. With Mr. Powell there appears to be a number of areas in which one must praise him. Jean Cahn writes an eloquent letter about his record on legal assistance for the poor. One must take note of that.

Apparently, although I am not a student of Mr. Powell's record—I have spent all my time on this struggle that we have before you today—I gather that there is no question that Mr. Powell did make a fight for legal aid for the poor inside the bar association.

Second, if one looks at the record in Richmond on school desegregation, it was a serious problem. I think Mr. Powell did something quite bad when he let State money get to Prince Edward County. Nevertheless, there is on the other side the fact that he did, over and over again, speak for keeping the schools open at the time of massive resistance. While I do not claim to be an expert on Mr. Powell, I gather from those who do know that there are things in his life where he has made real contributions. It seemed to us that to take our organization into opposing him, when one might say it was in a gray area, would have been a mistake.

Here we feel that there are no redeeming factors. We find nothing in Mr. Rehnquist's record in the civil rights area, like Mr. Powell speaking to keep the schools open. With Mr. Rehnquist we find nothing in the civil liberties area like aid to the poor for legal assistance. In other words, the record is all one way with Mr. Rehnquist.

That does not appear to be true of Mr. Powell, and so we decided we would take no position as we did in the case of Mr. Burger and Mr. Blackmun. We do not find any great joy in being the spearhead of the opposition in these matters. We felt we had to oppose when it came to Judge Haynsworth and Judge Carswell. We felt the same way on Mr.

Rehnquist. We did not feel the same way on Mr. Powell, and we are not taking any position on his nomination whatever.

Senator TUNNEY. Mr. Mitchell, do you have anything to add?

Mr. MITCHELL. I would just like to emphasize what Mr. Rauh said about our attempt to be fair. In all of these fights we have tried to get the story of the nominee before we made any kind of declaration about his position. When Mr. Blackmun was nominated by the President I undertook to get from the State of Minnesota and from the State of Arkansas, because Arkansas was in the circuit in which he served, information concerning his attitude on racial matters, and it was entirely favorable. In fact, the observation was made that Mr. Blackmun had come down from the bench on one occasion and said to our lawyers that he thought the Department of Justice was making a terrible mistake in trying to slow down school desegregation. So, obviously, we were not going to oppose that nomination.

In the case of Mr. Powell, we made a careful inquiry among his associates and friends in Virginia. There were mixed feelings on the part of black lawyers and others. I understand that there are those who are going to come forward and make observations about him, so it seemed to me they, because I know that one of them is a member of the Virginia Bar, a distinguished member of the Virginia Bar, ought to be the people who would say whatever had to be said. So we stood mute on the Powell nomination and were not for or against it.

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

Thank you, Mr. Mitchell and Mr. Rauh.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. I just have two questions of Mr. Mitchell and Mr. Rauh. I want to commend you, Mr. Mitchell, for your opening statement and also Mr. Rauh. I thought it was terribly helpful in pulling a great deal of information together, and I think it provided some very valuable insights.

How do you respond to the observation that is made that Mr. Rehnquist was really the lawyer for a rather authoritarian Attorney General, so to speak, in terms of his actions, whether you're talking about May Day, surveillance, or many of the wiretappings, and so on? Now he came up here, he indicated to the Committee that if he felt that these positions had been obnoxious to him he would not have defended them, which I find distressing in trying to distinguish his own views from those he had presented. How do you rebut the argument made by those saying that those who try to take from his speeches or statements a personal philosophy are doing a disservice to him? He was actually acting for a more authoritarian Attorney General, how do you react or respond to that?

Mr. RAUH. Senator Kennedy, it seems to us that Mr. Rehnquist has two choices. He may either disavow those positions or he may ask to be confirmed on the basis of them. He chose the latter when, for different reasons and especially for a nonexistent reason of lawyer-client privilege, he refused to tell you whether he accepted those positions and whether those were his present positions.

Now, I believe they were his personal positions. He did not just work as a quiet drone in the Attorney General's office, Senator Kennedy. He went out on the hustings as the administration spokesman. He wrote articles, he wrote letters to the papers. It is one thing to be

the inside person working with the Attorney General; but would anybody except a true believer be the principal spokesman outside the Department and especially on college campuses? He told the committee how he was the leader of the task force that went to college campuses. He is the principal article writer of the Department, the principal letter writer of the Department. I would say that, if he did not believe all this, it would be a great reflection on his character.

I think the truth of the matter is that he does believe what he said. His entire record, as I was trying to say, from 1957 through 1971, makes him a part of that rightwing philosophy. I have little doubt that he believes what the Attorney General believes. Whether the Attorney General could get confirmed here is a different story. But I believe that Mr. Rehnquist's views and the Attorney General's are identical. You gave him a chance to try to dissociate himself and he rejected it. I think you have to, as a legal matter, act on the presumption that the views he gave in his speeches, articles and letters are his views.

**Senator KENNEDY.** And how much weight do you think we can give or should give to those views in fulfilling our responsibility to advise and consent?

**Mr. RAUH.** Senator Kennedy, I guess this is really coming back to where we started. If you take the Professor Charles Black view, you have a right to consider everything that the President can consider. I fully accept that as the better view of the responsibility of the Senate based on the history set forth by Professor Black. But I do not believe for the rejection of Mr. Rehnquist that it is necessary for you to accept what we might call the expansionist view of the Senate's role. It seems to me that a narrower position is possible than that Professor Black proposes. The lesser position is this: That the Senate, at least, has the right to see that court nominees are of such a nature that the Constitution is carried out and that the people of this country have the feeling that there is on the court a man dedicated to human rights.

In this period of our history the court has been the last resort of black and brown people. I think the Senate, even if it does not go as far as Professor Black, must at least go to the point of insuring that the nominees are dedicated to the Constitution and to the rights of minorities.

Therefore, I would suggest that you would be remiss in your duty if you did not go into these matters, whether you are willing to go as far as Professor Black did or not.

**Senator KENNEDY.** Let me, Mr. Mitchell, just ask a final question, and to you, Mr. Rauh. You know we talk about whether men change when they take on the robes of the Supreme Court, and you mentioned, I think, Mr. Rauh, the fact that history shows that they really have not changed that much. I am not familiar with the article that refers to it, but I am not so sure I would be willing to accept that as a general thesis.

I would suppose one of the very perplexing problems that any of us has is trying to look on into the future and see how these men will decide a range of different issues of questions relating to human rights or liberties.

Mr. Mitchell, do you think you would, knowing what you did about Hugo Black, have been up here prepared either to support him? or

from what you have known about any of these other men who have gone on the Court, what can you say to help us on this question, really? I mean, when you put those robes on, I personally do feel there is a change. How significant and how weighty and how important that is, it is terribly difficult for any of us to judge. But certainly in Hugo Black you saw an enormous difference. What can you tell us about this in terms of our being fair to any of these nominees?

Mr. MITCHELL. Well, Senator Kennedy, when Justice Black was nominated to the Supreme Court, I, along with some of my contemporaries, attempted to stage a huge protest demonstration. Part of our equipment was Ku Klux Klan hoods. We all agreed we would go out and distribute handbills for this meeting wearing Ku Klux Klan hoods dramatizing the fact that Mr. Black had been a member of the Ku Klux Klan.

But there was living at that time Walter White, who was the Executive Secretary of the National Association for the Advancement of Colored People.

Mr. White had known Mr. Justice Black as a Senator from Alabama, had known him intimately, and had great respect for him. It was Mr. White who convinced us that although the Justice had this Ku Klux Klan identification in earlier life that he was in fact a person who had deep convictions.

It was because we trusted Mr. White as an expert witness on the nominee that we took off our Ku Klux Klan hoods, and we refrained from protesting, and up until one of the last decisions that Mr. Black made in the *Mississippi Park Closing* case, we have never regretted that.

I think in the case of people like Judge Haynsworth, Judge Carswell, and the present nominee, Mr. Rehnquist, you have to rely on the assurances that you get from people who are really experts on them either because they have worked with them intimately and known them well or are convinced themselves that this individual is different from the image that he projects. That is not present in the Rehnquist nomination.

The only thing we have as evidence of a change of heart is the fact that under circumstances where the prize for conformity is the U.S. Supreme Court he has been willing to say to men of good will like yourself, willing to say on the record, and in a somewhat evasive manner, that he has changed.

I do not think that is sufficient evidence. I do not think that the country can afford to take that kind of chance, and I repeat, as I said, in the earlier part of my testimony, in the words of Senator Hart, can you ever, could you ever, expect that a black man going into the U.S. Supreme Court, seeing Mr. Rehnquist sitting up there, knowing what his record is, would believe that he could get fair consideration? I think it is important that the people will believe that they get fair consideration, and I do not believe that Mr. Rehnquist has been convincing in that respect.

Senator KENNEDY. Have there been any—let me just ask—have there been any black leaders at all who have come forward that you know about or that you have respect for in behalf of Mr. Rehnquist, who would fill that same role as Mr. White did for you at the time of Justice Black's nomination?

**Mr. MITCHELL.** No one has, Senator Kennedy. The people of Arizona who know him by direct contact, have been unanimous in their condemnation of him. There has not been a single person of any importance who has come forward saying that they feel he has changed and he ought to be on the Supreme Court.

**Mr. RAUH.** Senator, may I say a word on the Justice Black analogy? I was a law clerk at that time for Justice Cardozo. When Justice Black went on the Court, he was one of America's foremost liberals. At the moment Justice Black, as a Senator, was President Roosevelt's leader in the Senate of the United States. When, I guess it was Justice Vandevanter retired, and there was a vacancy, the question arose whether Senator Black should get it. This was based on whether he could be spared from his New Deal duties in the Senate. He was, after Senator Barkley, the leader of the group seeking to get New Deal legislation through Congress. He had already proved his anti-Klan feelings.

What happened was that Black was then confirmed as a very liberal man.

Subsequent to his confirmation the story of the Klan association came out. There were people who felt as Mr. Mitchell did, and they were answered by Mr. White. But even at the time the story came out about the Klan, Black was at that moment respected as one of the great liberal Senators of the time. So, it is not really fair to put the question in those terms.

Had Black's record in the 20 years previous to his nomination been consistent with his Klan membership, it would have been one thing. But his record for 20 years was totally inconsistent with that short Klan membership.

Senator KENNEDY. And I suppose the point that you are making, Mr. Rauh, is that Mr. Mitchell indicated how heavily he relied on Mr. White's giving those kinds of assurances, having an intimate knowledge of Mr. Black. And I suppose the point you are making here is that the same kind of human concern or human compassion toward fellow human beings is lacking in Mr. Rehnquist's experience, so far as you have been able to detect both from what he has been able to present here and also from your own study.

**Mr. RAUH.** Precisely.

Senator KENNEDY. That might be at least helpful and useful to us, if someone could show a broader spirit or a man who conducted himself in that manner.

Thank you very much.

**Mr. RAUH.** Mr. Chairman, I have two things that Senator Cook mentioned this morning. May I quickly answer them for the record?

Senator HART. Yes.

**Mr. RAUH.** I promised Senator Cook I would get the dates on the Arizona civil rights law and I have them. The Arizona civil rights law passed the senate on February 16, 1965. It passed the house on February 26, 1965. It was finally passed by both houses on March 26, 1965. It was approved by the Governor April 1, 1965. That is the Arizona civil rights law which includes the Arizona Civil Rights Commission and no discrimination in either voting or public accommodations. Senator Cook asked me for the dates.

The other point that Senator Cook raised was the question of the press picking up the "qualified martial law" statement and using it.

I said that I believed it had been used even after the nomination since it was so commonly known. I would like to refer to the New York Times, Wednesday, November 3, 1971, where the following is reported:

Reacting to the criticisms that during the May Day protest in the District of Columbia many individuals had been swept into the police mass arrest net and held without opportunity to make bail, Mr. Rehnquist replied that an undeclared qualified martial law had existed.

I would also like to refer to the Washington Post of Sunday, November 7, 1971, in which the following occurs in the B section (I do not have the page number):

At the last mass arrests that were made by Washington police in the May Day, Rehnquist espoused the doctrine of qualified martial law.

I only mention those two items because Senator Cook had indicated he was going to bring forth some evidence that this was not the accepted newspaper reporting.

Thank you, sir.

Senator HART. Gentlemen, thank you very much. As has been true on other occasions, your testimony has been relevant and of great significance. Thank you.

Mr. MITCHELL. Thank you.

Mr. RAUH. Thank you.

Senator HART. Before I recognize Senator Kennedy, let me say that next we shall hear on behalf of himself and members of the congressional black caucus and a very distinguished colleague of mine of the Michigan delegation in the House, the Congressman from the First Michigan Congressional District, the Honorable John Conyers.

Senator Kennedy?

Senator KENNEDY. Mr. Chairman, yesterday I asked that a memo utilized in questioning Mr. Powell be made a part of the record. It was the memo regarding the consensus of the FBI conference that the FBI ought to enhance the paranoia endemic in the New Left so as to "get the point across there is an FBI agent behind every mailbox."

I said it was not a classified memo because it did not have the usual stamped classification in the usual place. However, I now notice that at one point the text says that it should be given the security afforded a document classified confidential. Although the memo has appeared many times in the media, I file it now with the suggestion that the committee determine from the FBI whether there are any continuing national security reasons for treating it as a classified document.

Senator HART. Before I say yes, shall I have a newspaper copy?

Senator KENNEDY. You figure that.

Senator HART. This will be placed in the record.

Congressman, we first welcome you, and then we express our appreciation that you have been willing, and that your schedule permitted you, to wait.

**STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN; ACCCOMPANIED BY HON. WILLIAM CLAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI, AND HENRY L. MARSH III, ATTORNEY**

Mr. CONYERS. Thank you, Mr. Chairman, Senator Hart, and the distinguished members of this committee.

Again I am very honored to come before you. I bring with me my dear friend from Missouri, Congressman William Clay; and to my right, I bring a distinguished attorney from Virginia, Henry L. Marsh III.

I will say more about him as we proceed.

I am here, Mr. Chairman, under the authority of the black congressional caucus which, as you probably know, is composed of the Honorable Shirley Chisholm, of New York; my colleague, William Clay, of Missouri; Congressman Charles Diggs, of Michigan; Congressman Robert Nix, of Pennsylvania; Congressman Augustus Hawkins, of California; Congressman Louis Stokes, of Ohio; Congressman Charles Rangel, of New York; Congressman Ronald Dellums, of California; Congressman Walter Fauntroy, of Washington, D.C.; Congressman Parren Mitchell, of Maryland; Congressman Ralph Metcalfe, of Illinois; and Congressman George Collins of Illinois.

We are delighted to be here even though the wait has been a long one. I would suggest that there is little room to quarrel with the view in connection with the nomination of William H. Rehnquist to the Supreme Court, that adequate legal experience and honesty alone are insufficient in reaching a determination of a nominee's fitness for the High Court. Beyond these requisites, his judicial philosophy is of the highest importance, and that is what we will emphasize and dwell upon in the time we have before you.

That is to say, his perception of the function of the Court, his obligations as a Justice in interpreting the Constitution, are clearly affected by his basic convictions on the socioeconomic issues of the day.

It is fundamental that an individual cannot divorce himself from his past sets of experiences. Even though he may not feel bound by the restraints of personal or constitutional judgment on issues he considered as a citizen, few men can achieve this degree of independence from their past.

No one seriously believes that a judge's professional work is not influenced and formed by his world outlook, by his economic and social and political understanding, by his experiences, and by his personal sense of justice regarding the great questions of his age.

And so, in passing on the very heavy question before you, might I quote from Professor Black of the Yale Law School, who has been mentioned during these proceedings. He wrote a passage that summarizes a great many pages of the testimony that will be inserted into the record:

\* \* \* there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote.

Our statement is replete with evidence of what might be called the socioeconomic viewpoint of the nominee in question.

We cited him at length to illustrate an outlook on life. We mentioned statements and illustrations from speeches, quotations, and activities that are perhaps not new to you and which have apparently been

gone over a good many times, but they do illustrate an outlook on life, a view of the world, which is too narrow, too ill suited for the times, and clearly out of step with the new responses that have emanated from the courts in an attempt to harmonize age-old challenges that still yet require constitutional interpretation.

Although it could be argued that no one of these statements taken alone presents in and of itself a serious threat to civil rights or civil liberties, it is maintained by us that they, taken as a whole, do, in fact, reveal a philosophy so rigid and conservative that it cannot help but have a chilling effect upon those who have struggled so valiantly to achieve the small gains made in the last 17 years under a system of law which has grudgingly given support and shelter to those legal doctrines that enshrine the first amendment and the 14th amendment.

We are presently witnessing increasing numbers of violent acts of State terror in America: The overreaction of law enforcement officers in Watts, Newark, and Detroit; the massacres at Kent State, Jackson State, and Orangeburg. The tragedies at Attica and San Quentin are current examples of attempts to spread a psychology of fear among oppressed ethnic groups who are demanding power and freedom. And so, nearly 200 years after the establishment of this Government, the contradictions and antagonisms have become regulated and institutionalized, but not eradicated.

The question becomes then whether the Constitution will be used to moderate the conflicting racial and economic struggle in America and keep it within the bounds of law and order, or whether it can be used as a document to lead us to a unified, harmonious, and peaceful society.

To reconcile traditional antagonisms rather than regulate them is the new challenge confronting the Supreme Court of the land.

What are we to say of an individual nominated for the Highest Court who views the Constitution with an ante bellum eye, who sees the gigantic steps forward by the Court as requiring two giant steps backward, and one whose philosophy if it had been consistently applied since the inception of the Republic would by now have left us with very little progress in the areas of civil rights and civil liberties.

A careful study of these excerpts from Mr. Rehnquist's remarks reveals a clear call for the curtailment of due process, of habeas corpus, and of freedom of speech. You will find the justification for wiretapping and other surveillance. The expressed fear of nonviolent disobedience is to be met by force. It's all there: The defense of Haynesworth, the SACB, and the handling of the May Day demonstrators.

And so, in brief conclusion, the real question is: Can this country afford at this perilous time in its history an individual on the Court with an ideology so out of tune with the times that if his philosophy should prevail, even in part, it would threaten to tear at the slender threads now holding us together? Make no mistake about it, the Court is viewed as the last hope by millions of Americans--especially blacks and other oppressed minorities.

Short of the ultimate fulfillment of the American dream, that hope must be maintained. Holding our society together may well depend on maintaining the faith, which still survives even among the most disaffected, that in our highest courts there may still be found equal justice under law.

We can ill afford to move backward at a time when we are moving forward at a dangerously low rate.

The Senate should not confirm or fail to confirm this nomination because of a threat from any segment of our society, but it must recognize the consequences of its actions.

The Senate has not only the responsibility, if I may humbly suggest, to advise and consent on Presidential nominations to the Court, but has the obligation to examine the candidate's fitness in relation to the potential harm that might be done.

Again, as Professor Black observed—

. . . a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by doing so.

Because there are reasonable grounds to believe that the views of William H. Rehnquist are inimical to the best interests of this Nation, the Senate is respectfully urged to advise the President negatively on this nomination.

I hope that the chairman and members of the committee will permit these Members of Congress and distinguished counsel from Virginia to make these suggestions because it seems very clear to me that unless this view is approached in evaluating this and the other nomination confronting you perhaps a rather serious mistake might be made. In other words, we are suggesting something that is really not new, but has been used and employed by the Senate in being that middle link between a nomination and a commission of Presidential nomination many, many times.

We are asking now that it be carefully reviewed, thoroughly considered, and fairly applied in the instant nomination.

**Senator HART.** Congressman, you have also a prepared statement which, I take it, you want to be printed in the record in full as if given.

**Mr. CONYERS.** Yes, Senator; I do ask that this statement be included in the record.

**The CHAIRMAN** (presiding). We will take it.

(The statement follows.)

#### TESTIMONY BEFORE SENATE JUDICIARY SUBCOMMITTEE CONSIDERING THE NOMINATION OF WILLIAM H. REHNQUIST TO THE SUPREME COURT OF JUSTICE

PRESENTED BY HON. JOHN CONYERS, JR., MEMBER OF CONGRESS ON BEHALF OF

HIMSELF AND MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS

Mr. Chairman and distinguished members of the Judiciary Committee, I consider it a privilege to appear before you in consideration of this Supreme Court nomination.

There would seem to be little room to quarrel with the view that adequate legal experience and honesty alone are insufficient in reaching a determination of a nominee's fitness for the high court. Beyond these requisites, his judicial philosophy is of the highest importance. That is to say his perception of the function of the Court, his obligations as a Justice in interpreting the Constitution are clearly affected by his basic convictions on the socio-economic issues of the day. An individual cannot divorce himself from his past sets of experiences. Even though he may not feel bound by the restraints of personal or constitutional judgment on issues he considered as a citizen, few men can achieve this degree of independence from their past. No one seriously believes that a judge's professional work is not influenced and formed by his world outlook, by his economic and

social and political understanding, by his experiences, and by his personal sense of justice regarding the great questions of his age.

In passing on the fitness of Supreme Court nominations, the Senate cannot ignore the candidate's total outlook. As Charles L. Black, Professor of Law at Yale University, recently wrote:

"... there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote."

We are today fully aware that the Constitution we live under and the laws we are judged by are not a lifeless set of wooden precepts moved about according to the rules of a mechanical logic. At least, the law is never that in the hands of great judges. The Constitution of today is what the judges of the past have made it and the Constitution of tomorrow will be what the judges appointed in our time will make it.

Appointments to the Supreme Court must be judged by time-honored standards not by immediate political opportunities or considerations. Presidential administrations come and go; laws are made and repealed; but judicial pronouncements set the course for generations. If tested by these standards, no man of just ordinary insight can be acceptable Court material. Judicial philosophy is an essential consideration of a nominee's fitness for the Court because of its potential effect on our law and the direction of our society. Furthermore, it is consistent with the Senate's constitutional role to examine this philosophy. Article II states: "... (the President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court". In giving its advice on a Presidential decision, like the selection of a Court nominee, the Senate must consider those things which went into making that decision. If it did not, it would not be able to advise properly, and would consequently be shirking its duty as spelled out by Article II.

It would be paradoxical to contend that the considerations which play a large part in the President's choice of a nominee are improper for the Senator in making the same decision.

In the *Federalist Papers*, Alexander Hamilton makes the following commentary on the advice-giving function of the Senate:

To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

Hamilton's passage supports the notion that Senators should or ought to consider anything which they believe to bear on the wisdom of the nomination. Foremost among these considerations would be the judicial philosophy of the candidate.

There is ample precedent for the consideration of a nominee's judicial philosophy as a condition of his fitness for the Bench. An examination of Supreme Court nominations since 1900 reveals that great attention has been paid to the philosophy, record, and attitudes of nominees. In every case of opposition since 1900, the socio-judicial philosophy of the nominee was the focal point for opposition.

President Nixon made it very clear in his nominating statement that he chose William H. Rehnquist for his conservative judicial philosophy. In other words, he chose Mr. Rehnquist because he felt the nominee's world view would be good for the country as reflected in his judicial performance. Since the Senate must advise the President on his choice, it would seem that the Senate would have to decide whether the nominee's judicial philosophy would be good for the country. The specific question raised here is whether the nominee is properly equipped to deal with the social and economic issues of his day. To paraphrase Justice Frankfurter, we should explore the depth of his insight into the problems of his generation. This raises the fundamental question—where does Mr. Rehnquist's sense of justice lie in respect to these issues?

The best source for divining a man's worldview is in his record as a practicing professional. In the case of William H. Rehnquist, that record covers his years as

a practicing lawyer and as chief counsel for the Department of Justice. It is that record which is under scrutiny here.

One might agree with Mr. Nixon when he says that "the rights of society and defendants accused of crimes" must be maintained, that "the peace forces must not be denied the legal tools they need to protect the innocent from criminal elements," that "we can strengthen the hand of the peace forces without compromising our precious principle that the rights of individuals accused of crimes must always be protected." But we need not agree with his lawyer's lawyer, the nominee, that such methods as wiretapping, mass arrests, preventive detention, no-knock, abrogation of the rights of the accused, and the extension of executive privilege are desirable means of achieving these ends. The following catalogue of statements exemplifies a viewpoint which would necessarily be a part of the judging equipment the nominee would bring to the high Court.

In the *Civil Service Journal*, "Public Dissent and the Public Employee", January-March, 1971, vol. II, No. 3, p. 7, he wrote:

If Justice Holmes mistakenly failed to recognize that dismissal of a government employee because of his public statements was a form of restraint on his free speech, it is equally a mistake to fail to recognize that potential dismissal from government employment is by no means a complete negation of one's free speech.

The government as an employer has a legitimate and constitutionally recognized interest in limiting public criticism on the part of its employees even though that same government as a sovereign has no similar constitutionally valid claim to limit dissent on the part of its citizens.

In a speech before the Newark Kiwanis Club, he stated: In the area of public law that disobedience cannot be tolerated, whether it be violent or nonviolent disobedience. If force is required to enforce the law, we must not shirk from its employment.

In testimony on March 9, 1971, before the Senate Judiciary Subcommittee on Constitutional Rights, he stated:

While there is obviously no justification for surveillance of any kind that does not relate to a legitimate investigation purpose, the vice is not surveillance per se, but surveillance of activities which are none of the government's business.

. . . we believe that stringent physical and personal security measures can greatly reduce the risk of improper access and dissemination so that it poses no greater threat to personal privacy than manual data storage.

From there he continued,

I think it quite likely that self-discipline on the part of the Executive Branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering. No widespread system of investigative activity . . . is apt to be perfect either in its conception or in its performance. The fact that isolated imperfections are brought to light, while always a reason for attempting to correct them, should not be permitted to obscure the fundamental necessity and importance of federal information gathering, or the generally high level of performance in this area by the organizations involved.

. . . the Department (of Justice) will vigorously oppose any legislation which, whether by opening the door to unnecessary and unmanageable judicial supervision of such activities or otherwise, would effectively impair this extraordinary important function of the federal government.

In testimony on March 17, 1971, before that same subcommittee, he stated:

I do not conceive it to be any part of the function of the Department of Justice or of any other governmental agency to survey or otherwise observe people who are simply exercising their First Amendment rights.

When you go further as, say: Isn't a serious constitutional question involved? I am inclined to think not. . . . This practice is undesirable and vigorously should be condemned, but I do not believe it violates the particular constitutional rights of the individuals who are surveyed.

In response to a question by Senator Ervin asking if surveillance tended to stifle the exercise of First Amendment rights, Rehnquist replied:

No. When the Army did this—and it apparently was generally known that they were doing it—about 250,000 people came to Washington on two occasions to protest the President's war policies.

In a speech entitled "Privacy, Surveillance, and the Law" delivered March 19, 1971, he commented:

The argument in support of the contention that information gathering *per se* may violate First Amendment rights is that such information gathering may have a 'chilling effect' on the exercise of First Amendment freedom.

I have previously stated my belief that the First Amendment does not prohibit even foolish or unauthorized information gathering by the government.

In remarks before the Federal Bar Association presented September 8, 1970, he observed:

The free-speech guarantee of the First Amendment is probably the best known provision of our Constitution. It is entirely proper that this is so, since the right of freedom of expression is basic to the proper functioning of a free, democratic society. Less well-known but, equally important, are those restrictions on complete freedom of speech which result from the balance of competing interests in the jurisprudential scale—the need to preserve order, the need to afford a remedy to the innocent victim of libel, the need of government to govern.

There is a tendency on the part of young people entering the government service to feel that they should have complete and unrestrained freedom to speak out on political and policy matters, regardless of how detrimental their speech may be to government programs in general or to the proper functioning of their own assigned responsibilities within the departments.

In a speech titled "Law Enforcement and Privacy to the American Bar Association panel in London on July 15, 1971, he defended government wiretapping under court order in criminal cases, and without court order in national security cases, both domestic and foreign:

Is the invasion of privacy entailed by wiretapping too high a price to pay for a successful method of attacking this and similar types of crime? I think not, given the safeguards which attend its use in the United States.

In a statement for the Arizona Judicial Conference of December 4, 1970, titled "Official Detention, Bail, and the Constitution", he remarked:

. . . minimizing the use of money bond does not eliminate the social need to detain those persons who pose a serious threat to the public safety.

I believe that society has the right to protect its citizens, for limited periods through due process procedures from persons who pose a serious threat to life and safety. We do not believe a free society can remain free if it is powerless to prevent wanton misconduct by dangerous recidivists during pretrial release. I believe the pretrial detention provision of the D.C. Crime Bill accomplishes this result in a manner entirely consistent with the spirit and letter of the U.S. Constitution.

With the plethora of rights recently granted him by the U.S. Supreme Court, the criminal defendant can and does do a good deal more than merely present evidence at trial. He attacks by motion and writ every phase of the proceedings against him, with the result that the time between indictment and trial has been necessarily lengthened.

Those opposing pretrial detention assert two constitutional arguments, one based upon the Eighth Amendment and one based on the due process clause of the Fifth Amendment. Neither provision, in my opinion, bars the enactment of pretrial detention provisions in anti-crime legislation.

In balancing the interest of the individual and those of society, I think that the pretrial detention concept represents a rational and constitutional solution to a complex problem.

In a statement before the Subcommittee on Constitutional Rights in 1971, he remarked on S. 895, the Speedy Trial Act of 1971 which would guarantee trials within sixty days, that ". . . this provision is not only draconic, but quite one-sided in its sanctions". The sanctions for the defendant are cited below:

First and foremost of these . . . would be an effort by statute to modify all or part of the exclusionary rule which now prevents the use against a criminal defendant of evidence which is found to have been obtained in violation of his criminal rights.

He contended that a system which would permit "a convicted defendant to spend the next ten or twenty years litigating the validity of the procedures used in his trial, is a contradiction in terms". Furthermore, he commented:

". . . the total lack of finality to any judgment of criminal conviction, so long as the prisoner may conceive some new claim of violation of his constitutional rights which occurred at this trial, is itself an affront to the notion of a system which promptly administers criminal justice. Under present practice, either a state or federal prisoner may relitigate again and again the validity of procedures used to convict him, so long as he can think of some new constitutional argument which has not been directly disposed of adversely to him in the rulings on his past petitions.

The Department believes that the modification of the federal habeas corpus statute, in order to more effectively screen out genuinely serious constitutional

violations from the mass of frivolous and technical petitions now filed, is an essential element in the search for the prompt administration of criminal justice.

In those same hearings, he remarked on habeas petitions:

"... it has been availed of time after time to relitigate issues which not only have nothing to do with the guilt or innocence of the defendant, but nothing to do with the underlying fairness of the fact finding process by which he was found guilty.

In a speech delivered May 5, 1970, at Appalachian State University in Boone, North Carolina, he defended the Mayday arrests:

"... the doctrine which there obtains is customarily referred to as 'qualified' martial law. In that situation the authority of the nation, state, or city, as the case may be, to protect itself and its citizens against actual violence or a real threat of violence is held to outweigh the normal right of any individual detained by governmental authority to insist on specific charges of criminal conduct being promptly made against him, with the concomitant right to bail or release pending judicial determination of those charges. The courts limited the duration of the power to the duration of the emergency, however, and have also insisted that the claim of violence be not a mere sham.

Police officials, he defended, "have the authority to detain individuals during the period of an emergency without being required to bring them before a committing magistrate and filing charges against them".

In a speech at the University of Arizona on April 22, 1970, he commented on *Miranda v. Arizona*:

I submit it is not at all unreasonable to suggest that the government, if it felt the occasion warranted such action and especially if it were acting under a mandate from Congress, would be entirely within the role allocated to it under the adversary system if it were to ask the Supreme Court of the United States to overrule the decision in *Miranda v. Arizona*. . . .

I say this not to indicate that such a request should be made or will be made, but simply to point out that under our system the United States, no more than any other litigant is required to accept any particular decision of the Supreme Court in the field of constitutional law as *stare decisis*.

In a Justice Department memorandum of September 5, 1969, on Clement Haynsworth, he wrote:

The legal and ethical question raised by these facts is whether a judge, who owns stock in one corporation should disqualify himself when the second corporation is a party litigant in his court. . . .

. . . It is clear from the facts presented that the Decring-Milliken officials who dealt with vending machine suppliers had no idea that Judge Haynsworth had any connection with any of these companies. As a matter of common sense, as well as of law, it is not possible to identify any conceivable effect that a decision one way or another in the Darlington case would have had on the fortunes of Vend-A-Matic.

There is no doubt in my mind that these (court) precedents support the conclusion, equally readily reached on common sense ethical considerations, that Judge Haynsworth ought not to have disqualified himself in the Darlington case. While the spirit as well as the letter of the statute and canons must be faithfully applied, questions of disqualification are to be decided in exactly the same manner as a judge decides substantive legal questions which regularly come before him.

In the *New York Law Review* in an article titled "The Constitutional Issues—Administration Position," vol. 45, 1970, p. 628, he wrote:

First, may the United States lawfully engage in armed hostilities with a foreign power in the absence of a Congressional declaration of war? I believe that the only supportable answer to this question is "yes" in the light of our history and of our Constitution.

Second, is the constitutional designation of the President as Commander-in-Chief of the Armed Forces a grant of substantive authority, which gives him something more than just a seat of honor in a reviewing stand? Again, I believe that this question must be answered in the affirmative.

Third, what are the limits of the President's power as Commander-in-chief, when that power is unsupported by congressional authorization or ratification of his acts? . . . But I submit to you that one need not approach anything like the outer limits of the President's power, as defined by judicial decision and historical practice, in order to conclude that it supports the action that President Nixon took in Cambodia.

In the *Arizona Law Review* article, "The Old Order Changeth: The Department of Justice under John Mitchell," vol. 12, 1970, p. 251, he stated.:

Attorney General Mitchell, on the other hand, has felt that the Department of is but one of the several instrumentalities engaged in the process of administering criminal justice, and that under our adversary system the role of the Department is basically that of advocate for the prosecution.

In testimony of October 5, 1971, before the Senate Judiciary Subcommittee on the Separation of Powers on increasing the authority of the ASCB, he asserted: . . . It is my opinion that the order was a valid exercise of powers that Congress has specifically conferred upon the President. The order cannot therefore be considered in any sense as a usurpation of the powers of Congress. . . .

Congress has given the President by statute responsibility for making regulations for the employment of individuals by the Civil Service, and of ascertaining the character and ability of federal job applicants. . . .

Congress has also by statute given the President power to delegate functions vested in him by law to any department or agency in the executive branch. . . .

What President Nixon has functionally accomplished by the Executive Order is simply to transfer from the Attorney General, where it previously resided, to the Subversive Activities Control Board the function of listing organizations for the information of federal employing agencies. As noted, this is part of a function which, in the absence of delegation by him, Congress has by law confided to the President.

Testifying on April 1, 1971, before the House Judiciary Subcommittee No. 4, Mr. Rehnquist remarked:

The desirability of obtaining some such declaration of policy in the Constitution outweighs the disadvantages of this particular proposal . . . (but) would not be a substitute for legislation. . . .

It may well be that the Supreme Court will likewise broaden its past interpretations in this area. Certainly even a modest expansion of the 14th Amendment decisions dealing with sex would obviate the more egregious forms of differences of treatment which result from governmental actions. With this prospect of expanded constitutional protection of women's rights without the necessity of an added constitutional provision, the committee might conclude that it should await resolution of the cases before it by the Supreme Court of the United States, in order to see whether there is a substantial area of different treatment of men and women which is not prohibited under the Constitution, but with respect to which there is a national consensus in favor of prohibition.

In testimony of June 15, 1964, before the Phoenix City Council on the topic of public accommodations ordinance for that city, he declared:

I am a lawyer without client tonight. I am speaking for myself. I would like to speak in opposition to the proposed ordinance because I believe the values it sacrifices are greater than the values it gives.

I venture to say there has never been this sort of an assault on the institution (of private property) where you are told, not what you can build on your property, but who can come on your property.

What has brought people to Phoenix and to Arizona? My guess is no better than anyone else's but I would say it's the idea of the lost frontier here in America. Free enterprise and by that I mean not just free enterprise in the sense of the right to make a buck but the right to manage your own affairs as free as possible from the interference of government.

Concerning that same ordinance, he wrote, in a letter to the editor of the *Arizona Republic* of June, 1964:

I believe that the passage by the Phoenix City Council of the so-called public accommodations ordinance is a mistake.

The ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theatre to choose his own customers . . . Such a drastic restriction on the property owner is quite a different matter from orthodox zoning, health and safety regulations which are also limitations on property rights.

If in fact discrimination against minorities in Phoenix eating places were well nigh universal, the question would be posed as to whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all.

The founders of this nation thought of it as the "land of the free" just as surely as they thought of it as the "land of the equal."

Unable to correct the source of the indignity of the Negro, it redresses the situation by placing a separate indignity on the proprietor.

On the subject of Phoenix's proposed school integration plan, the nominee wrote, in a letter to the editor of the *Arizona Republic* of September 9, 1967:

We are no more dedicated to an "integrated" society than we are to a "segregated" society. We are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.

The neighborhood school concept, which has served as well for countless years, is quite consistent with this principle. Those who would abandon it concern themselves not with the great majority, for whom it has worked very well, but with a small minority for whom they claim it has not worked well. They assert a claim for special privileges for this minority, the members of which in many cases may not even want the privileges which the social theorists urge be extended to them.

It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this.

On the subject of G. Harrold Carswell's nomination, he wrote in a letter dated February 14, 1970, to *The Washington Post*:

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

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

Regarding the Warren Court, he remarked in an article printed in *U.S. News and World Report* of December 13, 1957 (vol. 13):

Some of the tenets of the 'liberal' point of view which commanded the sympathy of a majority of the clerks I knew were: extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business—in short, the political philosophy now espoused by the court under Chief Justice Earl Warren.

On that same topic, he wrote in an article printed in the *American Bar Association Journal*, "The Bar Admission Cases: A Strange Judicial Aberration", vol. 229, 1958:

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

On the subject of progressives, he was quoted in a *New York Times* article of May 2, 1969 on page 1 as saying:

I suggest to you that this attack of the new barbarians constitutes a threat to the notion of a government of law which is every bit as serious as the 'crime wave' in our cities . . . the barbarians of the New Left have taken full advantage of their minority right to urge and advocate their views as to what substantive changes should be made in the laws and policies of this country."

Mr. Rehnquist is cited at length to illustrate an outlook on life, a view of the world which is too narrow, too ill-suited to the times and clearly out of step with the new responses that have emanated from the Courts in an attempt to harmonize age old challenges that require constitutional interpretation. Although it could be argued that no one of these statements taken alone presents a serious threat to civil rights and liberties, it is maintained that they, taken as a whole, reveal a philosophy so rigid and conservative that it cannot help but have a chilling effect upon those who have struggled so valiantly to achieve the small gains made in the last seventeen years under a system of law which has grudgingly given support and shelter to those legal doctrines that enshrine the First Amendment.

We are presently witnessing increasing numbers of violent acts of state terror in America. The over-reaction of law enforcement officers in Watts, Newark and Detroit. The massacres at Kent State, Jackson State and Orangeburg. The tragedies at Attica and San Quentin are current examples of attempts to spread a psychology of fear among oppressed ethnic groups who are demanding power and freedom. And so, nearly 200 years after the establishment of this government, the

contradictions and antagonisms have become regulated and institutionalized, but not eradicated.

The question becomes then whether the Constitution will be used to moderate the conflicting racial and economic struggle in America and keep it within the bounds of law and order, or whether it can be used as a document to lead us to a unified, harmonious and peaceful society. To reconcile traditional antagonisms rather than regulate them is the new challenge confronting the Supreme Court of the land. What are we to say of an individual nominated for the highest Court who views the Constitution with an ante-bellum eye, who sees the gigantic steps forward by the Court as requiring two giant steps backward and one whose philosophy if it had been consistently applied since the inception of the Republic would by now have left us with very little progress in the areas of civil rights and civil liberties. A careful study of these excerpts from Mr. Rehnquist's remarks reveals a clear call for the curtailment of due process, of habeas corpus and of freedom of speech. You will find the justification for wiretapping and other surveillance. The expressed fear of nonviolent disobedience is to be met by force. It's all there—the defense of Haynesworth, the SACB and the handling of the Mayday demonstrators. The real question is: Can this country afford at this perilous time in its history an individual on the Court with an ideology so out of tune with the times that if his philosophy should prevail, even in part, it would threaten to tear at the slender threads now holding us together? Make no mistake about it, the Court is viewed as the last hope by millions of Americans—especially Blacks and other oppressed minorities. Short of the ultimate fulfillment of the American dream, that hope must be maintained. Holding our society together may well depend on maintaining the faith, which still survives even among the most disaffected, that in our highest courts there may still be found equal justice under law. We can ill-afford to move backward at a time when we are moving forward at a dangerously slow rate.

The Senate should not confirm or fail to confirm this nomination because of a threat from any segment of our society, but it must recognize the consequences of its actions. In considering the nomination of Mr. Rehnquist, we might consider the words of Robert Frost:

The woods are lovely, dark and deep,  
But I have promises to keep,  
And miles to go before I sleep,  
And miles to go before I sleep.

And, we have promises to keep in maintaining a Court which is responsive to a changing America and we dare not sleep—not now.

The Senate has not only the responsibility to advise and consent on Presidential nominations to the Court, but has the obligation to examine the candidate's fitness in relation to the potential harm he may do the country. Again, as Charles L. Black has observed:

. . . a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by doing so.

Because there are reasonable grounds to believe that the views of William H. Rehnquist are inimical to the best interests of this nation, the Senate is respectfully urged to advise the President negatively on this nomination.

**Senator HART.** I take it that in addition to your prepared statement you are saying "Amen" to what Mr. Clarence Mitchell and Mr. Joseph Rauh advised the committee during the period you and Congressman Clay were present, is that right?

**Mr. CONYERS.** That is correct.

We did additionally have an opportunity to review the statement, and we would adopt it as our own.

We would like to point out that it is not necessary to find a member of the Klan or Birch membership lurking in the closets of a nominee to reach the point that disturbs us so much. That is to say, obviously conduct of that magnitude would reduce the inquiry of this committee

to a rather nominal function but the problem that confronts us here, and confronts us in a number of the nominations that the Senate must decide upon, are rarely that easy.

Usually it will require a careful review of all the statements of a nominee, all of his acts, the totality of his conduct put into perspective of the time and the period and the situation under which it occurred.

We do not have any trouble whatsoever, Mr. Chairman, and members, in saying that in applying a reasonable and fair test in the world view, into the outlook of this nominee, that the positions that he would espouse from the Court, based on what he has said and done in his capacities in public life up until now, could clearly indicate to us a danger as certain as if we found some obviously compelling evidence that would disqualify him by its revelation.

Senator HART. Thank you, gentlemen. You watch us every day and we pretend we think we can get into the shoes of a black American or see life as a black American sees it and we know we are kidding ourselves. This does not excuse us from making the effort, but having testimony from you, speaking for the black caucus, is an enormous help. Thank you.

Mr. CONYERS. Mr. Chairman, may I point out that there is yet another statement coming from precisely the same people. If there are no questions that would be put to us on the nomination of Mr. Rehnquist, then concerning the statement on the other nominee, I would raise the question with the Chair with respect to the hour and whether it would be best presented at this point or at another time or under whatever procedure these hearings are being conducted.

Senator BAYH. While the Chair is deciding that, may I ask one question of our witness?

First of all, we appreciate the fact that although the Constitution does not technically give the "other body" a voice in the nominating process, this is not the first time that those of you in the House who are deeply concerned about this area of human rights felt compelled to make what I feel have been significant contributions to the deliberative process in the Senate as we look over the nominations and I am glad you have done so.

Do you, any of you, have any specific information pro or con relative to some of these specific issues that you have heard us discuss with Mr. Mitchell and Mr. Rauh as to Mr. Rehnquist's position on the equal accommodations matter, the school desegregation matter, or the voting practices, the allegations that certain types of intimidation were utilized against the minority, or can you give us any specific instances, or any specific evidence that would further elaborate on what has been said in this area?

Mr. CONYERS. Senator, we do not have any factual or firsthand information that would shed any light on the questions that you raise. I am hopeful that you will, in addition to that, perceive that the questions that we raise do not really require that.

We are perfectly satisfied and willing to accept the nominee on the basis of his public statements that he chooses not to separate himself from his official capacities. Just as you and I have our public records which we would find very difficult to separate from us, I presume the same applies to him.

I am perfectly willing to assume that it was upon that basis that not only the President saw fit to nominate him but that he would ask us to see fit to evaluate him.

Senator BAYH. Of course, I am sure you recognize that there might well be a distinction between the information or evidence necessary to convince us personally, and that, once having been convinced personally that a certain cause is just or a certain nominee is qualified or unqualified, needed to explore the whole record to find whatever evidence might be available so that others might share our belief. It is in that direction I asked the question but I appreciate your comment.

Mr. CLAY. Senator, I think that when you read our whole position paper you will find that the underlying basis for our opposition to Mr. Rehnquist is based primarily on his judicial philosophy, and what we are saying in effect is that when judicial philosophy becomes a primary basis for nominating a person to the Supreme Court that it also must become the primary consideration for this Senate in confirming that person for the Supreme Court, and it is our contention that any person who has a documented history of anticivil rights positions, and anticivil liberties positions and philosophies is unequivocally unqualified to sit on the Supreme Court of the United States.

It was in that light that we prepared this position paper, and are presenting it to you.

The CHAIRMAN. Now, as I understand it, you want to testify against the other nominee.

Mr. CONYERS. Mr. Chairman, we would be willing to defer this. We are prepared-----

The CHAIRMAN. I would rather go on; let's clear this whole thing one way or another.

If you are prepared to testify, proceed.

Mr. CONYERS. Very well, thank you.

Mr. Chairman, would you excuse my colleague, Mr. Clay, who is attending on behalf of myself a meeting of the black caucus. His presence is urgently required.

Mr. Chairman and members, I will read only briefly from the prepared testimony. I ask to have the entire statement included in the record.

The CHAIRMAN. It will be admitted.

Mr. CONYERS. In considering the nomination of Mr. Louis F. Powell or in fact any other nominee to the Court, I do not think anyone would deny the Presidential prerogative of examining a potential candidate's philosophy before placing his name before the Senate for confirmation nor is there any requirement of the type of philosophy a nominee should espouse. But it also follows that there is nothing to preclude the Senate from laying bare that nominee's predilections, but even more than that, it has a responsibility to do so.

May I point out that many of the Founding Fathers feared that nominal "advice and consent" of the Senate on nominations to judgeships would create a dependency of the judiciary on the Executive.

It was their intent to make the judiciary independent by insisting on joint action of the legislative and executive branches of each nomination.

Consequently, again it has been pointed out with relation to the Senate's constitutional duty in advising on presidential nominations that "a Senator voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by doing so."

I trust that the distinguished members of this body will not regard it as presumptuous if I reiterate the basis upon which the approach ought clearly to be made in terms of the evaluations and the weighing of credentials and the examinations of a nominee.

It is obviously a heavy responsibility, it is burdensome, but I think that not to be looking carefully at the world view of the outlook that has developed through the nominee's own set of experiences is to omit and eliminate a very wide and important part of your responsibility in making the decision as to whether to advise the President favorably or unfavorably with regard to the nomination.

Competency as a legal technician is not sufficient cause for appointment to the Supreme Court. Since judges by definition must sit in judgment, exercising what Oliver Wendell Holmes called the "sovereign prerogative of choice," they must bring more to their task than a highly specialized technocracy. What a judge brings to bear upon his decision is the weight of his experience and the breadth of his vision, as well as his legal expertise.

In the words of Felix Frankfurter, a Justice ought to display both "logical unfolding" and "sociological wisdom." Or, as Henry Steele Commager put it: "Great questions of constitutional law are great not because they embody issues of high policy, but of public good, of morality." Similarly, great judicial decisions are great not because they are brilliant formulations of law alone, but because they embody high-mindedness, compassion for the public good, and insight into the moral implications of those decisions.

With that background we would urge a careful consideration of the nominee, and suggest that such consideration might lead to a negative vote and a rejection of his nomination on the part of the Senators here and in the body as a whole.

You see, for the past few days the press and the supporters of the nominee have been treating us to a view of Mr. Powell which would have us believe that he was the champion of the successful, gradual integration of the Richmond school board, and presided over the "successful, disturbance-free integration of the city's schools in 1959."

While it is true Mr. Powell sat on the school board of the city of Richmond from 1950 to 1961, serving as its chairman during the last 8 years of that period, something less than successful integration took place.

The opinion of Circuit Judge Boreman, a distinguished member of the court not noted for his liberal views, in a case entitled *Bradley v. School Board of the City of Richmond, Virginia*, participated in by distinguished counsel who sits here with me, clearly documents the fact that in Richmond, only a matter of months after Mr. Powell had

left the city school board, after serving as a member and chairman all those years, the court in the case found a "system of dual attendance areas which has operated over the years to maintain public schools on a racially segregated basis has been permitted to continue."

What the very words of the U.S. Court of Appeals, Fourth Circuit, indicate beyond any doubt is that Mr. Powell's 8-year reign as chairman of the Richmond School Board created and maintained a patently segregated school system, characterized by grossly over crowded black public schools, white schools not filled to normal capacity, and the school board's effective perpetuation of a discriminatory feeder or assignment system whereby black children were hopelessly trapped in inadequate, segregated schools.

The entire text of the *Bradley* opinion is submitted for the record of these proceedings so that it may be carefully scrutinized by this committee and Members of the Senate in order that a more accurate view may be gained of the conditions that existed under the Powell administration.

(The opinion referred to follows:)

**BRADLEY V. SCHOOL BOARD OF CITY OF RICHMOND, VIRGINIA**

*Minerva Bradley, I. A. Jackson, Jr., Rosa Lee Quarles, John Edward Johnson, Elihu C. Myers and Elizabeth S. Myers, Appellants,*

v.

*The School Board of the City of Richmond, Virginia, H. I. Willet, Division Superintendent of Schools of the City of Richmond, Virginia, and E. J. Oglesby, Alfred L. Wingo and E. T. Justis, individually and constituting the Pupil Placement Board of Commonwealth of Virginia, Appellees.*

No. 8757.

United States Court of Appeals

Fourth Circuit.

Argued Jan. 9, 1963.

Decided May 10, 1963

Action by Negro pupils, their parents and guardians to require transfer of pupils from Negro public schools to white public schools and, on behalf of all persons similarly situated, for injunction restraining defendants from operating racially segregated schools. The United States District Court for the Eastern District of Virginia, at Richmond, John D. Butzner, Jr., J., ordered that individual infant plaintiffs be transferred to schools to which they had applied but refused to grant further injunctive relief and plaintiffs appealed. The Court of Appeals, Boreman, Circuit Judge, held that where a reasonable start toward maintaining nondiscriminatory school system had not been made, plaintiff pupils, on behalf of others in class they represented, were entitled to injunction restraining school board from maintaining discriminatory "feeder" system whereby pupils assigned initially to Negro schools were routinely promoted to Negro schools and, to transfer to white schools, they must meet criteria to which white students of same scholastic aptitude would not be subjected.

Reversed in part and remanded.

Albert V. Bryan, Circuit Judge, dissented in part.

**1. Schools and School Districts** ➡ 155

Case of one of pupils who brought action to require transfer to pupils from Negro public schools to white public schools became moot, where he was assigned by Pupil Placement Board to integrated junior high school to which he had applied.

**2. Schools and School Districts**  $\Leftrightarrow$  153

School board and superintendent of schools were proper parties to action to require transfer of pupils from Negro public schools to white public schools where, although state Pupil Placement Board has authority over placement of pupils and local officials refrained from making recommendations to Board, approximately 98 percent of placements were made routinely as result of regulations of school board pertaining to attendance areas and Pupil Placement Board had no inclination to vary those attendance areas, although it had authority to do so. Code Va. 1950, §§ 22-232.1 to 22-232.31.

**3. Schools and School Districts**  $\Leftrightarrow$  154

That Negro applicants for enrollment in the first grade of white public schools were assigned to such schools, that two high schools had been constructed to accommodate all students in attendance areas, that any Negro student attending white school was, upon promotion to another school, routinely assigned to white school, and that some Negro students had been assigned to schools in white attendance areas did not evidence reasonable start toward maintaining non-discriminatory school system, where pupils assigned initially to Negro schools were routinely promoted to Negro schools and, to obtain transfer to white school, pupil must meet criteria to which white student of same scholastic aptitude would not be subjected. Code Va. 1950, §§ 22-232.1 to 22-232.31.

**4. Schools and School Districts**  $\Leftrightarrow$  155

Where a reasonable start toward maintaining nondiscriminatory school system had not been made, plaintiff pupils, on behalf of others in class they represented, were entitled to injunction restraining school board from maintaining discriminatory "feeder" system, whereby pupils assigned initially to Negro schools were routinely promoted to Negro schools and, to transfer to white schools, they must meet criteria to which white students of same scholastic aptitude would not be subjected. Code Va. 1950, §§ 22-232.1 to 22-232.31.

**5. Schools and School Districts**  $\Leftrightarrow$  154

It was primarily the duty of school board to eliminate discriminatory system with respect to placing of students in schools.

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Henry L. Marsh, III, Richmond, Va. (S. W. Tucker, Richmond, Va., on brief) for appellants.

Henry T. Wickham, Sp. Counsel, City of Richmond (J. Elliott Drinard, City Atty., Richmond, Va., and Tucker, Mays, Moore & Reed, Richmond, Va., on brief) for appellees, The School Board of the City of Richmond, Virginia, and H. I. Willet, Division Superintendent of Schools.

Before Boreman, Bryan and J. Spencer Bell, Circuit Judges.

Boreman, Circuit Judge.

[1] This is a school case involving alleged racially discriminatory practices and the maintenance of public schools on a racially segregated basis in the City of Richmond, Virginia. In September 1961 eleven Negro pupils, their parents and guardians instituted this action to require the defendants to transfer the pupils from Negro public schools to white public schools.<sup>1</sup> The plaintiffs also pray, on behalf of all persons similarly situated, that the defendants be enjoined from operating racially segregated schools and be required to submit to the District Court a plan of desegregation. The District Court ordered that the individual infant plaintiffs be transferred to the schools for which they had applied. This appeal is based upon the refusal of the court to grant further injunctive relief.

[2] Defendant, Virginia Pupil Placement Board, answered the complaint, admitting that plaintiffs had complied with its regulations pertaining to applications for transfer but denying discrimination and other allegations of the complaint. The defendants, School Board of the City of Richmond and the Richmond Superintendent of Schools, answered and moved to dismiss on the ground that sole responsibility for the placement of pupils rested with the Virginia Pupil Placement

<sup>1</sup> Of eleven original pupil plaintiffs, one was assigned by the Pupil Placement Board to an integrated Junior High School to which he had made application before the hearing in the District Court. His case became moot.

Board pursuant to the Pupil Placement Act of Virginia, Sections 22-232.1 through 232.17, Code of Virginia, 1950, as amended.<sup>2</sup>

The defendants interpreted the bill of complaint as attacking the constitutionality of the Pupil Placement Act and the motions to dismiss were grounded also on the theory that constitutionality should first be determined by the Supreme Court of Appeals of Virginia or the case should be heard by a District Court of three judges. The court below correctly denied the motions to dismiss after determining that the constitutionality of the Act had not been challenged by plaintiffs.

The record discloses that the City of Richmond is divided into a number of geographically defined attendance areas for both white and Negro schools. These areas were established by the School Board prior to 1954 and have not been materially changed since that time. It is admitted that several attendance areas for white and Negro schools overlap. The State Pupil Placement Board enrolls and transfers all pupils and neither the Richmond School Board nor the city Superintendent of Schools makes recommendations to the Pupil Placement Board.

During the 1961-62 school term, 37 Negro pupils were assigned to "white" schools. For the 1962-63 school term, 90 additional Negro pupils had been so assigned. At the start of the 1962-63 school term, all of the "white" high schools had Negro pupils in attendance. Negro pupils also attend several of the "white" junior high schools and elementary schools.

Certain additional facts are clearly established by the record. The City School Board maintains five high schools, three for whites and two for Negroes; five junior high schools for whites and four for Negroes; eighteen elementary schools for whites and twenty-two for Negroes. As of April 30, 1962, there were 40,263 pupils in Richmond public schools, 23,177 Negroes, 17,002 whites and 84 non-whites of a race other than Negro but considered white for the purpose of assignment in the Richmond public school system. Only 37 Negroes were then attending schools which white children attended, 30 of those being in the "white" Chandler Junior High School. Three of the remaining seven were in attendance at the "white" John Marshall High School, one attended the "white" Westhampton junior High School and three handicapped children attended the Richmond Cerebral Palsy Center. With the possible exception of the three last mentioned, these children had sought transfers from Negro schools and all but one were able to satisfy the residential and academic criteria which the Pupil Placement Board applies in case of transfers but not in case of initial enrollment. The remaining child had been admitted by court order in earlier litigation.<sup>3</sup>

The 1961-62 Directory of the Richmond, Virginia, Public Schools shows "White Schools" in one division and "Negro Schools" in the other. The "White Schools" are staffed entirely with faculties and officials of the Caucasian race. The schools listed as "Negro Schools" are staffed entirely with faculties and officials of the Negro race.

Thus it is clear, as found by the District Court, that Richmond has dual school attendance areas; that the City is divided into areas for white schools and is again divided into areas for Negro schools; that in many instances the area for the white school and for the Negro school is the same and the areas overlap. Initial pupil enrollments are made pursuant to the dual attendance lines. Once enrolled, the pupils are routinely reassigned to the same school until graduation

<sup>2</sup> Raised below (but not involved in this appeal) was the issue as to the joinder of the Richmond School Board and Superintendent of Schools as parties defendant. Correctly, we think the District Court held:

"\* \* \* The State Pupil Placement Board has authority over the placement of pupils, and the local officials refrain from making recommendations to the Board, but approximately 98 per cent of the placements are made routinely as a result of the regulations of the School Board pertaining to attendance areas. The evidence shows that the State Pupil Placement Board has no inclination to vary these attendance areas, although undoubtedly it has authority to do so. In view of this situation, the School Board and the Superintendent of Schools are proper parties."

<sup>3</sup> On September 2, 1958, a suit styled Lorna Reiper Warden et al. v. The School Board of the City of Richmond, Virginia, et al. was instituted in the District Court, praying, *inter alia*, that a permanent injunction be entered restraining the Richmond School Board and its division Superintendent of Schools from any and all actions that regulate or affect, on the basis of race or color, the admission, enrollment or education of the infant plaintiffs, or any other Negro child similarly situated, to and in any public school operated by the defendants.

That suit was decided on July 5, 1961. The District Court ordered that the then one remaining Negro plaintiff be transferred from the Negro school located five miles from her home and admitted to the white school in her neighborhood. However, the court denied class relief stating "There is no question as to the right of the infant plaintiff to be admitted to the schools of the City of Richmond without discrimination on the ground of race. She is admitted, however, as an individual, not as a class or group; and it is as an individual that her rights under the Constitution are asserted."

The court refused to grant a permanent injunction and dismissed the case from the docket.

from the school. Upon graduation, the pupils are assigned in the manner found by the District Court to be as follows:

"\* \* \* [A]ssignments of students based on promotion from an elementary school to a junior high school to high school are routinely made by the Pupil Placement Board. These assignments generally follow a pattern, aptly described as a system of 'feeder schools', that existed prior to 1954. Thus, a student from a white elementary school is routinely promoted to a white junior high school and in due course to a white high school. A Negro student is routinely promoted from a Negro elementary school to a Negro junior high school and finally a Negro high school. In order to change the normal course of assignment based on promotion all students must apply to the Pupil Placement Board. The majority of the plaintiffs in the present case are such applicants."

As of April 30, 1962, a rather serious problem of overcrowding existed in the Richmond Negro public schools. Of the 28 Negro schools 22 were overcrowded beyond normal capacity by 1775 pupils and the combined enrollments of 23 of the 26 white schools were 2445 less than the normal capacity of those schools. For the current 1962-63 school term, the applications for transfers from Negro to white schools of only 127 Negro pupils had been granted.

Four of the infant plaintiffs, who had completed elementary school, sought admission to the white Chandler Junior High School. After comparing test scores of these pupils with test scores of other pupils, the Pupil Placement Board denied the applications on the ground of lack of academic qualifications. These plaintiffs contended that pupils from white elementary schools in the same attendance area are routinely placed in Chandler Junior High and their scholastic attainments or qualifications are not scrutinized by the Pupil Placement Board. The District Court concluded that academic criteria were applied to Negro pupils seeking transfer based on promotion, which criteria were not applied to the white pupils promoted from elementary schools to junior high schools. This, said the court, is discriminatory and is a valid criticism of the procedure inherent in the system of "feeder schools". The court further stated:

"Proper scholastic tests may be used to determine the placement of students. But when the tests are applied only to Negroes seeking admission to particular schools and not to white students routinely assigned to the same schools, the use of the tests can not be sustained. *Jones v. School Board of the City of Alexandria*, 278 F. 2d 72 (4th Cir. 1960)."

Another of the Negro plaintiffs, who was promoted from a Negro junior high school, sought admission to the "white" John Marshall High School. His application had been denied because he lived thirteen blocks from the John Marshall High School and only five blocks from a Negro high school. However, it was pointed out in the court below that this plaintiff lives in the attendance area of the John Marshall High School and, had he been a white student, he would have been routinely assigned there without considering the distance of his residence from that school or from another high school. The District Court said: "\* \* \* Residence may be a proper basis for assignment of pupils, but it is an invalid criteria when linked to a system of 'feeder schools'. *Dodson v. School Board of the City of Charlottesville*, 289 F. 2d 439 (4th Cir. 1961)."

The remaining five plaintiffs sought transfers from the Graves Junior High School (Negro) to the "white" Chandler Junior High School. They were denied transfer by the Pupil Placement Board because of lack of academic qualifications. The evidence showed that the same standards for determining transfers, upon application, from one junior high school to another junior high school were applied by the Board indiscriminately to both white and Negro pupils. The District Court stated:

"\* \* \* Were this the only factor in this phase of the case, the issue would involve only judicial review of the decision of an administrative board. However, the situation of these plaintiffs must be considered in the context of the system of 'feeder schools', which routinely placed them in the Graves Junior High School while white students routinely were placed in Chandler Junior High School. The application of scholarship qualifications under these circumstances is discriminatory. *Green v. School Board of the City of Roanoke* [304] F. 2d [118] (4th Cir., May 22, 1962)."<sup>4</sup>

With respect to a determination of the rights of all of the infant Negro plaintiffs, the District Court held:

"The foregoing facts and conclusions of law require the admission of the plaintiffs to the schools for which they made application."

<sup>4</sup> The case to which the District Court referred is styled *Green v. School Board of City of Roanoke, Virginia*, and is now reported in 304 F. 2d 118.

An appropriate order was entered enjoining and restraining the defendants from denying the infant plaintiffs, therein named, admission to the schools for which they had made application. The defendants have not appealed from this order.

It follows that each infant plaintiff has been granted the relief which he or she individually sought. But the District Court, although expressing its disapproval of the "feeder school system" as now operating in the City of Richmond, denied further injunctive relief. The case was ordered retained on the docket for such further relief "as may be appropriate".<sup>5</sup>

The conclusion of the District Court that a "reasonable start toward a non-discriminatory school system" had been made appears to have been based primarily upon consideration of four factors discussed in its opinion as follows:

"Rigid adherence to placement of students by attendance areas has been modified in four respects. First, the Chairman of the Pupil Placement Board testified that any Negro child applying for enrollment in the first grade of a white public school in his attendance area is assigned to that school. Second, the Superintendent of Schools testified that George Wythe High School and John Marshall High School had been constructed to accommodate all high school students in their respective attendance areas. Counsel stated in argument that six Negro students had applied for admission to George Wythe High School for 1962 and all had been accepted. Third, a Negro student presently attending a white school, upon promotion to a higher school, is routinely assigned to a white school. Fourth, some Negro students have been assigned to schools in white attendance areas."

In the context of this case the principal questions to be determined may be stated as follows: (1) Are these four basic factors cited by the District Court sufficient to evidence a reasonable start toward maintaining a non-discriminatory school system and consistent with the true concept of equal constitutional protection of the races; and (2) should the court have granted further injunctive relief? We think question (1) must be answered in the negative and question (2) in the affirmative in view of the discriminatory attitude displayed by the Pupil Placement Board toward the transfers sought by the infant plaintiffs in the instant case and which transfers, denied as the result of discriminatory application of residential and academic criteria, were effected only through this protracted litigation.

It is notable that there is no assertion here, as in some of the other school cases, of a defense based upon a claim that a reasonable start has been made toward the elimination of racially discriminatory practices coupled with a suggestion that additional time, consistent with good faith compliance at the earliest practicable date, is necessary in the public interest. Instead, the answer of the City school authorities denied that anything done or omitted by them had given rise to the present litigation. The answer of the Pupil Placement Board admitted that the plaintiffs had complied with its administrative procedures but denied and demanded strict proof of racial discrimination.

One of the interrogatories served by the plaintiffs was: "What obstacles, if any, are there which will prevent the racially non-discriminatory assignment of students to public schools in the City of Richmond at the commencement of the 1962-1963 school session?" The local school authorities side-stepped the question by claiming to be unable to answer because all power to assign students to schools had been vested by law in the Pupil Placement Board. That Board replied to the interrogatory as follows: "\*\*\* [T]hat to the extent that such question

<sup>5</sup> In its written opinion the District Court stated as follows:

"The plaintiffs prayed that the defendants be enjoined from continuing discrimination in the city schools and that the School Board be required to submit a desegregation plan. The Court has weighed all of the factors presented by the evidence in this case and finds that the defendants have taken measures to eliminate racially discriminatory enrollments in the first grade. Apparently they are eliminating discriminatory enrollments in George Wythe High School [white] and they are routinely assigning Negro students in white junior high schools to white high schools."

"While the School Board has not presented a formal plan of desegregation, the Court finds that the defendants have made a reasonable start toward a non-discriminatory school system resulting in the attendance of 127 Negro students in white schools for the 1962-1963 school term. In view of the steps that have been taken in this direction, the Court concludes that the defendants should be allowed discretion to fashion within a reasonable time the changes necessary to eliminate the remaining objectionable features of the system of 'feeder schools'."

"In *Brown v. Board of Education*, 349 U.S. 294, 300 [75 S.Ct. 753, 99 L.Ed. 1083] (1955), the Supreme Court stated 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a flexibility for adjusting and reconciling public and private needs.' The Court is of the opinion that the relief decreed in this case is sufficient at this time in view of the evidence presented. The refusal of broad injunctive relief now is not to be construed as approval to continue the 'feeder school system' as it is now operated. See *Hill v. School Board of the City of Norfolk, Virginia*, 282 F.2d 473 (4th Cir. 1960). *Dodson v. School Board of the City of Charlottesville*, 289 F.2d 439 (4th Cir. 1961)."

"This case will be retained on the docket for such further relief as may be appropriate."

implies discrimination, such implication is denied and that such question lacks sufficient specificity to evoke an intelligent answer which does not involve broad conclusions or have argumentative deductions. Aside from that, and under *Brown v. Board of Education*, these defendants know of no reason why students should not be assigned to public schools without discrimination on the ground of race, color, or creed." (Emphasis added.)

The Superintendent of Schools testified that the City School Board had not attempted to meet the problem of overcrowded schools by requesting that Negro pupils in overcrowded schools in a given area be assigned to schools with white pupils. He stated that some new schools and additions to existing schools had been provided. The record discloses that the earlier litigation, *Warden v. The School Board of the City of Richmond*, referred to in our footnote 3, was instituted on September 2, 1958. At a special meeting held on September 15, 1958 (approximately two weeks after the beginning of the school term), the School Board voted to request the Pupil Placement Board to transfer the pupils then attending the Nathaniel Bacon School (white) to the East End Junior High School (white), and that a sufficient number of pupils be transferred from the George Mason (Negro) and Chimborazo (Negro) schools to the Nathaniel Bacon building to utilize its capacity, thus converting Nathaniel Bacon to a Negro school.

The attitude of the City school authorities, as disclosed by the Superintendent of Schools in his testimony, is and has been "that the state law took out of the hands of the School Board and the Superintendent of Schools any decision relating to the integration of schools [and that] \* \* \* it has been a feeling of both the School Board and the Administration that any conflict that might exist between the state and federal law should be decided by the Courts, not by the School Board and the Administration."

The following is taken from the testimony of the Chairman of the Pupil Placement Board:

"Q. Well, what do you do where you have overlapping school zones and school areas?"

"A. You have got that, of course, in Richmond.

"Q. Yes.

"A. Normally, I would say fully 99 per cent of the Negro parents who are entering a child in First Grade prefer to have that child in the Negro school. Judging by the small number of applications we get, that must be true. Now, we do not think that this Board was appointed for the purpose or that the law required the attempt on our part to try to integrate every child possible. What we thought we were to do was to be completely fair in considering the requests of Negroes, we will say, to go into White schools, but certainly not trying to put those in that didn't want to go in.

"Now, when a Negro parent asks for admission of his child in the First Grade of a White school, very clearly he is asking for desegregation or for integration, or whatever you want to call it, and he gets it. And it is true that *in general there will be two schools that that child could attend in his area, one White and one Negro, and we assume that the Negro wants to go to the Negro school unless he says otherwise, but if he says otherwise, he gets the other school.*" (Emphasis supplied.)

It is true that the authority for the enrollment and placement of pupils in the State of Virginia has been lodged in the Pupil Placement Board<sup>6</sup> unless a particular locality elects to assume sole responsibility for the assignment of its pupils.<sup>7</sup> The School Board of the City of Richmond has assumed no responsibility whatever in this connection. It does not even make recommendations to the Pupil Placement Board as to enrollments, assignments or transfers of pupils. It here defends charges against it of racial discrimination in the operation of the City's schools on the ground that the sole responsibility is that of the State Board. At the same time the system of dual attendance areas which has operated over the years to maintain public schools on a racially segregated basis has been permitted to continue. Though many of the Negro schools are overcrowded and white schools are not filled to normal capacity, the only effort to alleviate this condition has been to provide new buildings or additions to existing buildings, a move obviously designed to perpetuate what has always been a segregated school system.

It is clear that the pupil assignments are routinely made by the Pupil Placement Board. The Chairman of that Board says that now initial enrollments are on a voluntary basis and a Negro child may be enrolled in a white school upon

<sup>6</sup> Va. Code Ann. §§ 22—232.1-232.17 (Supp. 1960).

<sup>7</sup> Va. Code Ann. §§ 22—232.18-232.31 (Supp. 1960).

request. But in the absence of a request, the long established procedure of enrollment of Negro children in Negro schools and white children in white schools persists. Then the "feeder" system begins to operate and the only means of escape is by following the prescribed administrative procedure of filing requests or applications for transfer. The difficulties to be encountered in pursuing this course are graphically demonstrated by the experiences of the infant plaintiffs in this litigation. They were able to escape from the "feeder" system only after the District Court made possible their release by ordering transfers.

A Negro child, having once been caught in the "feeder" system and desiring a desegregated education, must extricate himself, if he can, by meeting the transfer criteria. As this court said in *Green v. School Board of City of Roanoke, Virginia*, 304 F.2d 118, 123 (4th Cir. 1962).

"\* \* \* These are hurdles to which a white child, living in the same area as the Negro and having the same scholastic aptitude, would not be subjected, for he would have been initially assigned to the school to which the Negro seeks admission."

It was pointed out in *Jones v. School Board of City of Alexandria, Virginia*, 278 F.2d 72, 77 (4th Cir. 1960), that, by reason of the existing segregation pattern, it will be Negro children, primarily who seek transfers. The truth of the statement is evidenced by the fact that in Richmond only 127 Negro children out of a total of more than 23,000 are now attending previously all-white schools. This court further said in *Jones*, *supra*: "Obviously the maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs and others similarly situated" \* \* \* 278 F.2d 72, 76.

In recent months we have had occasion to consider the legality of other "feeder" systems found in operation in the public schools of Roanoke County, Virginia, and in the City of Roanoke, Virginia. See *Marsh v. County School Board of Roanoke County, Va.*, 305 F.2d 94 (4th Cir. 1962), and *Green v. School Board of City of Roanoke, Virginia*, 304 F.2d 118 (4th Cir. 1962). In those cases, in opinions prepared by Chief Judge Sobeloff, the unconstitutional aspects of the systems there in operation were discussed in the light of the decisions of the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and in the light of numerous prior decisions of this and other courts. We find it unnecessary to again cite or review the pertinent decisions applicable to the maintenance of racially segregated school systems. In the *Marsh* and *Green* cases we reached the conclusion that injunctive relief, not only for the individual plaintiffs but for those who might find themselves confronted with the same problems, was justified.

A start has, indeed, been made to end *total* segregation of the races in the Richmond schools. The first step has been taken, one which, no doubt, was distasteful to those who are traditionally and unalterably opposed to an integrated school system. But, upon this record and from the statements of the school officials, we find nothing to indicate a desire or intention to use the enrollment or assignment system as a vehicle to desegregate the schools or to effect a material departure from present practices, the discriminatory character of which required the District Court to order relief to the infant plaintiffs before it. In the present status in which the case was left by the District Court, the school authorities are yet free to ignore the rights of other applicants and thus to require the parents of new applicants to protest discriminatory denials of transfers, to require an infant applicant with his or her parents to attend a hearing on the protest which is not likely to be held earlier than August of 1963, and then to require the applicants to intervene in the pending litigation (possibly to be met with defensive tactics calculated to result in delay), the applicants fervently hoping to obtain relief from the court not long after the beginning of the 1963-64 school session if such relief is to be meaningful.

The School Board of the City of Richmond has abdicated in favor of the Pupil Placement Board leaving the latter with a school system which, in normal operation, has demonstrated its potential as an effective instrumentality for creating and maintaining racial segregation. Nearly nine years have elapsed since the decisions in the *Brown v. Board of Education* cases and since the Supreme Court held racial discrimination in the schools to be unconstitutional. The Richmond school authorities could not possibly have been unaware of the results of litigation involving the school systems of other cities in Virginia, notably Norfolk, Alexandria, Charlottesville and Roanoke. Despite the knowledge which

these authorities must have had as to what was happening in other nearby communities, the dual attendance areas and "feeder" system have undergone no material change.

Assignments on a racial basis are neither authorized nor contemplated by Virginia's Pupil Placement Act. We are told that initial assignments are now made on a purely voluntary basis but the Placement Board *assumes* that a Negro child prefers to attend a school with children of his own race and he is so assigned unless otherwise requested. Richmond's administration of her schools has been obviously compulsive and it is evident that there has been little, if any, freedom of choice.

"Though a voluntary separation of the races in schools is uncondemned by any provision of the Constitution, its legality is dependent upon the volition of each of the pupils. If a reasonable attempt to exercise a pupil's individual volition is thwarted by official coercion or compulsion, the organization of the schools, to that extent, comes into plain conflict with the constitutional requirement. A voluntary system is no longer voluntary when it becomes compulsive." See *Jeffers v. Whitley*, 309 F.2d 621, 627 (4th Cir. 1962).

[3-5] Notwithstanding the fact that the Pupil Placement Board assigns pupils to the various Richmond schools without recommendation of the local officials, we do not believe that the City School Board can disavow all responsibility for the maintenance of the discriminatory system which has apparently undergone no basic change since its adoption. Assuredly it has the power to eliminate the dual attendance areas and the "feeder" system which the District Court found to be primarily responsible for the discriminatory practices disclosed by the evidence. It would be foolish in the extreme to say that neither the City School Board nor the Pupil Placement Board has the duty to recognize and protect the constitutional rights of pupils in the Richmond schools. That there must be a responsibility devolving upon some agency for proper administration is unquestioned. We are of the opinion that it is primarily the duty of the School Board to eliminate the offending system.<sup>8</sup>

In these circumstances, not only are the individual infant plaintiffs entitled to relief which has been ordered but the plaintiffs are entitled, on behalf of others of the class they represent and who are similarly situated, to an injunction against the continuation of the discriminatory system and practices which have been found to exist. As we clearly stated in *Jeffers v. Whitley*, 309 F.2d 621, 629 (4th Cir. 1962), the appellants are not entitled to an order requiring the defendants to effect a *general intermixing of the races in the schools* but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil *because of the pupil's race*. The order should prohibit the defendants' conditioning the grant of a requested transfer upon the applicant's submission to futile, burdensome or discriminatory administrative procedures. If there is to be an absolute abandonment of the dual attendance area and "feeder" system, if initial assignments are to be on a nondiscriminatory and voluntary basis, and if there is to be a right of free choice at reasonable intervals thereafter, consistent with proper administrative procedures as may be determined by the defendants with the approval of the District Court, the pupils, their parents and the public generally should be so informed.

If, upon remand, the defendants desire to submit to the District Court a more definite plan, providing for immediate steps looking to the termination of the discriminatory system and practices "with all deliberate speed," they should not only be permitted but encouraged to do so.

The District Court should retain jurisdiction of this case for further proceedings and the entry of such further orders as are not inconsistent with this opinion.

Reversed in part and remanded.

ALBERT V. BRAYAN, Circuit Judge (dissenting in part).

I see no need for the prospective injunction. With fairness and clarity the opinion of the Court comprehensively discusses and approves the course the District Court prescribed for the defendants to follow in the future. With no reason to believe his directions will not be respected, the District Judge refused the injunction. In this he exercised the discretion generally accorded the trial judge in such situations, especially when the necessity for an injunction must be measured by local conditions. Of these we have no knowledge more intimate than his. I would not add the injunction.

<sup>8</sup> *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955); *Cooper v. Aaron*, 368 U.S. 1, 78 S.Ct. 1401, 3 L.Ed. 2d 5 (1968).

Mr. CONYERS. Under his guidance, the Richmond School Board maintained a "discriminatory 'feeder' system, whereby pupils assigned initially to Negro schools were routinely promoted to Negro schools." To transfer to white schools, they had to "meet criteria to which white students of the same scholastic aptitude were not subjected."

The court found, not the black congressional caucus, not those who would rail against the nominee, but the court found that, including the years when Louis Powell was the leading policymaker on the Richmond School Board, the plaintiffs in the Bradley case were "able to escape from the 'feeder' system only after the district court made possible their release by ordering transfers."

And the judge describes in two sentences the state of the Richmond public school system which Mr. Powell and his supporters so rather proudly point to as a prime example of his "sensitivity" to the needs of black people:

" . . . it is clear, as found by the district court, that Richmond has dual school attendance areas; that the city is divided into areas for white schools and is again divided into areas for Negro schools; that in many instances the area for the white school and for the Negro school is the same and the areas overlap. Initial pupil enrollments are made pursuant to the dual attendance lines. Once enrolled, the pupils are routinely reassigned to the same school until graduation from that school."

The deleterious effect of 8 years of Lewis Powell's control over the education of the black and white children of the city of Richmond is clearly pictured in the statistics cited by the court:

As of April 30, 1962, a rather serious problem of overcrowding existed in the Richmond public schools. Of the 28 Negro schools, 22 were overcrowded beyond normal capacity by 1,775 pupils, and the combined enrollments of 23 of the 26 white schools were 2,445 less than the normal capacity of those schools.

As of 1961 when Mr. Powell left the Richmond School Board only 37 black children out of a total of more than 23,000 were attending previously all-white schools in the city of Richmond. A fair examination of the evidence suggests that Lewis Powell, in this instance, certainly was no respecter of the decrees of the very Court for which his nomination is now being considered. For in *Brown v. Board of Education* and *Cooper v. Aaron*, the Court had found that it was primarily the duty of the school board to eliminate segregationist practices in the public schools. But as the *Bradley* opinion notes, the Richmond School Board could not even claim that a reasonable start had been made toward the elimination of racially discriminatory practices.

It said, "The superintendent of schools testified that the city school board had not attempted to meet the problem of overcrowded schools by requesting that Negro pupils in overcrowded schools in a given area be assigned to schools with white pupils." Rather than admitting that it had failed, the Richmond School Board was blaming the "Pupil Placement Board" and others for what was clearly, as the Court decreed in *Bradley*, its own miserable dereliction of duty. Mr. Powell, in a letter to the city attorney, dated July 20, 1959, wrote that "The entire assignment prerogative is presently vested in the State pupil placement board, and although the law creating this board may be shaky, it has still not been held invalid."

In any event, it is our basic defense at the present time. Here, Mr. Powell is clearly letting a weak governmental agency take the blame for what in fact were his own segregationist policies where pupil assignment was concerned.

Numerous other cases which deal with the conditions of the Richmond schools during the era of Mr. Powell's chairmanship document the horrendous conditions which he helped to perpetuate and institutionalize.

In *Warden v. The School Board of Richmond*, a special meeting of the School Board of Richmond on September 15, 1958, is shown to have recommended that an all-white public school be converted to an all-black school in order to perpetuate segregation. Obviously, Mr. Powell's sanction of the maintenance of a dual system of attendance areas based on race offended the constitutional rights of the black schoolchildren who were entrapped by Powell's policy decisions.

From the foregoing evidence, and much other, it does not appear that Mr. Powell was a neutral bystander during these critical years of Richmond's history. In fact, the record reveals that Mr. Powell participated in the extensive scheme to destroy the constitutional rights that he had sworn to protect.

When Lewis Powell resigned from the Richmond School Board in order to take his place on the Virginia State Board of Education, an editorial in the March 3, 1961, edition of the Richmond Times-Dispatch praised him for the fact that "the two new white high schools were planned and built during his chairmanship." There were those in Richmond who had good cause to be justly proud of the masterful way in which Mr. Powell had perpetuated the antiquated notions of white supremacy through a clever institutionalization of school segregation.

Now, with regard to his role as a member and later chairman of the Virginia State Board of Education, the defenders of his record in the field of education proudly point to his support of the "Gray proposals" in the 1950's as proof positive of his "courage" in the face of those who were advocating the stiffer line of "massive resistance" vis-a-vis the Brown decision. His early support of these proposals, it can be documented, was translated into his later actions as a member of the State school board, which, I shall show, also served to foster substantive segregation in the public schools—this time on a statewide scale.

On August 30, 1954, the Governor of Virginia appointed a Commission on Public Education (known as the "Gray Commission") to examine the implications of the Supreme Court's *Brown v. Board of Education* decision of May 17, 1954, for the school segregation issue in the State of Virginia.

The Gray Commission made at least three separate reports to the Governor—on January 19, 1955, June 10, 1955, and November 11, 1955. In summary, these "Gray Proposals" called for legislation which would provide "educational opportunities for children whose parents will not send them to integrated schools," and the description of the Gray Commission operation which I think is critical to our understanding of the issue being raised here, is as follows: They were set up "to meet the problem thus created by the Supreme Court, the Commission proposes a plan of assignment which will permit local

school boards to assign their pupils in such manner as will best serve the welfare of their communities and protect and foster the public schools under their jurisdiction. The Commission further proposes legislation to provide that no child be required to attend a school wherein both white and colored children are taught and that the parents of those children who object to integrated schools, or who live in communities wherein no public schools are operated, be given tuition grants for educational purposes."

In order to implement the tuition grant strategy, the Gray Commission called for the amendment of section 141 of the Virginia constitution—which had formerly prohibited public funds from being appropriated for tuition payments of students who attended private schools—so that “enforced integration (could be) avoided.”

I also would seek permission to include the text of the Gray proposals into the record of these proceedings, it is not long.

The CHAIRMAN. They will be admitted.

(The material referred to follows:)

**REPORT OF THE VIRGINIA COMMISSION ON PUBLIC EDUCATION (GRAY COMMISSION),  
NOVEMBER 11, 1955**

(From Race Relations Law Reporter, Volume 1, Number 1, 1956)

**EDUCATION—PUBLIC SCHOOLS—VIRGINIA**

On August 30, 1954, the Governor of Virginia appointed a Commission on Public Education (known as the “Gray Commission”) to examine the effect of the decision of the United States Supreme Court in the *School Segregation Cases* and to make recommendations. A portion of the report of that Committee, including recommended constitutional \* and legislative changes, appears below.

**REPORT OF COMMISSION ON PUBLIC EDUCATION**

RICHMOND, VA., November 11, 1955.

To: THE HONORABLE THOS. B. STANLEY, *Governor of Virginia*

Your Commission was appointed on August 30, 1954, and instructed to examine the effect of the decision of the Supreme Court of the United States in the school segregation cases, decided May 17, 1954, and to make such recommendations as may be deemed proper. The real impact of the decision, however, could not be fully considered until the final decree of the Supreme Court was handed down and its mandate was before the Federal District Court for interpretation. This did not take place until July 18, 1955.

The Commission and its Executive Committee have held many meetings, including a lengthy public hearing, wherein many representatives of both races expressed their views, and the Commission has made two interim reports, one on January 19, 1955, and the other on June 10, 1955. It now submits its further recommendations for consideration by Your Excellency.

\* \* \* \* \*

**SUMMARY OF LEGISLATION PROPOSED**

The Commission has been confronted with the problem of continuing a public school system and at the same time making provision for localities wherein public schools are abandoned, and providing educational opportunities for children whose parents will not send them to integrated schools.

To meet the problem thus created by the Supreme Court, the Commission proposes a plan of assignment which will permit local school boards to assign their

\* On January 9, 1956, the electors of Virginia voted on a proposal to call a convention to amend the Virginia Constitution (see Appendix III, below). Unofficial returns indicated that the proposal was adopted.

pupils in such manner as will best serve the welfare of their communities and protect and foster the public schools under their jurisdiction. The Commission further proposes legislation to provide that no child be required to attend a school wherein both white and colored children are taught and that the parents of those children who object to integrated schools, or who live in communities wherein no public schools are operated, be given tuition grants for educational purposes.

There has heretofore been pending before The Supreme Court of Appeals of Virginia the case of *Almond v. Day*, in which the court had before it for consideration the question of whether the Legislature could validly appropriate funds for the education of war orphans at public and private schools. On November 7, 1955, the Court rendered its decision and held, among other things, that § 141 of the Constitution of Virginia prohibited the appropriation of public funds for payments of tuition, institutional fees and other expenses of students who may desire to attend private schools.

If our children are to be educated and it enforced integration is to be avoided, it is now clear that § 141 must be amended. Moreover, unless this is done, the State's entire program, insofar as attendance to private schools is concerned, involving the industrial rehabilitation program for the physically and mentally handicapped, grants for the education of deserving war orphans, grants in aid of Negro graduate students, and scholarships for teaching and nursing, to remedy shortages in these fields is in jeopardy.

Accordingly, it is recommended that a special session of the General Assembly be called forthwith for the purpose of initiating a limited constitutional convention so that § 141 may be amended in ample time to make tuition grants and other educational payments available in the current year and the school year beginning in the fall of 1956. A suggested bill for consideration of the General Assembly is attached hereto as Appendix III.

Contingent upon the favorable action of the people relative to the amendment of the Constitution herein proposed, your Commission recommends the enactment of legislation in substance as follows:

1. *That school boards be authorized to assign pupils to particular schools and to provide for appeals in certain instances.*

Such legislation would be designed to give localities broad discretion in the assignment of pupils in the public schools.

Assignments would be based upon the welfare of the particular child as well as the welfare and best interests of all other pupils attending a particular school. The school board should be authorized to take into consideration such factors as availability of facilities, health, aptitude of the child and the availability of transportation.

Children who have heretofore attended a particular public school would not be reassigned to a different one except for good cause shown. A child who has not previously attended a public school or whose residence has changed, would be assigned as aforesaid.

Any parent, guardian or other person having custody of a child, who objects to the assignment of his child to a particular school under the provisions of the act should have the right to make application within fifteen days after the giving of the notice of the particular assignment to the local school board for a review of its action. The application should contain the specific reasons why the child should not attend the school assigned and the specific reasons why the child should be assigned to a different school named in the application. After the application is received by the local school board a hearing would be held within forty-five days and, after hearing evidence, the school board would determine to what school the child should be assigned.

An appeal if taken should be permitted from the final order of the school board within fifteen days. The appeal would be to the circuit or corporation court. The local school board would be made a defendant in this action and the case heard and determined *de novo* by the judge of the court, either in term or in vacation. If either party be aggrieved by the order of the court an appeal should be permitted to the Supreme Court of Appeals of Virginia.

2. *That no child be required to attend an integrated school.*

3. *That the sections of the Code relating to the powers and duties of school boards relative to transportation of pupils be amended as to provide that school boards may furnish transportation for pupils.*

In the opinion of the Commission, such is merely a restatement of existing law. However, it is felt that it should be made perfectly clear that no county school board be required to furnish transportation to school children.

*4. That changes be made in the law relating to the assignment of teachers.*

Local school boards should be vested with the authority to employ teachers and assign them to a particular school. The division superintendent should be permitted to assign a particular teacher to a particular position in the school, but not to assign the teacher to a school different from that to which such teacher was assigned by the local school board without the consent of such board.

*5. That localities be authorized to raise sums of money by a tax on property, subject to local taxation, to be expended by local school authorities for educational purposes including cost of transportation and to receive and expend State aid for the same purposes.*

Those localities wherein no public schools are operated should be authorized to provide for an educational levy or a cash appropriation in lieu of such levy. The maximum amount of the levy or cash appropriation, as the case may be, should be limited in the same manner as school levies or school appropriations are limited.

The procedure to be followed by school officials and local tax levying bodies for obtaining these educational funds would be the same as prescribed by law for the raising of funds for public school purposes. The educational funds so raised would be expended by the local school board for the payment of tuition grants for elementary or secondary school education and could, in the discretion of the board, be expended for transportation costs. Local school boards should be vested with the authority to pay out such grants and costs under their own rules and regulations.

Localities should be granted and allocated their share of State funds upon certifying that such funds would be expended for tuition grants. Any person who expends a tuition grant for any purpose other than the education of his child should be amenable to prosecution therefor.

*6. That school budgets be required to include amounts sufficient for the payment of tuition grants and transportation costs under certain circumstances; that local governing bodies be authorized to raise money for such purposes; that provision be made for the expenditure of such funds; and that the State Board of Education be empowered to waive certain conditions in the distribution of State funds.*

This would be companion legislation to that dealing with the assignment of pupils and compulsory education, respectively. It would be designed to further prevent enforced integration by providing for the payment of tuition grants for the education of those children whose parents object to their attendance at mixed schools. Without such a measure, enforced integration could not be effectively avoided since many parents would then be required to choose integrated schools as the only alternative to the illiteracy of their children.

The division superintendent of the schools of every county, city or town wherein public schools are operated should be required to include in his estimate of the school budget an amount of money to be expended as tuition grants for elementary and secondary school education. The locality would be authorized to include in its school levy or cash appropriation an amount necessary for such tuition grants.

The educational funds so raised would be expended in payment of tuition grants for elementary or secondary school education to the parents, guardians or other persons having custody of children who have been assigned to public schools wherein both white and colored children are enrolled, provided such parents, guardians or other persons having custody of such children certify that they object to such assignment.

Each grant should be in the amount necessary for the education of the child, provided, however, that in no event would such grant exceed the total cost of operation per pupil in average daily attendance in the public schools for the locality making such grant as determined for the preceding school year by the Superintendent of Public Instruction.

Provision should be made for the payment of transportation costs in the discretion of the board to those who qualify for tuition grants.

No locality that expends funds for tuition grants should be penalized in the distribution of State funds. Any person who expends tuition grants for any purpose other than for the education of his child should be amenable to prosecution.

*7. That provision be made for the reimbursement by the State of one-half of any additional costs which may be incurred by certain localities in payment of tuition grants required by law.*

The Commission realizes that the payment of tuition grants in localities wherein public schools are operated may necessitate some expenditures beyond the adopted

school budgets. Since tuition grants are vital to the prevention of enforced integration, it should be provided that the State bear one-half of any excess costs to the locality.

*8. That local school boards be authorized to expend funds designed for public school purposes for such tuition grants as may be permitted by law without first obtaining authority therefor from the tax levying body.*

Local school boards should be authorized to transfer school funds, excluding those for capital outlay and debt service, within the total amount of their budget and to expend such funds for tuition grants, in order to give the local boards more flexibility to meet the requirements of the tuition grant program.

*9. That the employment of counsel by local school boards be authorized to defend the actions of their members and that the payment of costs, expenses and liabilities levied against them be made by the local governing bodies out of the county or city treasury as the case may be.*

Such a measure is necessary if we are to continue to have representative citizens as members of our local school boards.

*10. That the Virginia Supplemental Retirement Act be broadened to provide for the retirement of certain private school teachers.*

The Virginia Supplemental Retirement Act should be broadened to provide for the retirement of school teachers if such teachers be employed by a corporation organized for the purpose of operating a private school after the effective date of the enactment of legislation recommended by this report.

The purpose of this is to protect the retirement status of those public school teachers who may hereafter desire to teach in private schools that are established because of the decision in the school segregation cases. Corporate entity is deemed necessary for practical administration by the Retirement Board.

*11. That the office of the Attorney General should be authorized to render certain services to local school boards.*

The Attorney General should be authorized when requested to do so by a local school board, to give such advice and render such legal assistance as he deems necessary upon questions relating to the commingling of the races in the public schools.

The localities will have many problems confronting them in view of the school segregation cases and will also have many new responsibilities, including the promulgation of a vast number of detailed rules and regulations. Under such circumstances it is felt that the office of the Attorney General should be made available to them. The Commission realizes, of course, that in order for such a measure to operate effectively the office of the Attorney General must be expanded and the necessary funds appropriated by the General Assembly.

*12. That those sections of the Code relating to the minimum school term, appeals from actions of school boards, State funds which are paid for public schools in counties, school levies and use thereof, cash appropriations in lieu of school levies, and unexpended school funds, be amended; and that certain obsolete sections of the Code be repealed.*

Local school boards should be authorized but not required to maintain public schools for a period of at least nine months. A locality may be confronted with an emergency situation.

The present procedure governing appeals from actions of school boards should be clarified so that it will not conflict with appeals in assignment cases.

The State Board of Education appears to have the authority to approve the operation of schools in a locality for a period of less than nine months with no loss in State funds. This should be made clear.

The requirement for minimum school levies or cash appropriations in lieu thereof should be eliminated and levies or cash appropriation for educational purposes authorized.

The procedure for the reversion of unexpended school funds should be broadened so as to make it apply to appropriations for educational purposes.

Those sections of the Code relating to distribution of school funds which are obsolete, being covered by the Appropriation Act, should be repealed.

The section of the Code requiring segregated schools has been rendered void by the Supreme Court of the United States and should be repealed.

The section of the Code requiring cities to maintain a system of public schools should be repealed since it duplicates another provision of the Code.

## APPENDIX III

A BILL To provide for submitting to the qualified electors the question of whether there shall be a convention to revise and amend certain provisions of the Constitution of Virginia

Whereas, by Item 210 of the Appropriation Act of 1954 (Acts of Assembly, 1954, Chapt. 708, p. 970), the General Assembly sought to enact measures to aid certain war orphans in obtaining an education at either public or private institutions of learning, which said Item has been adjudicated by the Supreme Court of Appeals of Virginia, insofar as it purports to authorize payments for tuition, institutional fees and other expenses of students who attend private schools, to be violative of certain provisions of the Constitution respecting education and public instruction; and,

Whereas, the State's entire program, insofar as attendance at private schools is concerned, involving the industrial rehabilitation program, grants for the education of war orphans, grants in aid of Negro graduate students, and scholarships for teaching and nursing, is in jeopardy; and

Whereas, in order to permit the handicapped, war orphans, Negro graduate students and prospective teachers and nurses to receive aid in furtherance of their education at private schools and in order to insure educational opportunities for those children who may not otherwise receive a public school education due to the decision of the Supreme Court of the United States in the school segregation cases, it is deemed necessary that said provisions of the Constitution be revised and amended; and,

Whereas, it is impossible to procure such amendments and revisions within the time required to permit educational aid forthwith for the current school year and that beginning in the fall of 1956 except by convening a constitutional convention; and,

Whereas, because it is deemed unwise at this time to make any sweeping or drastic changes in the fundamental laws of the State, and also, in order to assure the adoption of the contemplated amendments and revisions within the time necessary to permit educational aid in the school year of 1956-57, it is deemed necessary that the people eliminate all questions from consideration by said convention save and except those essential to the adoption of those revisions and amendments specified in this Act; and,

Whereas, in order to avoid heated and untimely controversies throughout the State as to what other matters, if any, may or should be acted upon by said convention, it is believed to be in the public interest to submit to the electors the sole question whether a convention shall be called which will be empowered by the people to consider and act upon said limited revisions and amendments only, and not upon any others:

Now, therefore, be it enacted by the General Assembly of Virginia:

1. § 1. That at an election to be held on such day as may be fixed by proclamation of the Governor (but not later than sixty days after the passage of this Act), there shall be submitted to the electors qualified to vote for members of the General Assembly the question "Shall there be a convention to revise the Constitution and amend the same?" Should a majority of the electors voting at said election vote for a convention, the legal effect of same will be that the people will thereby delegate to it only the following powers of revision and amendment of the Constitution and no others:

A. The convention may consider and adopt amendments necessary to accomplish the following purposes, and no others:

To permit the General Assembly and the governing bodies of the several counties, cities and towns to appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate and graduate education of Virginia students in non-sectarian public and private schools and institutions of learning in addition to those owned or exclusively controlled by the State or any such county, city or town.

B. The convention shall be empowered to proclaim and ordain said revisions and amendments adopted by it within the scope of its powers as above set forth without submitting same to the electors for approval, but the convention will not have the power to either consider, adopt, or propose any other amendments or revisions.

§ 2. The judges of election and other officers charged with the duty of conducting elections at each of the several voting places in the State are hereby required to

hold an election upon the said question of calling the convention, on the day fixed therefor by proclamation of the Governor, at all election precincts in the State, but the several electoral boards may, in their discretion, dispense with the services of clerks of election in such precincts as they may deem appropriate. Copies of the Governor's proclamation shall be promptly sent by the State Board of Elections to the secretary of each electoral board and due publicity thereof given through the press of the State and otherwise if the Governor so directs.

§ 3. The ballots to be used in said election the State Board of Elections shall cause to be printed, and distributed and furnished to the respective electoral boards of the counties and cities of the State. The number furnished each such board shall be ten per centum greater than the total number of votes cast by said board's county or city in the last presidential election. The respective electoral boards shall cause the customary identification seal to be stamped on the ballots delivered to them. In order to insure that the electors will clearly understand the limited powers which may be exercised by the convention, if called, said ballots shall be printed in type not less in size than small pica and contain the following words and figures:

"Constitutional Convention Ballot:

**"INFORMATORY STATEMENT**

"The Act of the General Assembly submitting to the people the question below provides that the elector is voting for or against a convention to which will be delegated by the people only the limited powers of revising and amending the Constitution to the extent that is necessary to accomplish the following purposes, and no other powers:

To permit the General Assembly and the governing bodies of the several counties, cities and towns to appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate and graduate education of Virginia students in nonsectarian public and private schools and institutions of learning in addition to those owned or exclusively controlled by the State or any such county, city or town.

"The Act also provides that the legal effect of a majority vote for a convention will be that the people will delegate to it only the foregoing powers, except that the convention will be empowered to ordain and proclaim said revisions and amendments adopted by it within the scope of said powers without submitting same to the electors for approval, but the convention will not have the power to either consider, adopt or propose any other amendments or revisions.

"In the light of the foregoing information the question to be voted on is as follows:

"Shall there be a convention to revise the Constitution and amend the same?

- For the convention.
- Against the convention."

§ 4. A ballot deposited with a cross mark, a line or check mark placed in the square preceding the words "For the convention" shall be a vote for the convention, and a ballot deposited with a cross mark, line or check mark preceding the words "Against the convention" shall be a vote against convention.

§ 5. The ballots shall be distributed and voted, and the results thereof ascertained and certified, in the manner prescribed by section 24-141 of the Code of Virginia. It shall be the duty of the clerks and commissioners of election of each county and city, respectively, to make out, certify and forward an abstract of the votes cast for and against the convention in the manner now prescribed by law in relation to votes cast in general State elections.

§ 6. It shall be the duty of the State Board of Elections to open and canvass the said abstracts of returns, and to examine and make statement of the whole number of votes given at said election for and against the convention, respectively, in the manner now prescribed by law in relation to votes cast in general elections; and it shall be the duty of the State Board of Elections to record said certified statement in its office, and without delay to make out and transmit to the Governor of the Commonwealth an official copy of said statement, certified by it under its seal of office.

§ 7. The Governor shall, without delay, make proclamation of the result, stating therein the aggregate vote for and against the convention to be published in such newspapers in the State as may be deemed requisite for general information. The State Board of Elections shall cause to be sent to the clerks of each

county and corporation, at least fifteen days before the election, as many copies of this Act as there are places of voting therein; and it shall be the duty of such clerks to forthwith deliver the same to the sheriffs of their respective counties and sergeants of their respective cities for distribution. Each such sheriff or sergeant shall forthwith post a copy of such Act at some public place in each election district at or near the usual voting place in the said district.

§ 8. The expenses incurred in conducting this election, except as herein otherwise provided, shall be defrayed as in the case of the election of members of the General Assembly.

§ 9. The State Board of Elections shall have authority to employ such help and incur such expenses as may be necessary to enable it to discharge the duties imposed on it under this Act, the expenses thereof to be paid from funds appropriated by law.

2. An emergency existing, this Act shall be in force from the time of its passage.

Mr. CONYERS. Thank you, Mr. Chairman, so it may be viewed with the other recommendations which include the polling in the Gray Commission itself. One is that no child be required to attend an integrated school.

2. That localities should be granted State funds upon certifying that such funds would be expended for tuition grants (to send, in practice, white children to segregated, all-white private institutions).

3. That the State board of education be empowered to liberalize certain conditions in the distribution of State funds (so that, in practice, tuition grants, transportation costs, institutional fees, and other expenses involved in supporting the multitudinous new white private schools could be met).

So, I think it should be clear, Mr. Chairman, without reading the entire statement which has been permitted to be put in the record, that there is a great deal to be inquired into contrary to the thinking of many of my friends, some of whom have testified before this committee, who have candidly admitted that they have not sought to inquire into the grounds either favorable or otherwise to this second nomination that is simultaneously before this committee for consideration, because I would suggest to you that the directorships of corporations of the nominee which were directly implicated in racial discrimination lawsuits involving title 7 of the Civil Rights Act of 1964 do require your examination, and might I just mention the fact that the nominee here has personally and publicly admitted that he is a longstanding member of the Country Club of Virginia as well as the Commonwealth Club of Richmond.

He has confirmed that he never sought to alter their policies against the admission of black Americans to those clubs, and so many of his supporters, I have heard, contend that his claim that he used the country club membership only infrequently is itself a defense for his voluntarily joining and frequenting openly segregated places of leisure. His volunteering the information that he belongs to these clubs is similarly held in some circles as a defense.

Neither of these facts can hide the fact that a potential Supreme Court Associate Justice saw nothing wrong in such policies as the Commonwealth Club's practice of allowing "colored servants with them to the club only if they are dressed in appropriate attire." The added so-called defense offered by his supporters—that he belongs to the University Club and the Century Association of New York (both of which are integrated)—is a direct affront to the intelligence of the American people. The acquiescence in the face of institutionalized

segregation which, in our judgment, characterizes the career of the nominee, as an educator in Virginia, finds succinct symbolism in his shrug-of-the-shoulder attitude on the issue of membership in segregated country clubs. How can a man who has never raised his voice to such distasteful segregationist practices claim to be philosophically sensitive or at all attuned to the vital issues of particular import to blacks on which he will have to exercise considered judgment as a member of the Supreme Court?

The importance of this issue becomes readily apparent when one realizes that a member of this illustrious body, Senator Edward Brooke, and if, in my judgment unfortunately, if Mr. Powell is confirmed, a fellow member of the Supreme Court, Justice Thurgood Marshall, would be precluded from joining him as a guest at a number of the clubs in which he holds membership.

I only mention for purposes of inviting discussion the fact that is dealt with in some detail, the fact that the law firm of the nominee which reputedly has in its employ over a hundred attorneys, has yet to face the question of equal employment for black attorneys as well as whites in that office.

We would conclude, if it pleases the chairman and members of this committee, that the life style, his view of government as evidenced by Mr. Powell's own activities on the boards of education, his close association with a variety of corporate giants, his public conduct, his membership in the largest all-white law firm in Richmond, his support of segregated social clubs, and his defense of the status quo, are inconsistent with the kind of jurist that we would hope you would see, as we do, is desperately needed for the court in the 1970's and in the 1980's. These considerations take on more weight when one considers the tremendous problems which our country will be facing during those decades.

I might close by raising a different kind of troubling question because we now have had some indication from the questioning that has gone on, and I have attempted to follow it as closely as I could, that the nominee has attempted to make some distinction, to our surprise, about his position in connection with the Gray Commission and the pupil placement schemes that allowed parents, white parents, to take their children out of the public school systems wherever there was an opportunity or a chance that there might be an integrated school system and send them to private schools at the expense of the State. On that note, I would conclude my remarks and with the kind indulgence of the Chair, ask if my counsel be permitted an observation in connection with this statement on the nomination.

(Mr. Conyers' prepared statement follows.)

**TESTIMONY BEFORE THE SENATE JUDICIARY SUBCOMMITTEE CONSIDERING THE  
NOMINATION OF LEWIS F. POWELL TO THE SUPREME COURT OF JUSTICE PRE-  
SENTED BY THE HON. JOHN CONYERS, JR. MEMBER OF CONGRESS ON BEHALF  
OF HIMSELF AND MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS**

Mr. Chairman and distinguished members of the subcommittee, I appreciate the opportunity to testify before you on a matter of such great importance as the nomination of Lewis F. Powell as an Associate Justice of the Supreme Court.

In considering Mr. Powell or any other nominee to the Court, no one would deny the Presidential prerogative of examining a potential candidate's philosophy before placing his name before the Senate for confirmation. Nor is there any requirement of the type of philosophy a nominee should espouse. But it also follows

that there is nothing to preclude the Senate from laying bare that nominee's pre-dilections, but indeed it has a responsibility to do so.

Many of the founding fathers feared that nominal "advice and consent" of the Senate on nominations to judgeships would create a dependency of the judiciary on the executive. It was their intent to make the judiciary independent by insisting on joint action of the legislative and executive branches of each nomination. Consequently, as Charles L. Black, Professor of Law at Yale University, has pointed out, such inquiry is consistent with the Senate's constitutional duty in advising on presidential nominations:

. . . . a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by doing so.

Competency as a legal technician is not sufficient cause for appointment to the Supreme Court. Since judges by definition must sit in judgment, exercising what Oliver Wendell Holmes called the "sovereign prerogative of choice," they must bring more to their task than a highly specialized technocracy. What a judge brings to bear upon his decision is the weight of his experience and the breadth of his vision, as well as his legal expertise. In the words of Felix Frankfurter, a justice ought to display both "logical unfolding" and "sociological wisdom." Or, as Henry Steele Commager put it: "Great questions of constitutional law are great not because they embody issues of high policy, of public good, of morality." Similarly, great judicial decisions are great not because they are brilliant formulations of law alone, but because they embody highmindedness, compassion for the public good, and insight into the moral implications of those decisions.

#### I. POWELL'S RECORD ON THE RICHMOND SCHOOL BOARD

For the past several days, the press and Lewis Powell's supporters have been treating us to a view of Mr. Powell which would have us believe that he was the champion of the successful, gradual integration of the Richmond public schools. As *Time Magazine* put it, Mr. Powell, as Chairman of the Richmond School Board, presided over the "successful, disturbance-free integration of the city's schools in 1959."

While it is true Mr. Powell sat on the School Board of the City of Richmond from 1950 to 1961, serving as its chairman during the last eight years of that period, something less than successful integration took place. The opinion of Circuit Judge Boreman, not noted for his liberal views, in *Bradley v. School Board of the City of Richmond, Virginia* clearly documents the fact that in Richmond, only a matter of months after Mr. Powell had left the city School Board, "the system of dual attendance areas which has operated over the years to maintain public schools on a racially segregated basis has been permitted to continue." [317 F. 2d 429 (1963) at 436.] What the very words of the United States Court of Appeals, Fourth Circuit, indicate beyond a shadow of a doubt is that Lewis Powell's eight-year reign as Chairman of the Richmond School Board created and maintained a patently segregated school system, characterized by grossly overcrowded Black public schools, white schools not filled to normal capacity, and the school board's effective perpetuation of a discriminatory feeder or assignment system whereby Black children were hopelessly trapped in inadequate, segregated schools.

The entire text of the *Bradley* opinion is submitted for inclusion into the record of these proceedings, so that it may be carefully scrutinized by this committee and members of the Senate in order that a more accurate view may be gained of the conditions that existed under the Powell administration.

Under his guidance, the Richmond School Board maintained a "discriminatory 'feeder' system, whereby pupils assigned initially to Negro schools were routinely promoted to Negro schools." To transfer to white schools, they had to "meet criteria to which white students of (the) same scholastic aptitude (were) not subjected." [317 F. 2d, at 430.] The Court found that, including the years when Lewis Powell was the leading policy-maker on the Richmond School Board, the infant plaintiffs in the *Bradley* case were "able to escape from the 'feeder' system only after the District Court made possible their release by ordering transfers." [317 F. 2d, at 436.]

Listen to the words of Judge Borenman, as he describes the state of the Richmond public school system which Mr. Lewis Powell and his supporters so proudly point to as a prime example of his "sensitivity" to the needs of Black people:

. . . it is clear, as found by the District Court, that Richmond has dual school attendance areas; that the City is divided into areas for white schools and is again divided into areas for Negro schools; that in many instances the area for the white school and for the Negro school is the same and the areas overlap. Initial pupil enrollments are made pursuant to the dual attendance lines. Once enrolled, the pupils are routinely reassigned to the same school until graduation from that school.

The deleterious effect of eight years of Lewis Powell's control over the education of the Black and white children of the city of Richmond is clearly pictured in the statistics cited by the Court:

As of April 30, 1962, a rather serious problem of overcrowding existed in the Richmond public schools. Of the 28 Negro schools, 22 were overcrowded beyond normal capacity by 1775 pupils, and the combined enrollments of 23 of the 26 white schools were 2445 less than normal capacity of those schools. [317 F. 2d, at 432-3.]

As of 1961 when Mr. Powell left the Richmond School Board only 37 Black children out of a total of more than 23,000 were attending previously all-white schools in Richmond.

A fair examination of the evidence suggests that Lewis Powell, in this instance, certainly was no respecter of the decrees of the very Court for which his nomination is now being considered. For in *Brown v. Board of Education* [347 U.S. 483.] and *Cooper v. Aaron* [358 U.S. 358], the Court had found that it was primarily the duty of the *School Board* to eliminate segregationist practices in the public schools. But as the *Bradley* opinion notes, the Richmond School Board could not even claim that a reasonable start had been made toward the elimination of racially discriminatory practices. [317 F. 2d, at 435.] "The Superintendent of Schools testified that the City School Board had not attempted to meet the problem of overcrowded schools by requesting that Negro pupils in overcrowded schools in a given area be assigned to schools with white pupils." [317 F. 2d, at 435.] Rather than admitting that it had failed, the Richmond School Board was blaming the "Pupil Placement Board" and others for what was clearly, as the Court decreed in *Bradley*, its own miserable dereliction of duty. Mr. Powell, in a letter to the City Attorney, dated July 20, 1959, wrote that "The entire assignment prerogative is presently vested in the State Pupil Placement Board, and although the law creating this Board may be shaky, it has still not been invalid. In any event, it is our basic defense at the present time." Here, Mr. Powell is clearly letting a weak governmental agency take the blame for what in fact were his own segregationist policies where pupil assignment was concerned.

Numerous other cases which deal with the conditions of the Richmond schools during the era of Mr. Powell's chairmanship document the horrendous conditions which he helped to perpetuate and institutionalize. In *Warden v. The School Board of Richmond*, a special meeting of the School Board of Richmond on September 15, 1958 is shown to have recommended that an all-white public school be converted to an all-black school in order to perpetuate segregation [*Lorna Renee Warden et al. v. The School Board of the City of Richmond, Virginia, et al.*]. Obviously Mr. Powell's sanction of the maintenance of a dual system of attendance areas based on race offended the constitutional rights of the black school children who were entrapped by Powell's policy decisions. From the foregoing evidence, it does not appear that Mr. Powell was a neutral bystander during these critical years of Richmond's history. In fact, the record reveals that Mr. Powell participated in the extensive scheme to destroy the constitutional rights that he had sworn to protect.

When Lewis Powell resigned from the Richmond School Board in order to take his place on the Virginia State Board of Education, an editorial in the March 3, 1961 edition of the Richmond *Times-Dispatch* praised him for the fact that "the two new white high schools (were) planned and built during his chairmanship." (Emphasis added.) There were those in Richmond who had good cause to be justly proud of the masterful way in which Mr. Powell had perpetuated the antiquated notions of white supremacy through a clever institutionalization of school segregation.

#### II. POWELL'S RECORD ON THE VIRGINIA STATE BOARD OF EDUCATION

The defenders of Lewis Powell's record in the field of education proudly point to his support of the "Gray Proposals" in the 1950's as proof-positive of his

"courage" in the face of those who were advocating the stiffer line of "Massive Resistance" *vis-a-vis* the *Brown* decision. His early support of these proposals, it can be documented, was translated into his later actions as a member of the State School Board, which, I shall show, also served to foster substantive segregation in the public schools—this time on a state-wide scale.

On August 30, 1954, the Governor of Virginia appointed a Commission on Public Education (known as the "Gray Commission") to examine the implications of the Supreme Court's *Brown v. Board of Education* decision of May 17, 1954 for the school segregation issue in the State of Virginia.

The Gray Commission made at least three separate reports to the Governor—on January 19, 1955, June 10, 1955, and November 11, 1955. In summary, these "Gray Proposals" called for legislation which would provide "educational opportunities for children whose parents will not send them to integrated schools." [Race Relations Law Reporter, Vol. 1., No. 1., 1956, p. 242].

To meet the problem thus created by the Supreme Court, the Commission proposes a plan of assignment which will permit local school boards to assign their pupils in such manner as will best serve the welfare of their communities and protect and foster the public schools under their jurisdiction. The Commission further proposes *legislation to provide that no child be required to attend a school wherein both white and colored children are taught and that the parents of those children who object to integrated schools, or who live in communities wherein no public schools are operated, be given tuition grants for educational purposes.* (Emphasis added. *Ibid.*)

In order to implement the tuition grant strategy, the Gray Commission called for the amendment of Section 141 of the Virginia Constitution—which had formerly prohibited public funds from being appropriated for tuition payments of students who attended private schools—so that "enforced integration (could be) avoided".

I submit the entire text of the "Gray Proposals" into the record of these proceedings, so that all may view its other recommendations, which include the following:

1. That no child be required to attend an integrated school.
2. That localities should be granted State funds upon certifying that such funds would be expended for tuition grants (to send, in practice, white children to segregated, all-white private institutions).
3. That the State Board of Education be empowered to liberalize certain conditions in the distribution of State funds (so that, in practice, tuition grants, transportation costs, institutional fees, and other expenses involved in supporting the multitudinous new white private schools could be met).

Thus was the idea of using tuition grants as a means of circumventing the intent and spirit of the *Brown* decision first expressed. The Gray Proposals subsequently became the policy of the State of Virginia and its Board of Education. White parents who refused to send their children to integrated public schools but who could not afford to carry the entire financial burden of sending them to segregated private schools were soon subsidized by publically-funded tuition grants, or "pupil scholarships" as they came to be called.

That Lewis Powell was a support of the tuition grant strategy there is little doubt. The actual minutes of the Virginia State Board of Education show that Powell was present at numerous meetings between 1962 and 1968 at which the regulations governing the payment of tuition grants were approved, the actual appropriations of funds for these grants were made, and annual reports summarizing the total outlay of State and local monies for the "pupil scholarships were given." The total annual outlay in Virginia for these tuition grants was enormous. During the 1962 to 1963 school year, for example, a total of \$2,252,995.07 paid from State funds and local funds advanced by the State for the localities was paid out in the form of tuition grants of various forms (Minutes of the Virginia State Board of Education, Vol. XXXIV, p. 84, August 22-24, 1963).

The minutes of the State Board's special meeting of July 1, 1964 clearly indicate that Lewis Powell was present when, by a *unanimous* vote, a resolution was passed which facilitated the filing of tuition grant applications by Prince Edward County parents. This July 1, 1964 vote, which clearly documents Lewis Powell's favorable stance towards the tuition grant strategy in Prince Edward County, Virginia, is a particularly crucial one. For in the case of Prince Edward County, all public schools were closed for five full years, from 1959 to 1964. Lewis Powell was on the State Board of Education for a full three of those five years. As the text of the Fourth Court of Appeals indicates, "the county made no provision

whatever for the education of Negro children; white children attended segregated foundation schools financed largely by state and county tuition grants to the parents." [*Griffin v. Board of Supervisors of Prince Edward County*, 339 F. 2d 488]. For five years, only white children attending private schools subsidized by publicly funded tuition grants received an education in Prince Edward County. Foundation schools, for white students only, thrived and were supported almost entirely by public funds in the form of tuition grants. They were staffed with the same white teachers as formerly taught in public schools. Despite such findings as those of the Court of Appeals in *Griffin* that such practices were constitutionally impermissible, that the payment of tuition grants to parents desiring to send their children to such schools was enjoined so long as those schools remained segregated, and that the entire tuition grant practice constituted discrimination on racial grounds [339 F. 2d, 486], there has been no indication that Mr. Lewis Powell individually or the State Board of Education collectively ever opposed the perpetuation of this practice.

On July 1, 1964 the minutes of the State Board of Education show that Lewis Powell voted for a resolution authorizing retroactive reimbursement to Prince Edward parents who had paid tuition for their children's attendance at private schools during the 1963-4 school year. There could be no clearer or more candid declaration of Lewis Powell's intentions with regard to the school segregation issue than his support of the unanimous vote on that day. A random sampling of the entire range of the Virginia State School Board minutes from 1962 to 1968 reveals that on at least eight occasions, Lewis Powell was present at meetings at which specific tuition grants were made, not only in Prince Edward County, but all over the State of Virginia. A Survey of the minutes also has produced proof of at least three instances in which Mr. Powell was present while the "Regulations of the State Board Governing Pupil Scholarships" (tuition grants) were adopted.

Also of prime importance in evaluating Mr. Powell's behavior on the Virginia State Board of Education is the lack of information that he did anything but acquiesce in the face of the State Board's routine accreditation of segregated, all-white, private schools. For example, at a meeting of the State Board on March 26, 1964, with Powell recorded as present, a list of 65 private secondary schools was approved and accredited. These private, all-white, segregated schools included some of the same ones—Huguenot Academy, Surry County Academy, and Prince Edward Academy for which the U.S. District Court for the Eastern District of Virginia found that publically-funded tuition grants were the main support. The minutes of these meetings fail to indicate that Mr. Powell voted against the accreditation of such schools, despite the District Court's decree in *Griffin* that the further payment of the grants for use in those schools was suspended so long as they maintained segregation. Notwithstanding the Federal District Court's admonition that "the State cannot ignore any plain misuse to which a grant has or is intended to be put," [239 F. Supp at 563], the State Board of Education continued to process and approve applications for tuition grants without making any investigation to determine whether the schools were embodying racially discriminatory policies. Looking at the record, it is clear that Mr. Powell was in fact the "champion" of segregation rather than champion of integration as has been suggested.

The question can legitimately be asked—what was it that Lewis Powell was trying to preserve as Chairman of the Richmond and Virginia public schools? Was it merely, as Powell maintained in yesterday's testimony, the preservation of the public school system *per se* that he was unflinchingly interested in? I cannot condone the simplistic acceptance of Mr. Powell's literal word in this matter. For what was the public school system of Riehmond in 1958 or even in 1961 but a microcosm of white supremacy—all white, under-attended, well-equipped schools *vis-a-vis* over-crowded, dingy, all-black schools. Cannot Mr. Powell's "saintly" crusade for the presentation of the Virginia-style of "equal" public education be viewed as an inherent desire on his part to preserve a system which to so fine a degree sought to further institutionalize the Virginia schools' own peculiar brand of racism? Are not his lofty pleas for the maintenance of public education at any cost often refuted by a record which finds Mr. Powell rejecting the obviously vulnerable positions in favor of more sophisticated schemes which have effectively preserved segregation.

### III. POWELL'S DIRECTORSHIP OF CORPORATIONS IMPLICATED IN RACIAL DISCRIMINATION

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race. Powell is a member of the Board of Directors of 11 corporations. (His firm also represents many of these corporations.)

It is vital that the distinction be drawn between Mr. Powell's behavior as an attorney and his behavior as a private citizen. One could argue that an attorney should not be held accountable for his actions due to the inherent nature of legal advocacy. But, as a member of the Board of Directors of corporations which have been adjudged guilty of violating various provisions of Title VII, Powell cannot automatically escape blame. A Director is by definition a policy-maker and shares the legal responsibility of the conduct of his corporation.

Lewis Powell is both the legal counsel and a Director of the Philip Morris, Inc., one of Virginia's largest tobacco companies (he has been a Director since 1964). Philip Morris has been the defendant in at least one major Title VII case, *Quarles v. Philip Morris, Inc.* [279 F. Supp 505]. Here, a civil rights action was brought by a group of Blacks in a class action. The U.S. District Court held that the evidence established that two Black employees had been discriminated against as to wages. The discrimination on the basis of race against these employees, the Court held, had been clearly proven. The Court also held that Philip Morris, Inc. had discriminated against Quarles and the Black employees hired in the prefabrication department prior to January 1, 1966 with respect to advancement, transfer, and seniority. It held furthermore that prior organization of departments on a racial basis had prevented Blacks from advancing on their merits to jobs open only to whites. New "non-discriminatory" employment policies had only partially eliminated disadvantages, the court ruled. Plaintiffs were awarded relief to compensate for damages suffered as the result of this blatant example of employment discrimination. According to the records of the Equal Employment Opportunity Commission, the Chesapeake & Potomac Telephone Co., another corporation on which Mr. Powell serves as a Director, is currently being investigated for possible Title VII violations.

#### IV. POWELL'S BELONGING TO RACIALLY SEGREGATED CLUBS

Mr. Powell has personally and publically admitted that he is a long-standing member of both the Country Club of Virginia and the Commonwealth Club of Richmond. He has confirmed that he never sought to alter their policies against the admission of Blacks. Powell-supporters have been contending that his claim that he used the country club membership largely to play tennis and has only infrequent lunches at the Commonwealth Club [*New York Times*, October 26, 1971], is in itself a defense for his voluntarily joining and frequenting openly-segregated places of leisure. His volunteering of the information that he belongs to these clubs is similarly held by his supporters as a "defense."

Neither of these facts can hide the fact that a potential Supreme Court Associate Justice saw nothing wrong in such policies as the Commonwealth Club's practice of allowing "colored servants with them to the club only if they are dressed in appropriate attire." The added so-called "defense" offered by his supporters—that he belongs to the University Club and the Century Association of New York (both of which are integrated)—is a direct affront to the intelligence of the American people. The acquiescence in the face of institutionalized segregation which characterizes Lewis Powell's career as an educator in Virginia finds succinct symbolism in his shrug-of-the-shoulder attitude on the issue of membership in segregated country clubs. How can a man who has never raised his voice to such distasteful segregationist practices claim to be philosophically sensitive or at all attuned to the vital issues of particular import to Blacks on which he will have to exercise considered judgment as a member of the Supreme Court?

The importance of this issue becomes readily apparent when one realizes that a member of this illustrious Body, Senator Edward Brooke and, if Powell is confirmed, a fellow member of the Supreme Court, Justice Thurgood Marshall, would be precluded from joining him as guest at either of the aforementioned clubs.

#### V. EMPLOYMENT DISCRIMINATION WITHIN POWELL'S LAW FIRM

Hunton, Williams, Gay, Powell & Gibson (his law firm) at the present time employs no Black attorneys in a work force of over 100 attorneys. One or two years ago, a Black Richmond attorney, Je Royd Greene, wrote the placement office of Yale, his alma mater, and requested that it stop scheduling on-campus interviews with Hunton, Williams, charging that the firm's senior partners (including Powell) had a clearly enunciated policy which forbade the hiring of any Black attorneys—ever. Greene claims that his charge is based on a statement attesting to this notion made by one of the associates in Hunton, Williams itself. Notwithstanding Powell's denial, the fact remains that his law firm has never and does not yet employ any Black attorneys. This information is consistent with Powell's record of racial discrimination in other areas of his activities.

## VI. POWELL AND THE RICHMOND ANNEXATION ISSUE

A common tactic supported by the white power structure in Virginia has been to annex areas to city areas, thereby diluting much of the Black voting strength. Recently, Richmond annexed part of the surrounding white suburbs. The net effect of this annexation was to decrease the Black population of Richmond from 55 percent down to 42 percent.

In *Holt v. Richmond* [U.S.D.C., ED. Va.], a suit was brought under Section 5 of the Voting Rights Act to 'de-annex' the suburbs. The suit was brought by a Black Richmond citizen as a class action on behalf of Richmond's Blacks. The Justice Department has disclosed documents which show that Powell urged Attorney General John Mitchell to reverse his ruling that Richmond's annexation of suburban areas violated Black voting rights (see the Chicago *Sun-Times*, October 30, 1971). Last August, Powell wrote a letter in an unofficial capacity—acting as an interested citizen—claiming that 43,000 suburban residents were being annexed to expand the city's tax base, not to dilute the voting power of the city's Blacks. The Justice Department, however, refused to withdraw its objection. It was held in a recent District Court opinion, that the primary purpose and effect of the annexation was to dilute the voting strength of the black citizens of the City of Richmond, a view in direct contradiction to Powell's.

Mr. Lewis Powell's lifestyle, his view of government as evidenced by his activities on the boards of education, his close association with a variety of corporate giants, his public conduct, his membership in the largest all white law firm in Richmond, his support of segregated social clubs, and his defense of the status quo, are inconsistent with the kind of jurist needed for the Court in the 1970's and '80's. These considerations take on more weight when one considers the tremendous problems which our country will be facing during those decades.

A different kind of troubling question is now being raised. One ought to closely examine the character of the nominee. One should inquire whether he has fully revealed the answers sought by the Committee. Without hastening to incorrectly interpret the answers given yesterday, it is hoped every Senator will give careful consideration to the matter of his nomination in its entirety, and to question whether the nominee has been completely candid in answering questions concerning his past.

The CHAIRMAN. All right. Have you got any questions?

Senator BAYH. Just one or two.

The CHAIRMAN. I am going to turn it over to you and when you get through we will recess until 10:30 tomorrow morning.

How long a statement do you have?

Mr. MARSH. About 5 minutes.

Senator BAYH. Shall I wait until Mr. Marsh is through?

Mr. MARSH. Thank you, Senator. I am here not only as assistant to Congressman Conyers but also as the official spokesman for the black attorneys of the State of Virginia, the Old Dominion Bar Association. We have filed our statement with the Senate Judiciary Committee, and this bar association went on record, consisting of all the black lawyers, 60 or 70 in the State of Virginia, as opposing both nominations.

Senator BAYH. Would you like to have this statement put in the record in full at this time?

Mr. MARSH. Yes, I would; in addition to a one-page supplement which I would like to have passed around.

Senator BAYH. Without objection it will be included in the record.  
(The statement follows:)

NOVEMBER 8, 1971.

**STATEMENT OF THE OLD DOMINION BAR ASSOCIATION OF VIRGINIA BY WILLIAM A. SMITH, PRESIDENT AND HENRY L. MARSH, III, CHAIRMAN OF JUDICIAL APPOINTMENTS COMMITTEE**

Gentlemen of the committee: the question posed by the nomination of Lewis F. Powell, Jr., is whether a man who has for much of his life waged war on the Constitution of the United States should be elevated to the Supreme Court.

At no time in the history of our nation has it been more necessary to carefully scrutinize the attitude and record of persons nominated for the Supreme Court.

We believe that the survival of our nation depends on the recognition and satisfaction of the aspirations of black and other minority citizens for equal opportunity and greater participation in America's promise and that this goal will not be achieved by packing the Supreme Court with men with proven records of hostility to the Equal Protection Clause of the Fourteenth Amendment.

Since Mr. Powell has had no judicial experience, he must be evaluated and judged on the basis of his record. Lewis Powell's record is spread in the pages of the law books containing the opinions of the federal courts at all levels and on the minute books of the boards on which he served. An examination of that record makes it clear that Mr. Powell is not qualified to serve on the Supreme Court because (1) he has consistently voted to resist or ignore the decisions of the Supreme Court requiring racial integration of public schools; (2) he has supported measures and schemes which frustrate compliance with the law; (3) he has permitted those subject to his policy to violate Title VII of the Civil Rights Act of 1964; and (4) he has practiced racial segregation and discrimination in his private and professional life.

During much of the past 20 years of his life, he has been continuously voting and acting to fight the implementation of the decision of the Supreme Court in the school cases in the State of Virginia. While calling for law and order in his public statements, he has repeatedly and consistently demonstrated by his public deeds a wanton disrespect for law which is rarely found in a nominee to the Supreme Court.

For convenience, Mr. Powell's record will be discussed under the following headings.

1. Service on the Richmond School Board
2. Position on the Gray Commission Proposal
3. Service on the State Board of Education
4. Directorship of corporations practicing illegal racial discrimination

#### SERVICE ON THE RICHMOND SCHOOL BOARD

Mr. Powell was a member of the Richmond Public School Board from 1950 until 1961, serving as its Chairman from July, 1952 until 1961.

In such capacity and in his service on the State Board of Education, he was required to subscribe the oath of office which states in part:

"I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of Virginia . . ."

During the period subsequent to the Brown decisions, he consistently voted to resist attempts to seek compliance with those decisions.

The copy (attached as Exhibit "A") of the opinion of the Court in *Bradley v. School Board of City of Petersburg*, 317 F. 2d 429 (1963) demonstrated (1) the post-Brown conduct of the school board under Powell's leadership; (2) certain specific actions of the board which frustrated attempts to integrate the schools.

#### Position On The Gray Commission Proposal

Supporters of Mr. Powell have suggested that he deserves credit because he supported the Gray Commission Proposal. The attached summary of this proposal demonstrates its lawless nature.

The salient fact is that Powell supported the Gray Commission Proposal which contemplated and resulted in the expenditure by the State of Virginia of public funds to support private, racially segregated elementary and secondary schools in order to frustrate the implementation of the *Brown* decision. A summary of the Gray Proposal can be found in *Race Relations Law Reporter*, Volume 1, No. 1, pages 241-247 (1956). A copy of this Proposal is submitted as Exhibit "B".

#### SERVICE ON THE BOARD OF EDUCATION

While serving on the State Board of Education (1961-69), Powell consistently voted to frustrate the implementation of the *Brown* decision in Virginia. On July 1, 1964, he voted to pay retroactive tuition grants to the white parents of Prince Edward County in an obvious attempt to avoid the effect of federal court decisions forbidding payment of such grants. This action was subsequently enjoined by the federal court. See *Griffin v. Board of Supervisors of Prince Edward County*, 339 F. 2d 486 (1964). 489, 490.

The *Griffin* opinion, enclosed herein as Exhibit "C" also contains a summary of other actions of the State Board of Education which reflected hostility to the *Brown* decision.

Because of the above stated reasons, the Old Dominion Bar Association urges this committee to recommend against the confirmation of Lewis F. Powell, Jr. We renew our previous request to be heard in opposition to this nomination.

Yours truly,

WILLIAM A. SMITH,  
HENRY L. MARSH III.

NOVEMBER 9, 1971.

SUPPLEMENT TO THE STATEMENT OF NOVEMBER 8, 1971 BY THE OLD DOMINION BAR ASSOCIATION OF VIRGINIA TO THE SENATE JUDICIARY COMMITTEE

LEWIS POWELL'S DIRECTORSHIP OF PHILIP MORRIS, INC.

This Congress has recognized the importance of granting equal employment opportunity to blacks, women and other minorities by enacting Title VII of the Civil Rights Act of 1964. It is pertinent to inquire if a nominee to the Supreme Court has demonstrated in his record, a hostility to equal employment opportunity.

Lewis Powell became a Director of Philip Morris, Inc. in 1964. On 4 January 1968, a Federal Court in Virginia found that Philip Morris was guilty of discrimination against its black employees.

The Court, in the case of *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (4th Cir. 1968) held as follows:

"The court finds that the company's discrimination against Briggs and Mrs. Oatney is an intentional, unlawful employment practice. Relief under 706(g) [42 U.S.C. 2000e-5(g)] bringing their wage rates to \$2.55 per hour is appropriate."

\* \* \* \* \*

"The court finds that the defendants have intentionally engaged in unlawful employment practices by discriminating on the ground of race against Quarles, and other Negroes similarly situated. This discrimination, embedded in seniority and transfer provisions of collective bargaining agreements, adversely affects the conditions of employment and opportunities for advancement of the class." 279 F. Supp. at 519.

A copy of the *Quarles* opinion is attached hereto as Exhibit D. [Filed with the Committee.]

As a Director of Philip Morris, Inc., Mr. Powell had a responsibility for the conduct of the Corporation. In view of the importance of the implementation of Title VII to the effort to achieve equal opportunity, this aspect of Mr. Powell's record falls short of the standard expected of a Justice of the Supreme Court.

**Mr. CONYERS.** Mr. Chairman, would you yield to me for the purpose of describing counsel a little more fully before the committee? I neglected to do that. He is the vice mayor of the city of Richmond, Va., serving his third consecutive term as a member of the city council. He is a member of the executive committee and former past chairman of the black elected officials of Virginia, a partner in the law firm of Hill, Tucker and Marsh of Richmond, Va.; a distinguished civil rights attorney in his own right who has served as counsel in nearly all of the civil rights cases that have arisen in the State of Virginia. He is chairman of the judicial appointments committee, and the spokesman for the Old Dominion Bar Association of Virginia. He has been a cooperating attorney with the NAACP legal defense fund, and a member of the NAACP national legal committee and various other professional organizations.

**Mr. MARCH.** Thank you, Congressman Conyers, and Senator Bayh. I am not going to repeat anything that has been said earlier. I do want to reiterate the points mentioned by Congressman Conyers, and dwell on four points. On the service on the Richmond School Board, Mr.

Powell's position on the Gray Commission proposals, his service on the State board of education, and his directorship of corporations practicing illegal discrimination.

With respect to his service on the board I point out that he, as all other officers in Virginia, are required to do, was required to take an oath which reads, "I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Virginia." This is an oath that Mr. Powell took in 1950, and he took whenever he was sworn in for a term on either of the boards on which he served, which lasted for about 20 years. During the period subsequent to the *Brown* decision notwithstanding his oath he consistently voted to resist attempts at compliance with that decision.

Congressman Conyers had gone into some of those votes and I would just like to stress with respect to the State board of education, that this board had the responsibility of administering the tuition grant program in Virginia, which was the outgrowth of the Gray proposal. Mr. Powell was present, the minutes of these meetings show that he was present, when the standards were set up, when private schools were created, as substitutes for public schools, when standards were set up for the administering of tuition grants.

When localities refused to pay for grants Mr. Powell was present and votes were taken to pay the money directly to the parents. On one occasion which his proponents purport to slough over on July 1, 1964, after 11 years of litigation when the parents in Prince Edward County tried to prevent a distribution, paying tuition funds to the white parents, Mr. Powell was present representing white and I was present for the black parents, and he voted to pay those retroactive grants and he must have known this was an illegal act. The Federal courts subsequently enjoined this act. But this is an example of the type of action that was taken by the nominee.

The tuition grant program in Virginia lasted until 1969, when it was struck down by the Second Circuit Court attack that was mustered against it. Mr. Powell was on the board when the first attack was instituted, and when the grant program was partially enjoined in 1964 he was still on the board when the grant program was finally enjoined in 1969, so his complicity in the tuition grant program which paid some years from \$2 to \$3 million to parents attending segregated schools at public expense to avoid integration is documented.

I might point out that all of the statements made by Congressman Conyers are not opinions. They are reported decisions of Federal courts, made by judges, and I think that it is unfortunate that the Powell nomination is not receiving the scrutiny that it ought to receive from this body.

Finally, I would like to address myself to the question involved in the implications of this nomination to the Nation. I think that any Supreme Court nomination has a tremendous effect on the administration of justice in this Nation. It has an effect on lower court judges, who have been groping and grappling for solutions. It has an effect on persons in the white community who are being urged to take a stand on controversial issues, and it has an effect on black citizens who are struggling to seek equal opportunity. We suggest, the Old Dominion Bar Association suggests, to put Mr. Powell on the Court in face of his record, his record of continued hostility to the law, his

continual war on the Constitution, would be to demonstrate to us that this Senate is not concerned for the rights of black citizens in this country. Those of us who are working within the system, who have been working within the system for years, have been disturbed by many setbacks even in the Supreme Court, even in the Warren court. Freedom of choice was first tendered to the Warren court in 1963 in the Atlanta case. The court ignored it. It was tendered in 1965 in the case of Bradley against the School Board of Richmond, again a case which Mr. Powell had something to do with in that he had been formerly a member of that board. The court ignored the freedom of choice question then. We tendered this question again in 1968 in the New Kent case. Five years after it had first been tendered, the Supreme Court finally struck it down.

There are many of us who have been concerned about the pace of the Warren court. It has been the only thing we have had to work with, and we urge the Senate not to take that one weapon away from those of us who are struggling within the system to make it work for the minorities in this Nation. I will be happy to answer any questions that you may have.

Senator BAYH. I appreciate the fact that you gentlemen have taken the time to give us your thoughts. You certainly have raised some questions that have not been raised earlier, that I intend to explore. Let me consider some of these questions. I tend to follow the Professor Black philosophy that you have mentioned two or three times in your statement, Congressman Conyers, if a Member of the Senate feels in good conscience that a man sitting on the Court would do damage to the country he should vote against him.

The question that some of us are torn about is where do we draw the line? Do we look at each nominee and judge him if he is consistent with us on all points and on all issues or are there certain areas that will do irreparable damage if he is out of step or out of touch with what we feel is the right position and others that would be not considered thusly.

I felt in the whole area of equal rights, civil rights, basic human rights is that area where if a nominee is truly out of touch, out of step, I would consider him to fail.

Let me explore some other areas specifically. We have to look at specifics. Mr. Marsh, the Hill, Tucker & Marsh law firm, is that an all-black firm?

Mr. MARSH. At the present time. We have had white attorneys in our firm. It is difficult to find attorneys of either race.

Senator BAYH. I am trying to draw a distinction—I do not know whether it has been a steady pattern or not.

Mr. MARSH. No, sir. I can answer that—

Senator BAYH. Is an all-black law firm being as bad as an all white?

Mr. MARSH. No, sir; we have had two or three white interns, one who worked with our firm left to go on his own a year or so ago, so we have an open equal opportunities policy. We do not have a segregationist law firm.

Mr. CONYERS. Of course, very well known white lawyers we have heard of being discriminated against entering into a black firm, but as members of the black bar, we know that the practice is very closed in some of the larger white firms and specifically as a matter of policy

they exclude black students regardless of qualifications and young lawyers for consideration to membership in the firm. That is fairly well established. There has never been reported any reciprocal discrimination going on.

Senator BAYH. I want to draw a distinction in my own mind. The Old Dominion Bar Association, I suppose it is an all-black bar association?

Mr. MARSH. I think it is at the present time.

Senator BAYH. This white club business, I have resigned from a couple of clubs myself when I found out they were following this type of pattern. In my own mind there is a question whether just membership in a club is significant. If it is part of a pattern, it disturbs me, I trust we do not have any evidence in Mr. Powell's background, as we did in Judge Carswell's background, where he was a member of an all-white public club that went through this incorporation, as you will recall, and was made into a private club with just the purpose of permitting the club then to evade or avoid the Supreme Court ruling that the public facilities not be discriminatory.

Mr. MARSH. I do not know of any such information. However, in my opinion it might very well be that the Country Club of Virginia is a public accommodation within the language of title II of the Civil Rights Act.

Senator BAYH. That was not the difference in the Carswell matter. It was a private—well, maybe it is, I do not know.

Mr. MARSH. Well, I think the distinction is this, Senator. It might very well be. I have handled litigation in Richmond against a so-called private golf course and the court held that that golf course was in effect a public accommodation because of interstate matches and other things and the very same thing appears to be true with some of these clubs. Now, we frankly have not had time to attack them and I am not suggesting here that it is. I am just—you raised the question about the public accommodations and I am saying that is an issue which in my mind is open but I am not making any accusations. Frankly, I do not think membership in a segregated club alone would be a sufficient basis for disqualifying a nominee if he is otherwise qualified. I do think that circumstance taken in context of all of the other things present with respect to Mr. Powell, is consistent with a pattern of public action on a public record, in his law firm, in his firm taking fees for representing Prince Edward County and other local governing bodies, resisting the *Brown* decision, his firm not hiring black attorneys, his firm or his being a director of Philip Morris which was found guilty of violating title 7 over a long period of time after he was a director. All of these things become a part of a pattern which I think does add significance to his membership.

Senator BAYH. I was concerned about the thrust of the Gray Commission report. I had been, of course, for some time, so much so that I asked Mr. Powell specifically yesterday a series of rather lengthy questions. The most specific one was responded to by Mr. Powell—

I was not a member of that commission, I did not support its provision.

Senator BAYH. You did not support its provisions?

Mr. POWELL. No, I did not.

Now, there seems to be a little inconsistency there with what you gentlemen have just said. Do you have anything further to say to elaborate upon this before we look into it?

Mr. MARSH. Well, yes. I certainly think that the Gray Commission proposal was, as Congressman Conyers pointed out, a way of subsidizing segregated education at public expense for those persons who did not wish an integrated education. Mr. Powell's role from 1961 until 1969 on the State board of education was to administer this tuition grant program.

Senator BAYH. I asked was the Gray Commission report implemented into law by the legislature of Virginia?

Mr. MARSH. Yes, sir. Not in its initial form, but the essence of that proposal was section 141 of the Virginia constitution was amended, and the tuition grant program was set up in Virginia and existed until we knocked it out in court litigation. Mr. Powell was a member of the State board of education and later chairman of that board and had the responsibility of administering that program, and the records show many meetings when he was present and voting on various aspects of that program, and I have not heard of any dissent on his part. I was living in Virginia, and handling litigation at the time. It would have been news if he had dissented from some of the actions taken by the board and I know of no such action. So, I think that I do not understand his testimony. I was not here, but I think that the public record is replete with his complicity in the tuition grant program in the State of Virginia. He was a defendant each time we undertook to attack the program. He was enjoined by the court to stop paying the grants in 1969 and I do not see how—if he disagreed with it it must have been a big secret.

Senator BAYH. As I recall, and I am trying to look at the record here, he alluded to the horns of a dilemma, he did not say it this way, I suppose he said it better, but is it not possible that a member of the school board would have been on the horns of a dilemma where the Virginia State law said one thing and *Brown v. The Board of Education* said something else?

Mr. MARSH. Senator Bayh, I think that it is a fortunate thing for the Senate on this occasion because we have an opportunity to view Mr. Powell's actions in the eye of a hurricane, if you will. He was part of the scene, and whether or not he did what any reasonable person would do is not the question. The question is his loyalty and his fidelity to the Constitution of the United States and we suggest that there were those of us in that time who did take the position against the Gray proposals.

Senator BAYH. Was he not also subject to the laws of the State of Virginia? This Gray Commission matter is important to me. I am trying to make an objective judgment in a case which it is not easy to be objective about. I want to find the answer to these questions and you can be helpful here; just what responsibility does a school board member have, is he an administrator of a law that is passed, of a system that is established by the State legislature, or is he in a system where he can go out on his own?

Mr. MARSH. I think it is a good and fair question and I think the oath I read to you reveals part of the answer, "I swear I will uphold the Constitution of the United States." That is in the Virginia constitution, and that is first.

Senator BAYH. What else does it say?

Mr. MARSH. "I swear that I will uphold the constitution and the laws of the State of Virginia," but in our system of laws Mr. Powell must

know as an outstanding attorney that under the supremacy clause the laws of the United States prevail. So we think that although he had an obligation, his obligation was to the highest law and that under our system was the law of the Constitution of the United States. We suggest that therein lies the defect of the nomination. Maybe Mr. Powell did what any reasonable man would have done. But any reasonable man would not necessarily be entitled to sit on the Supreme Court.

Senator BAYH. We have been told that Mr. Powell urged against "massive resistance," is that accurate?

Mr. MARSH. I do not have any information to deny that. I have reason to believe it is true.

Senator BAYH. Well, then, would any reasonable man in the same and similar circumstances in the State of Virginia at that given time have urged against massive resistance?

Mr. MARSH. Certainly many of us did. All during the tuition grant programs, many whites stayed in the public schools, notwithstanding Mr. Powell's administration of the tuition grant program. Many of them stayed in schools that were ultimately black. Many Virginians did not take part in the lawlessness. I think the thing you have to keep in mind is that Mr. Powell did not have just two alternatives. He had three. The massive resistance strategy was foolish, and Mr. Powell was—

Senator BAYH. People in Prince Edward County did not think it was.

Mr. MARSH. That was the only place in the country, I would submit, that that happened and I might submit also that Mr. Powell did cooperate, attempt to cooperate, with them on July 1, 1964, by paying those, voting to pay those retroactive grants. But the point I am making is this, that because Mr. Powell had sense enough to recognize the futility of the massive resistance program and to go for a more sophisticated scheme of evading the *Brown* decision does not affect your decision. The Constitution outlaws the ingenious as well as the obvious scheme, and the fact that Mr. Powell had the knowledge to know how to evade the Constitution more effectively, as he did in the city of Richmond during the massive resistance era, without having integration, does not commend him to the Supreme Court. In other words, during the massive resistance challenge in Richmond Mr. Powell did not urge compliance with the Constitution, he urged a form of segregation which would not cause white and black children to be denied school but would permit them to have segregated schooling.

In Virginia until almost 1968 or 1969, we had very little desegregation of the schools. In most of Virginia desegregation was very slight until after the *New Kent* case was decided so we had a sad saga in Virginia's history where more than a generation of children received segregated education notwithstanding the Supreme Court, because of the actions of men like Mr. Powell who, true, rejected massive resistance, but instead embraced another form of segregation which worked when obviously massive resistance would not have worked.

Mr. CONYERS. Would the gentleman yield to permit me to emphasize that point. That is to say that to be opposed to massive resistance and to support a pupil placement program which would effectively

continue segregation in the face of court orders based on constitutional interpretations is really not to commend the nominee to this body by any stretch of the imagination. The massive resistance plan, as has been explained to me time and time again, was a plan that was based upon the theory that nobody would go to school if we had to integrate, there would be no schools for anyone, a plan so simple, so obviously destined to be overturned in the courts, that a person who really wanted to devise a more effective scheme of successfully segregating even in the wake of the *Brown* decisions would obviously turn to another alternative, and that is exactly what Mr. Powell did; and we say, Senators, not as an unwitting tool, or that he was dragged along by a State authority or laws over which he had no control; I think we have to put the gentleman in the context of the prestige and the influence and the power that he wields in the State of Virginia. He is clearly one of the 10 most influential citizens of that State, and I would suggest that his influence does not stop at the Arlington city line by any means.

A past president of the American Bar Association, we are talking about a man of great legal skill who was able to lead, and we are suggesting that, without trying to exaggerate his involvement, he was one of those who helped plan the alternative, the successful alternative, to massive resistance, and I think that if those facts could be developed, and we would be willing to continue to work on this matter so that these questions would be raised to the satisfaction of the members of this committee so that they might be spread upon the record for the rest of the Members in your distinguished body, we think nothing could be more important because if we are confronting Members who are ready to say, "Yes, I will allow the life work and the attitude, the social views, of a nominee to be considered as a part of the review that I must make under the powers of a Senator to advise and consent, to give advice and consent to the President," then these matters which are available, and have not been gone into thoroughly, should certainly lead you to the conclusions that I have come to as a Member who approached the subject with no particular partisan patience, who has no knowledge personally of the nominee, have had only the most casual reports about him, none of which were particularly negative, but an investigation and research into his roles as a member of the board in the Richmond school system and later chairman in the State board system, were so persuasive to me, and to my other colleagues, that we felt a responsibility to hope that the inquiries along the line that you have already raised now, Senator Bayh, would be further pursued, because we are very certain that the role of this gentleman during these tremendously important and difficult days for the State of Virginia will begin to take on its true characterization and I do not think it will be favorably interpreted for the nominee.

Senator BAYH. Thank you.

I think the fact that you have raised these questions will be given consideration by this committee. I appreciate the fact that you gentlemen have taken the time to come.

Senator BURDICK. I have not heard the direct testimony so I will have to read it.

Mr. MARSH. One further point, Senator, if you will indulge me, on the massive resistance period: When a group of blacks applied to a white school in Richmond, 2 weeks after the school had started they still had not been admitted; the school board voted by unanimous vote to convert that school—this was during the massive resistance era—and because of this vote all of the white teachers and all of the white children were taken out. Then the children were admitted but it was a black school. This is an example of the kind of leadership that did avoid school closing, but at what price. If it had stopped after that period, we might have one view, but the tuition grant program continued until 1969; so we think that there is a pattern here which bears some looking into, and it is all spread on the minutes of the board and in the court records. It is not conjecture.

We think we have an advantage in this situation that we do not have in the case of Mr. Rehnquist. We did vote to oppose him too, the lawyers in Virginia did, but I think in this situation we do have an advantage which I am concerned not enough inquiry is being made into.

Senator BAYH. Will you tell us why the NAACP and the National Conference of Civil Rights leadership has not taken a similar position?

Mr. MARSH. They will have to speak for themselves, Senator Bayh. I have to do what my conscience tells me is right, and at a great sacrifice, I might add, but they will have to answer for their actions. I can only say that I have lived in Virginia for the last 10 years and I fought in all kinds of cases, and frankly, Mr. Powell has been very friendly to me personally, it is not that he is not a gentleman, he has been very cordial to me, I like him as a person, and I am aware of the power he holds in Richmond, Va., but I have no problem of making a decision to let this committee know what I know about the law of the United States and how it has been frustrated in the State of Virginia and how it would be a serious mistake to put a man on the court who has participated in that frustration.

Senator BAYH. Thank you very much, gentlemen.

I do appreciate the time you have taken and the contribution you have made to our hearings.

Mr. CONYERS. Mr. Chairman, might I ask for inclusion of a couple of matters in the record? One would be the *Bradley v. The School Board of Richmond* decision, which is explicit about the conditions and attributes to whom the responsibility lies for the dual and segregated school system existing, and also the report of the Commission on Public Education, which is an explanation of the so-called Gray Commission.

Senator BAYH. All right, it will be put in the record.

Mr. CONYERS. I thank the Chairman, and finally, Mr. Chairman, we have copies, which are incidentally, exhibits in a desegregation case, of the law firms who were compensated at State expense for defending school boards in Virginia during the years of 1957, 1958, and 1959 and 1960, and the Powell firm figures fairly conspicuously in the defense of school boards and for that purpose, of course, we would like to have that included so that it may be brought to the attention of your colleagues and scrutinized for whatever value it may be.

Senator BAYH. Without objection, we will put that in the record.  
(The material referred to follows:)

Case and payee	Total	State	Fee	Expense
1961				
Swann v. Charlotte-Mecklenburg Board of Education (amicus curiae brief) Hunton, Williams, Gay, Powell & Gibson	1,436.90	1,436.90	1,225.00	186.90
Swann v. Charlotte-Mecklenburg Board of Education: Hunton, Williams, Gay, Powell & Gibson	22,225.95	22,225.95	20,195.00	2,030.95
United States v. Franklin City School Board: Moyler & Moyler, Mays, Valentine, Davenport & Moore	3,789.29	1,894.64	850.00	5.54
Adams v. Elliott Richardson, HEW v. School Board, Thompson v. School Board: Bateman, West & Beale	1,978.39	989.18		
Newport News controversy: Bateman, West & Beale	1,500.00	750.00	1,500.00	
Beckett v. Norfolk: Wilcox, Savage, Lawrence, Dickson	32,920.58	16,460.29	23,677.16	9,243.42
Allen v. School Board of Accomack County: Mays, Valentine, Davenport & Moore	1,744.81	872.40	1,700.00	44.81
Lee v. Smith and Cumberland County School Board:				
(a) H. James Edwards and Associates (printers)	1,731.41	865.70	1,731.41	
(b) William C Carter	10,728.69	5,364.34	10,728.69	
(c) Michael & Dent	8,068.10	4,034.05	8,068.10	
(d) C. Overton Lee	196.80	89.40	196.80	
(e) Philip J. Hirschkop	4,000.00	2,000.00	4,000.00	
Total.	24,725.50	12,362.75	24,725.50	
1960				
Allen v. Prince Edward County (study made pursuant to district court order): Dr. George Zehme	3,149.72	3,149.72		3,149.72
Thompson v. School Board of Arlington County: James H. Simmonds	4,090.63	2,000.00	4,000.00	90.63
Blackwell v. School Board of Fairfax County: Wood, Testerman & Simmonds		1,866.50	1,866.50	
Blair v. School Board of Grayson County: Campbell & Campbell		825.00	825.00	
Crisp v. Pulaski County School Board: Crowell, Deeds & Nuckles, Gilmer, Harmon & Sadler	4,833.72	2,250.00	4,500.00	333.72
Brooks v. School Board of the Galax: Crowell & LaRue	830.25	550.00	775.00	55.25
Jones v. School Board of City of Alexandria: Phillips & Wagner	5,000.00	2,500.00	5,000.00	
Allen v. School Board of Prince Edward County: Hunton, Williams, Gay, Powell	1,894.85	1,894.85	1,500.90	394.85
Beckett v. School Board of Norfolk (copies of transcript): Horace Weiss	76.20	76.20		76.20
Do.	41.10	41.10		41.10
Walker v. School Board of Flood City: William H. King	1,455.36	727.67	1,262.50	192.86
Total for 1960.	17,971.67	15,881.04	19,729.00	4,334.33
1959				
Allen v. Prince Edward County (copies of pleading): Lewis Printing Co	193.40	193.40		193.40
Arlington school case: Tucker, Mays, Moore & Reed	2,547.55	2,547.55	1,700.00	847.55
Charlottesville school case: Tucker, Mays, Moore & Reed	2,773.27	2,773.37	2,250.00	523.37
Thompson v. City School Board of Arlington: Simmonds & Ball, Williams, Mullen, Pollard & Rogers	4,092.59	4,092.59	4,000.00	92.59
Beckett v. Norfolk, Kilby v. Warren County, Allen v. Charlottesville: Williams, Mullen, Pollard & Rogers	7,558.95	7,558.95	7,500.00	58.95
Beckett v. School Board of Norfolk (copy of transcript): Horace Weiss	27.30	27.30		27.30
Kilby v. School Board of Warren County: W. J. Phillips	2,099.00	2,000.00	2,000.00	
Newport News school case: Tucker, Mays, Moore & Reed	600.00	600.00	600.00	
Prince Edward County school case: Tucker, Mays, Moore & Reed	625.00	625.00	625.00	
Adkinson v. School Board of Newport News: Robertson, Riely, Moore (State's part of fee)	10,000.00	10,000.00	10,000.00	
Allen v. Prince Edward County (copies of pleadings): Lewis Printing Co	45.00	45.00		45.00
Allen v. School Board of Prince Edward County: Hunton, Williams, Gay, Moore	4,555.08	4,555.08	4,500.00	55.08
Tones v. School Board of city of Alexandria: Lewis S. Pendleton	300.00	300.00	300.00	
Total for 1959.	35,318.14	35,318.14	33,475.00	1,843.24

Case and Payee	Total	State	Fee	Expense
1958				
Thompson v. County School Board of Arlington. Simmonds, Culler, Dunn & Coleburn.....	2,830.50	2,830.50	2,500.00	330.50
Newport News School case: Tucker, Mays, Moore & Reed.....	300.00	300.00	300.00	-----
Norfolk School case. Tucker, Mays, Moore & Reed.....	500.00	300.00	300.00	-----
Prince Edward County School case Tucker, Mays, Moore & Reed.....	400.00	400.00	400.00	-----
Charlottesville School case: Tucker, Mays, Moore & Reed.....	1,100.00	1,100.00	850.00	250.00
Prince Edward County School case. Hunton, Williams, Gay, & Moore.....	2,367.29	2,367.29	2,500.00	367.29
Arlington School case. Tucker, Myas, Moore & Reed.....	4,699.11	4,699.11	3,750.00	941.11
Allen v. School Board of City of Charlottesville. Mary W. Bible.....	19.64	19.64	-----	19.64
Kulby v. Warren County (copies of transcript) Mary W. Bible.....	48.45	48.45	-----	48.45
Allen v. Charlottesville. Mary W. Bible.....	34.20	34.20	-----	34.20
Atkins v. Prince Edward City Hunton, Williams, Gay, Moore & Powell.....	3,262.36	3,262.36	3,000.00	262.36
Thompson v. School Board of Arlington (copy of transcript). Mrs. Ceil Wilson.....	113.10	113.10	-----	113.10
Beckett v. School Board of Norfolk (copy of transcript). Horace Weiss.....	48.00	48.00	-----	48.00
Jones v. School Board of City of Alexandria. Lewis Pendleton Jr.....	329.33	329.33	300.00	29.33
Beckett v. School Board of Norfolk. Williams, Cooke, Worrell & Kelly.....	17,853.28	17,853.28	17,853.28	-----
Total for 1958.....	34,205.26	34,205.26	31,753.28	2,443.98
Prince Edward County school case: Tucker, Mays, Moore & Read.....	543.00	543.00	300.00	243.60
Newport News school case: Tucker, Mays, Moore & Reed.....	1,870.64	1,870.64	1,500.00	370.64
Norfolk school case. Tucker, Mays, Moore & Reed.....	2,674.26	2,674.26	2,000.00	674.26
Research in connection with segregation cases re Powers of governor McC. G Finnigan.....	350.00	350.00	350.00	-----
Charlottesville school segregation case Tucker, Mays, Moore & Reed.....	418.12	418.12	400.00	18.12
Arlington school case. Tucker, Mays, Moore & Reed.....	660.00	660.00	600.00	60.00
Thompson v. County School Board of Arlington Bill & Simmonds.....	2,033.17	2,003.17	2,000.00	3.17
Allen v. School Board of the City of Charlottesville Perkins, Battle & Minor.....	300.00	300.00	300.00	-----
Allen v. School Board of the City of Charlottesville & Kendall Ellis, Superintendent John S. Battle.....	3,096.45	3,096.45	3,096.45	-----
Arlington County school case. Tucker, Mays, Moore & Reed.....	735.93	735.93	500.00	246.18
Charlottesville school case Tucker, Mays, Moore & Reed.....	746.18	746.18	500.00	246.18
Davis v. County School Board of Prince Edward County. Hunton, Williams, Gay Moore & Powell.....	7,672.96	7,672.96	7,500.00	172.96
Thompson v. County School Board of Arlington. Simmonds and Culler.....	1,533.00	1,533.00	1,500.00	33.00
Total for 1957.....	22,603.71	22,603.71	20,546.45	1,177.13

Senator BAYH. Pursuant to the previous order of the chairman, we will recess now until 10:30 tomorrow at the same place.

(Whereupon, at 5:45 p.m., the hearing was recessed, to reconvene at 10:30 a.m., Wednesday, November 10, 1971.)



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

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WEDNESDAY, NOVEMBER 10, 1971

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

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

Present: Senators Eastland, Hart, Kennedy, Bayh, Burdick, Tunney, Hruska, Fong, Mathias, and Gurney.

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

The CHAIRMAN. Senator Weicker.

Senator, identify yourself for the record.

### STATEMENT OF HON. LOWELL P. WEICKER, JR., A U.S. SENATOR FROM THE STATE OF CONNECTICUT

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

Senator Lowell Weicker of Connecticut.

The CHAIRMAN. You may proceed.

Senator WEICKER. Mr. Chairman and distinguished members of the committee, I am only going to take a few minutes of your time but I wanted to do this personally and not just have it placed into the record.

It is with a great deal of pride and affection that I appear before you to speak on behalf of Lewis Powell.

I came to know this distinguished American 25 years ago when he and my father returned as comrades in arms and friends from World War II.

I was 15, he almost 40. So when I commend Lewis Powell to the favorable attention of your committee, it is done not just by the evaluations of a U.S. Senator, but done through the eyes of a youngster, college student, Army lieutenant, law student, lawyer, mayor, Congressman and constant friend. And, gentlemen, from whatever view, Lewis Powell has always lived for the America that was dreamt to be.

To him, patriotism and compassion have not been just words. They have meant courageous activism. Sometimes the battlefields were Europe; other times they were Richmond and Virginia.

As I've watched Lewis Powell through the gaze of different ages and different occupations, I always knew that to him love of country involved heart, brains, and guts in equal measure. I knew that he be-

lieved in our political system as the greatest not because it could protect the status quo but because it could bring about change without tragedy. And he has been in the forefront of such change.

Loose talkers will never have much in common with this man from Richmond. Americans who have been, are, or could be wronged, will.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Wait a minute; any questions?

Senator HART. Thank you very much.

The CHAIRMAN. Mr. Biemiller.

Do you have a prepared statement?

**TESTIMONY OF ANDREW J. BIEMILLER, LEGISLATIVE DIRECTOR,  
AFL-CIO; ACCCOMPANIED BY KENNETH A. MEIKLEJOHN, LEGIS-  
LATIVE REPRESENTATIVE**

Mr. BIEMILLER. I have, Mr. Chairman.

The CHAIRMAN. Will you give me a copy?

Mr. BIEMILLER. It was sent to the committee.

I beg your pardon; I thought they had been sent to the committee.

The CHAIRMAN. Well, it doesn't matter, just so you have a copy. Now proceed.

Mr. BIEMILLER. Mr. Chairman, for the record, my name is Andrew J. Biemiller. I am Legislative Director for the American Federation and Congress of Industrial Organizations. I am accompanied by Mr. Kenneth A. Meiklejohn, one of our legislative representatives.

Mr. Chairman, the AFL-CIO opposes the confirmation of William H. Rehnquist as an Associate Justice of the Supreme Court of the United States. We do so because Mr. Rehnquist's public record demonstrates him to be a rightwing zealot whose sole distinctions in public life are that he was the only major person of stature who opposed the Arizona civil rights bill in 1964 and that he has been one of the prime theoreticians of and apologists for this administration's root and branch assault on the constitutional system of checks and balances.

His nomination is consistent with and, indeed, can only be justified in terms of the President's program to secure a Supreme Court molded in his constitutional image. Mr. Rehnquist's name has been placed before this committee for consideration not because he has demonstrated the self-discipline, detachment and large minded independence that are the necessary prerequisites for distinguished judicial performance, but because he has demonstrated his complete fealty to the administration's programs, a quality that makes him an attractive servant for the President.

It is precisely because he is the administration's man rather than his own that he should not sit on the High Court, an equal and independent branch of the Government. Indeed, as the labor movement is all too acutely aware from its initial experiences with the Pay Board, a body of limited scope and authority, nothing is more destructive of the people's confidence than officials who have an obligation to the public but who view themselves as an extension of the executive, responsible to its interests rather than the public interest.

The central aim of this administration is the achievement of unbridled executive power. That is the lesson of its insistence on the right to engage in unregulated and unreviewable wiretapping in what it

regards as domestic security cases, its attempts to downgrade the Senate's role in the process of judicial confirmation, its refusals to utilize the \$12 billion Congress appropriated to stimulate the economy, its efforts to act unilaterally to breathe new life into the Subversive Activities Control Board and its campaign to intimidate the press culminating in the Pentagon papers litigation, to name just the instances out of many more that come most forcefully to mind. And during all of this Mr. Rehnquist has been the "President's lawyer's lawyer."

During the debate on Judge Parker's nomination, Senator William E. Borah of Idaho said :

Upon some judicial tribunals it is enough, perhaps, that there be men of integrity and of great learning in the law, but upon this tribunal something more is needed, something more is called for, for here the widest, broadest and deepest questions of government and governmental polities are involved.

This campaign of executive self-aggrandisement at the expense of the people and the other branches of Government reveals the exact nature of the "something more" a nominee to the Supreme Court must demonstrate. What is necessary is a deep and abiding commitment to the proposition, stated by James Madison, that captures the essence of our constitutional system : "The people, not the Government, possess the absolute sovereignty."

The Constitution was adopted to limit the Government's power by declaring certain rights that may not be curtailed except by the people themselves through the amendment power, and to allocate those limited powers among the legislature, the executive and the judiciary.

The executive drive for dominance has created, and will continue to create, constitutional confrontations of the first magnitude. The Court is the final arbitrator in those confrontations. It is empowered to decide whether the executive will be rebuffed again when it overreaches as it was in the Pentagon papers litigation or whether the administration will receive judicial sanction in its campaign to subordinate both legislative authority and individual freedoms. There is no place on a tribunal with these responsibilities for a Justice who is dedicated to principles opposite to those of the Constitution.

The single example of the slightest concern of the individual freedoms voiced by Mr. Rehnquist, prior to his nomination, is to the rights of businessmen to refuse to deal with individuals on the basis of race. The thought that this position impinges on the freedoms of the customer apparently never entered Mr. Rehnquist's calculations or was discounted by him.

#### Mr. Rehnquist represented to the Phoenix City Council :

I venture to say there has never been this sort of an assault on the institution [of private property] where you are told not what you can build on your property but who can come on your property.

Yet, as a lawyer, he must have known that since 1701, in an opinion by Chief Justice Holt, in *Lane v. Cotton*, the common law has been that a businessman, particularly an innkeeper, is "bound to serve the subject in all the things that are within the reach and contemplation of" his calling. Mr. Rehnquist's view is so far outside the mainstream of constitutional thought that it was unanimously rejected by the Supreme Court in sustaining the constitutionality of the public accommodations provisions of the Civil Rights Act of 1964.

Mr. Rehnquist's lack of understanding of what the Bill of Rights is all about is further illustrated by his criticism of the Supreme Court through the slogan "criminal defendants, pornographers, and demonstrators." That phrase shows, first, that Mr. Rehnquist rejects the presumption of innocence, for a man who is a defendant in a criminal case is only charged with an offense; he has not yet been found guilty.

Precisely because the balance which the Constitution strikes between the rights of the Government and the accused is a delicate one, in which the entire society has a grave concern, one who must make these nice judgments ought at least to accept the fundamental premise of the system. By assimilating pornographers and demonstrators, Mr. Rehnquist obscures the fact that obscenity is not free speech while the message of the demonstrators is.

He also shows an inability to distinguish, as the courts must distinguish, between peaceful demonstration, which is an essential form of that communication which the First Amendment is designed to protect, and mob action which, of course, is intolerable. The American labor movement has suffered sufficiently from judges who do not understand that there is such a thing as constitutionally protected peaceful picketing.

Thus, while the President has characterized Mr. Rehnquist as a "strict constructionist," he is, if anything, a strict constructionist of the Constitution prior to the adoption of the Bill of Rights, in other words, a man who construes the Constitution in favor of executive power.

Given his antilibertarian record, there was a heavy burden on Mr. Rehnquist to demonstrate to this committee that his service on the Supreme Court would be consistent with the basic Constitutional system. The burden of justifying his appointment was particularly great in light of the background of his nomination. For 5 weeks before Mr. Rehnquist's name was submitted, the Administration had floated trial balloons culminating in a list of six persons which caused dismay among the general public and in the entire legal profession.

This bizarre process tended to undermine the citizens' respect for the nominations by making it apparent that the administration cannot appoint justices to the highest court in the land any more than it can formulate international policy or domestic economic policy without Madison Avenue gimmickry more suitable for selling used cars.

Yet, when Mr. Rehnquist was given an opportunity to explain his basic Constitutional philosophy by careful inquiry by members of this committee, he did not grasp the opportunity despite the fact that in 1959 he had argued "The only way for the Senate to learn of a nominee's Constitutional views is to 'inquire of men on their way to the Supreme Court something of their views on these questions.'" Instead he chose to fence with the Senators and when this proved too transparent an evasion, he hid behind a spurious claim of privilege.

The proposition advanced was that Mr. Rehnquist could not answer the Senators' questions because he might reveal advice that he had given to the President.

It is clear that this claim was merely opportunistic because when it suited his purpose Mr. Rehnquist did describe advice he had given to the President.

But even if the claim could be taken at face value, its very invocation is but further evidence of Mr. Rehnquist's failure to give proper respect to the Senate's coordinate responsibility for the appointment of Supreme Court justices.

To deny this committee the information which it must have to make an informed choice is but a subtler version of the administration's discredited contention that the Senate is but a rubber stamp when it is asked to confirm a Supreme Court nominee.

In short, we oppose Mr. Rehnquist on the ground that he does not know what the Constitution is all about. We rest on this ground because the President has proclaimed that ideological conformity with his Constitutional views was his guiding consideration. That being so, it must also be a guiding consideration in the Senate, for the President should not be allowed to staff the Supreme Court as he would a Republican political caucus.

No President has in recent times attempted to do so. President Roosevelt nominated both Justices Black and Frankfurter, and President Eisenhower nominated both Chief Justice Warren and Justice Whittaker.

While a nominee's orientation is, of course, a highly proper consideration, extremism of the right or the left is not a virtue in a justice of the Supreme Court.

Since the evidence is that Mr. Rehnquist is an extremist in favor of Executive supremacy and diminution of personal freedoms, his nomination should be rejected, just as the nomination of William Kunstler, an extremist of the left, should be rejected if it were made.

**Senator HART.** Thank you very much, Mr. Biemiller.

I was struck by the excerpt that you give of Mr. Rehnquist's testimony before the Phoenix City Council in opposition to the Phoenix Public Accommodation Ordinance, or whatever it was called, and I am advised that his full testimony on that occasion is available to us; and I think in fairness to Mr. Rehnquist we ought to put the full testimony in the record.

There is a little more balance to it than that excerpt suggests, but it still does not resolve the dilemma that it presents to those of us who feel an obligation to find some demonstrated sensitivity to the rights and aspirations of minorities. The answer he gave to us was that he now has changed his position because the ordinance worked fairly well, and he didn't realize then how deeply troubled minorities were by the denial of the opportunity to make purchases in drug stores or buy a meal at a restaurant. However, we were reminded yesterday that when he was testifying in this fashion in Phoenix that Congress was about on the verge of adopting a Federal policy public accommodations; and I had the impression that, in 1964 anybody who owned a television set was aware of the depth of the concern, and some people had an appreciation of the sense of outrage which attached to that kind of denial.

**Mr. BIEMILLER.** You state our views most precisely, Senator.

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

**The CHAIRMAN.** Senator Bayh?

**Senator BAYH.** Mr. Biemiller, I read your statement. I am sorry I did not have a chance to hear all of it personally, but I do appreciate the effort you have made to be here with us. Some of us who have

been concerned about the public statements of Mr. Rehnquist have had difficulty getting the answers to important questions.

The difficulty has not been placed by the nominee on the normal grounds of not wanting to take a position that might prejudge a case or prejudice his ability to be objective when a case comes before him, but on a lawyer-client privilege basis.

Do you have any thoughts on this? Given a whole series of public statements which are a matter of great concern to me and to you, what position should one assume if we are unable to get the nominee to come forth and say whether these are his personal views?

Mr. BIEMILLER. Well, as we state in our statement, Senator, we feel in the first place he even violated his own rules at one stage when he was testifying here, as the transcript shows. But way beyond that, we do feel that, as he himself stated in an article in the Harvard Law Record, that the Senate has a perfect right to try to find out what the views of a prospective justice are, and—

Senator BAYH. But if we are unable to do this, then what?

Mr. BIEMILLER. Then we would, of course, oppose his confirmation. I certainly wouldn't vote to confirm him if I were a Senator.

Senator BAYH. Do you think it is fair to assume that because of the statement he made, in response to one question, that if he didn't agree with the position he would no longer be there, that these stated or unrebutted views without change constitute his own?

Mr. BIEMILLER. I think that is a logical conclusion.

Senator BAYH. Now, Mr. Rehnquist has written, as I recall, that the Government can dismiss an employee who criticizes Government policy in public. There is a quote here to that effect from the Civil Service Journal.

Do you have any comments about this particular attitude?

Mr. BIEMILLER. As I recall, there was a rather considerable colloquy that took place between Mr. Rehnquist and Senator Ervin on this question.

We certainly do not agree with the position that Mr. Rehnquist has taken, and we think it certainly weakens his own position.

Senator BAYH. Inasmuch as we are concerned with strengthening our institutions, and given the nominee's background, given this statement relative to Government employees, given the feeling that he has expressed publicly in at least two areas where equal rights for minority groups were concerned, what, in your judgment, would be the effect on this broad base of public support if a man who has expressed these concerns were put on the highest court of the land?

Mr. BIEMILLER. We think it would be most undesirable. We think it would have an adverse effect on the confidence that the American people have in their institutions. We said that pointblank and I repeat it.

Senator BAYH. Thank you very much.

The CHAIRMAN. Senator Burdick?

Senator BURDICK. Mr. Chairman, I thank you, Mr. Biemiller, for your contribution this morning.

Just one thought occurred to me as you were giving your statement, and you were quite clear in your views. What weight do you attach to the fact that Mr. Rehnquist says he no longer holds the same views that he once did concerning public accommodations? Would you give that any weight?

**Mr. BIEMILLER.** Well, I think Senator Hart's remarks bear on this matter. It is difficult for me to understand how anybody could not have been aware of the situation that prevailed in 1964, and to say that he was not aware of the feeling of minorities at that time, that a recanting of that comes pretty late in the game; and if I were a Senator it would not influence my judgment on it.

**Senator BURDICK.** That is all I have, Mr. Chairman.

**The CHAIRMAN.** Senator Tunney?

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

**Mr. Biemiller,** thank you very much for your statement.

As I understand your statement, you are saying that Mr. Rehnquist is not, in fact, a conservative, because, as I understand the tradition of conservatism in this country it is to oppose government imposing its will on the personal freedoms of the individual? In other words, a conservative would like the individual to have as much freedom as possible, and where government, any Federal, local, or State government, attempts to circumscribe freedom, the conservative feels on the face of it, it is wrong. Now, if Mr. Rehnquist is not a conservative, what would you consider him to be?

**Mr. BIEMILLER.** Well, as we say in our paper, we think he is way over on the extreme right; he is a radical of the right. I think you are using the terms quite accurately. I remember one time having a conversation with the late Senator Byrd in which we were discussing the question of the financing of the social security system. At that time an effort was being made by some Members of the Congress to sort of seize the social security fund and turn it into a baby Townsend plan. In that discussion he said, I have long admired the conservative economic views of the American Federation of Labor in the field of social security and I deplore the radical views of the U.S. Chamber of Commerce in this area. I think this is the proper use of the words.

The conservative is trying to conserve those things that have become imbedded on the American scene; and certainly we think that it is a proper thing that a conservative would respect the Bill of Rights which has been one of the great doctrines of this country.

You will note, also, we are not opposing the nomination of Mr. Powell, who, I think, fits that description.

**Senator TUNNEY.** As I understand your testimony then, you are saying that in your opinion Mr. Rehnquist is a person who wants to depart from the basic traditions of the country and give to the executive branch far greater powers than it has enjoyed under our constitutional system?

**Mr. BIEMILLER.** Precisely, and that is why we are opposing his nomination.

**Senator TUNNEY.** I think maybe you are a conservative, Mr. Biemiller.

**Mr. BIEMILLER.** On many things I am.

**Senator TUNNEY.** On many things I am, too. Thank you.

**The CHAIRMAN.** Senator Hruska?

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

Mr. Biemiller, you have indicated it is not for a President to try to staff the Supreme Court as though it were a Republican caucus. Then you go on to say no President in recent times has attempted to do so

and you cited President Roosevelt who nominated Black and Frankfurter and President Eisenhower who nominated Warren and Whittaker.

Didn't you leave out a very important and distinguished President in the person of Mr. Johnson?

Mr. BIEMILLER. I don't recall that Mr. Johnson tried to stack the Supreme Court.

Senator HRUSKA. No, yet he did appoint Mr. Goldberg, Mr. Marshall, and Mr. Fortas. Were they extreme rightists or were they extreme leftists?

Mr. BIEMILLER. Mr. Goldberg was named by Mr. Kennedy, not by Mr. Johnson.

Senator HRUSKA. We will bring Mr. Kennedy into it; we will call it the Kennedy-Johnson administration.

Mr. BIEMILLER. Mr. Kennedy also named Mr. White.

Senator HRUSKA. Yes. But a ratio of three to one, if that were the ratio might be considered by some people as packing.

Mr. BIEMILLER. We would not.

Senator HRUSKA. You would not. It is plain from your paper that you would not.

Mr. BIEMILLER. And also as long as you brought President Johnson in, when he proposed to elevate Associate Justice Fortas to be Chief Justice at the same time he had named Judge Thornberry whose record in the Congress could hardly be labeled as very far to the left.

Senator HRUSKA. And you would not regard Mr. Thornberry's nomination as an effort to extend executive—what do you term it, executive dominance?—notwithstanding the very close personal and political affiliation between Mr. Johnson and Mr. Thornberry?

Mr. BIEMILLER. No, I would not, because Judge Thornberry's record both as a Member of the House and as a judge certainly does not show any inclination for concentrating power in the executive.

Senator HRUSKA. But in that case that was not an effort to extend the executive power?

Mr. BIEMILLER. Not in our opinion.

Senator HRUSKA. And you see nothing in the way of bias or anything in the way of extending the President's philosophy in the appointment of Mr. Marshall and Mr. Fortas?

Mr. BIEMILLER. I do not think that either of them were dedicated to the proposition of extending the power of the executive.

Senator HRUSKA. Were they men of strong personal beliefs?

Mr. BIEMILLER. Justice Marshall most certainly was of strong belief in protecting the Bill of Rights.

Mr. Fortas equally so.

Senator HRUSKA. And the rights of people?

Mr. BIEMILLER. Right.

Senator HRUSKA. And especially minorities?

Mr. BIEMILLER. Correct, but they were strictly—I repeat—in our opinion, correctly interpreting the Bill of Rights.

Senator HRUSKA. I have heard that there is a difference of opinion on that, a difference of opinion that even extended to the Supreme Court. Is that your recollection?

Mr. BIEMILLER. There may be a difference of opinion, most certainly. This is one of the things that makes America a great country, that we have differences of opinion.

Senator HRUSKA. Well, you have made a good statement, and I think it is clear; it is forceful, uncompromising, and certainly is an exercise of the free speech that everyone has in this country.

Mr. BIEMILLER. Which I hope will always exist.

Senator HRUSKA. Including the right to be wrong, all of us have a right to be wrong, don't we?

Mr. BIEMILLER. I hope that the right to be wrong, the right of free speech, will always prevail in the United States. We do not think, however, we are wrong in this instance.

Senator HRUSKA. Well, you know, it has always impressed this Senator as a little anomalous; we have people like Mr. Marshall who certainly were dedicated to a set of loyalties prior to his nomination. On the Court he has performed and executed his duties very, very well notwithstanding prior views. What did he do—win 31 out of some 32 cases as an advocate before the Supreme Court? That is a pretty good record.

Mr. BIEMILLER. That is my recollection.

Senator HRUSKA. Babe Ruth didn't do that well. And then we had Mr. Goldberg who certainly did his stint for organized labor and represented them well. That was his chief means of livelihood and he did very well.

There was one thing about him that I have always admired. When he was considered for Secretary of Labor he voluntarily and without any urging resigned and disclaimed any further interest in the pension that was already his. It was vested and it was payable by the labor organizations he represented so well.

Mr. BIEMILLER. The United Steel Workers of America.

Senator HRUSKA. That he represented so well, faithfully and expertly.

Mr. BIEMILLER. You will also recall that in those early days on the Court he refused to participate in certain cases.

Senator HRUSKA. That is right, but he did have biases and prejudices; he did have loyalties built up over a quarter of a century of one guiding principle, "Let's get for labor everything we can get. That is my duty as a lawyer and as an advocate." And he pursued it well, didn't he?

Mr. BIEMILLER. He was a very competent labor lawyer.

Senator HRUSKA. Mr. Goldberg was very competent and highly satisfactory or he would not have lasted as long with his employers and clients as he did.

There we have examples of two well built-in, well instituted, highly disciplined loyalties. The men who held those views sat at this table and we asked them one question that was determinative for virtually all of the committee and for the Congress: "Will you be fair when a case comes before you in the Supreme Court, and will you consider the law and the evidence and the Constitution, and apply it the best you know how as a judge without respect to the color of the man's skin, his race or creed or whether he is an employer or a worker or a labor union or any other particular quality—will you be fair?"

And each of them said "Yes, I will be." And that pretty much concluded the matter: we knew that they said they would set aside those loyalties and we accepted that statement. Every nominee for the Supreme Court has amassed and has acquired loyalties of some kind

which he must set aside; he must set them aside. That has been the case throughout the history of the Supreme Court.

But then, when we elect a President who has another type of political philosophy, one who has an idea that may be another kind of loyalty embodied in a nominee would be nice to have on the Supreme Court so as to lend balance to the decisionmaking, a great outcry occurs. We find voices which for 30 years had been very happy with the very liberal Court crying out in shocked rage—"Wait a minute, our reservation here is being disturbed: we don't like it."

Doesn't that pretty well characterize the opposition to Mr. Rehnquist?

Mr. BIEMILLER. No. I think there is far more involved than you state. In the first place, you will recall the labor movement did not oppose Mr. Burger, did not oppose Mr. Blackmun, and as I stated a few moments ago, is not opposing Mr. Powell.

We have opposed other nominations.

Senator HRUSKA. Not Mr. Goldberg?

Mr. BIEMILLER. You were restricting yourself at the moment to President Nixon's people and I said we did not oppose—we have opposed now three of his nominees because in our opinion they would not be—

Senator HRUSKA. President Nixon's nominees would lend balance to the Supreme Court and you don't want balance?

Mr. BIEMILLER. Three good Supreme Court Justices.

Senator HRUSKA. Is that fair?

Mr. BIEMILLER. Our opposition has not been on that basis whatsoever. It has been on the basis that we did not think these people would properly serve as the kind of people we think should be on the Court. I am not going to rehash Haynesworth and Carswell with you, but in the case of Rehnquist it is our considered opinion that he has demonstrated that he does not have a good solid belief in the Bill of Rights, that he does definitely want to change the structure of the American Government, to strengthen the executive; and we are opposed to this move.

Senator HRUSKA. Well, you know some of us have known Mr. Rehnquist and seen him perform over a long period of time. Those of us who have been in a position where we listened to his discussions—some of which were extended and complicated and reach right into the field that you talk about—have reached other conclusions. Of course, that is—

Mr. BIEMILLER. Which you have a perfect right to do.

Senator HRUSKA. That is our respective privilege.

Mr. BIEMILLER. Exactly.

Senator HRUSKA. Thank you very much for your appearance. We always like to have you come here.

Mr. BIEMILLER. Thank you, Senator.

Mr. MATILAS. Mr. Chairman, I would like to welcome my distinguished constituent, Mr. Biemiller, a very distinguished Marylander—glad to have him here in the committee.

In your opposition to Mr. Rehnquist, you have cited the position which you feel the nominee might take as a member of the Court with respect to civil rights, but beyond that do you have any concern as a

Justice of the Supreme Court that Mr. Rehnquist would prejudice any other group in American society? Would he be able to render fair justice with an even hand, say, toward labor?

Mr. BIEMILLER. We raised the issue, of course, of peaceful picketing where we have had some bad experiences with some judges; but that relates to the Bill of Rights essentially, which is the kind of thing that is involved there.

Our major thrust, I repeat, is on the question of his attitude on the Bill of Rights, and leading from that into his obvious position that he wants, in our opinion, to unduly strengthen the executive in our division of powers under the American Constitution.

Senator MATHIAS. Is there any record or any statement Mr. Rehnquist has made with respect to peaceful picketing that gives you concern, for example?

Mr. BIEMILLER. He certainly, when he talks about demonstrators being in the same category as pornographers, makes us worry because picketing is in one sense a demonstration.

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

Senator HRUSKA. Mr. Biemiller, I have been asked to suggest that among the craft unions there are those which practice discrimination against minority groups more than almost any other organized form of activity. Maybe they would be interested in having Mr. Rehnquist on the Supreme Court granting for this moment only that your interpretation of Mr. Rehnquist's views is correct.

Would you have any comment on that?

Mr. BIEMILLER. In the first place, I don't agree with your basic statement. There was a time, without any question, in American history where there was a lot of discrimination against Negroes, and we have said so very honestly and frankly in front of many committees of the Congress. In recent years that has been largely eliminated. Today the American labor movement is trying desperately to strengthen the hand of the EEOC by giving it cease and desist powers and that move has the absolute backing not only of the national office of the AFL-CIO. This stems from our conventions and it has the backing of the building trades department as well as the rest of the labor movement.

Senator HRUSKA. So you say that there isn't any discrimination, racially, now in the unions; you say it has been eliminated?

Mr. BIEMILLER. I say the craft unions are rapidly eliminating such discrimination and wherever we find instances of it we continue to drive for the elimination of any discrimination that is still extant.

Senator HRUSKA. Well, the thing that many people are wondering about, and frankly I find it a little mystifying myself, is why if what you say is accurate it was necessary for the Nixon administration to implement the so-called Philadelphia plan and, incidentally, it is my understanding that Mr. Rehnquist had a large role to play in the formulation and structure of that plan and its successor plans.

Now, if that discrimination has totally disappeared, why would there be any need for an organization such as the EEOC to be armed to the teeth with authority to do away with discrimination when it is already done away with, according to your testimony?

Mr. BIEMILLER. I repeat I did not say it was completely done away with; I said the labor movement has come in here consistently saying-

we want the EEOC armed with that power. We said that way back in 1964; in fact, we said it before 1964. I testified in front of a House committee as early as 1954 on that same issue. We have always been for that power because we thought it was essential that it be there.

Now, this is the situation that prevails.

Now, on the Philadelphia plan, let me make an observation. We didn't fight the Philadelphia plan on the grounds that it would solve discrimination. We fought it on the grounds it would not solve discrimination and today the Labor Department, if you ask them carefully, will agree that they have accomplished very little with the Philadelphia plan.

The proper way to solve discrimination in the building trades is the way that we are going about it. We are reaching out; we have all kinds of programs underway bringing blacks and other minorities into the building trades, putting them through the apprenticeship system; and if you, for example, could take the time sometime to see a discussion of the Philadelphia plan that was held on the program "The Advocates" on public service TV, you would find that there were Negroes in Philadelphia testifying at that time that this was not solving any problem, that the only way that you are going to solve the problem of getting blacks and other minorities into the building trades is by bringing them through the apprenticeship program.

And the Philadelphia plan was simply a question of counting numbers, and what was happening under the Philadelphia plan was that an employer would find five Negroes and move them from job to job to prove that he was meeting the percentage—it was a percentage deal. There weren't any solid jobs ever created under the Philadelphia plan and I repeat that the Department of Labor has admitted it.

**Senator Hruska.** That is not exactly my understanding of the plan or the reasons for its implementation. Is it true that under your apprentice training plans, particularly in the craft unions, that there is free, liberal, and proper entry into the ranks of the apprentices by members of minority groups?

**Mr. Biemiller.** In recent years—I stated earlier at one time this was not true; and I know President Meany himself has been before the Senate Labor Committee admitting pointblank there had been prejudice and we wanted to weed it out, and we think we are doing it.

I repeat, though, anybody who has a flagrant case of discrimination and brings it to the attention of the AFL-CIO, we take action to remedy it in any way that we possibly can.

**Senator Hruska.** You have been at this since 1964. Has the great bulk of activity occurred since the Philadelphia plan was instituted? What fruit do we see from that by way of percentage of membership in the craft unions in the apprentice ranks?

**Mr. Biemiller.** I want to doublecheck this figure, but I will be glad to do it for the record; my offhand recollection is that the Department of Labor records on apprenticeship show between 12 and 13 percent blacks in the apprenticeship program today.

**Senator Hruska.** Did you object to Mr. Rehnquist's participation in the formulation and the structuring and the organization of the Philadelphia plan?

**Mr. Biemiller.** No; because at the time we didn't even know that he was participating in it; but we objected to the Philadelphia plan. That certainly is on the record; there is no argument about that.

**Senator HRUSKA.** Would you be inclined to believe that that was an effort on his part to bring the Bill of Rights close to a lot of people who haven't been able to find employment in the rank and file of the shopcraft unions?

**Mr. BIEMILLER.** We don't believe the Philadelphia plan was a very intelligent way of approaching the problem. That is the situation. We don't regard any of the architects of that plan as having successfully coped with the problem of discrimination in the building trades.

**Senator HRUSKA.** Do you give this administration any credit for good faith or do you think they were just trying to confuse the situation and make things worse?

**Mr. BIEMILLER.** No; we have said we think they were mistaken in their views and did not understand the structure of the building and construction trade industry.

**Senator HRUSKA.** Thank you very much.

**The CHAIRMAN.** Senator Bayh?

**Senator BAYH.** Mr. Chairman, could I ask one additional question?

**The CHAIRMAN.** Sure; that is all right. Go ahead.

**Senator BAYH.** Mr. Biemiller, there have been some thoughts raised here that concern me a bit about motives. I suppose, is the best way to describe it. Most of us can have honest differences of opinion without questioning the motivation of the individual who differs with us. The inferences of the statement just made is that you supported certain previously named nominees because you thought they would get in and get all they could for organized labor. Thus the inference is that you might oppose Mr. Rehnquist because he wouldn't follow that particular criterion. Does that criterion have any relevance in your support or your opposition to the nominee?

**Mr. BIEMILLER.** It has no relevance whatsoever. As Senator Hruska himself pointed out, not only when Mr. Goldberg became a Justice, but when he became Secretary of Labor, he pretty well severed his connections with the labor movement. We did not name Mr. Goldberg as Secretary of Labor. President Kennedy named Mr. Goldberg. We didn't object to his being named. I am deferring that for the moment. We don't have candidates for these particular jobs. We don't have candidates for anything. But we do feel, as responsible American citizens, we have a right to come in and oppose people, particularly for the Supreme Court of the United States, a lifetime job, whose views we do not think are in the best interests of the American people. It is that simple. It has nothing to do with the question of the organized labor movement per se.

**Senator BAYH.** You mentioned that you did not oppose Chief Justice Burger?

**Mr. BIEMILLER.** Right.

**Senator BAYH.** In determining whether you should take a position, would you care to give the committee the benefit of your thoughts whether at that time you thought Justice Burger would vote with you on most of these issues?

**Mr. BIEMILLER.** No; we—

**Senator BAYH.** Has he, since he has been on the Court, been totally satisfactory to you?

**Mr. BIEMILLER.** I am trying to recall; I think on some of his votes we would be critical but we weren't making any—

**Senator BAYH.** In other words, you really weren't looking for total agreements in making this determination?

**Mr. BIEMILLER.** Not at all.

**Senator BAYH.** How about Justice Blackmun?

**Mr. BIEMILLER.** The same thing; Justice Blackmun's record, as I recall it, was what we would call spotty as a circuit court judge on labor cases; but nothing that we found offensive.

**Senator BAYH.** I noticed you have not testified in opposition to the nominee Powell?

**Mr. BIEMILLER.** That is correct.

**Senator BAYH.** Do you believe that this nominee, if he gets on the Court, is going to agree with labor's position on most issues?

**Mr. BIEMILLER.** We haven't any idea whether he will agree with us or not, but we see nothing in his overall record that justifies opposition to him.

**Senator BAYH.** The way I understand your concern is that there are certain basic things that transcend labor-management or regional differences, that there are certain basic problems in statements the nominee has made about integration, like the letter that he addressed to the Phoenix newspaper saying that he would deny black people the opportunity to go into the drug stores of Phoenix, which trouble you not only because you are a representative of organized labor but go to something more basic; is that it?

**Mr. BIEMILLER.** Completely. We are simply acting as American citizens.

**Senator BAYH.** Now you know I have been concerned about the fact that there are some unions that have not had the kind of open access over the years that we would like them to have because we have talked about this. There have been several laws in the Senate addressed to the problem of making accessible schools, public places, business places, transportation, voting booths to minority citizens. What position have you taken? I know that you have been before this committee on a number of occasions addressing yourself to the various civil rights laws we have had over the past 10 years.

**Mr. BIEMILLER.** We have enthusiastically supported all the laws that have been passed by the Congress. We would have, in a few instances, preferred them to be a little stronger than they were, such as the EEOC matter which we are now moving heaven and earth to try to straighten out and give the EEOC more power.

**Senator BAYH.** Let me ask that question so we can be as definitive as we can.

What is your present position about the merits of cease and desist powers for the EEOC, in order to remedy some of the injustices that have existed in the various unions?

**Mr. BIEMILLER.** We think it is a power that ought to be given to the EEOC. I repeat we have held that position now for nearly 20 years. We tried to effect it in 1964. We were rebuffed in that by the compromise that was worked out; and we are enthusiastically supporting the bill that has recently been reported, the Williams bill, recently reported by the Senate Committee on Labor and Public Welfare which does provide for cease and desist powers for the EEOC.

**Senator BAYH.** How did Mr. Rehnquist testify when he was asked his opinion on the cease and desist power of the EEOC?

**Mr. BIEMILLER.** There you have me; I don't know.

**Senator BAYH.** Well, he opposed it.

**Mr. BIEMILLER.** He may have; I am not sure.

**Senator BAYH.** I found myself differing with you about the Philadelphia plan when it went before the Senate. I thought this was an effort we ought to make and, at the time, was hoping that you and your organization would support it. I must say in retrospect I have to make the same judgment that you have made, that the Philadelphia plan has not really worked the miracle that some thought it would work. We thought it would be a step in the right direction, certainly the cease and desist powers would.

You mentioned the percentage of minority members in the apprentice programs. I think you said 12 or 13 percent?

**Mr. BIEMILLER.** My recollection is 12 to 13; I will check the figure and if it wrong I will give the committee the correct figure.

(Subsequently Mr. Biemiller advised the committee that the figure was correct.)

**Senator BAYH.** How would that compare to the same apprentice programs 10 years ago?

**Mr. BIEMILLER.** The figures then were quite low in certain trades; in certain trades a decade ago there were hardly any Negroes.

**Senator BAYH.** You feel there has been significant progress?

**Mr. BIEMILLER.** There has been significant progress made in this; we have been working at this in every way we know how.

**Senator BAYH.** Now, one last general question, and I will not belabor you further.

My friend, the Senator from Nebraska, said we were asking one basic question. I concur in his judgment that the basic question we are trying to have answered is: "Will you be fair?"

The concern that some of us have does not relate to the intellectual honesty or dishonesty of the various nominees. Certainly, I must say, although I am deeply concerned about some of the things that the present nominee has said and some of the thoughts that I fear he possesses, I must say I think he is a man of integrity. I think one can suggest that when we ask a question, "Will you be fair?" that then there is an ancillary question that is very pertinent, "Using what criteria?" "Using what criteria?"

When you have a nominee who talks about self-discipline being sufficient to guarantee individuals from big brotherism, that all we need is self-discipline on the part of the executive branch, and when he is asked a question as to whether surveillance poses a constitutional question and he says no, then some of us are concerned about his basic philosophy. And I don't believe we ought to get involved in all this business of classifying liberals, conservatives, strict constructionists. Instead we should look for something about his basic philosophy which would lead him to make an honest and fair interpretation of the Constitution based on a criterion that really understands the significance of the Bill of Rights. If self-discipline was all that was necessary, if surveillance posed no constitutional question, then there wouldn't be any need for those 10 amendments that constitute the basic Bill of Rights. Do you have any comment on that?

**Mr. BIEMILLER.** Well, I certainly think, and I immodestly think I know something about the history of America during that period, hav-

ing once been an historian by profession, that one of the greatest things that ever happened in American history was the adoption of the Bill of Rights and it was done for the specific purpose that you are talking about. There was a fear that without those firm protections that the Government would get too powerful. The whole thrust of our position on Mr. Rehnquist comes back to exactly that point, that we doubt that he is of the frame of mind that completely understands the thrust of the Bill of Rights or that he would interpret the Bill of Rights in the way we think it has been correctly interpreted by the Supreme Court to date.

Senator BAYH. Thank you.

The CHAIRMAN. Mr. Biemiller, you certainly are entitled to your opinions, which you have expressed in a very forceful way.

They are conclusions. I do not think they are borne out by the facts. Now, I could understand your opposition to Mr. Rehnquist.

I think that Mr. Rehnquist is an honorable man. I think he is an outstanding lawyer and I think he is going to make an outstanding Justice of the Supreme Court.

I also think he is a badly persecuted man. I think he is being persecuted without cause by those who are opposed to him; and I hope before the day is over that I will be able to place in the record the falsehoods, the number that were uttered against him yesterday.

Now, that does not apply to your statement.

Mr. BIEMILLER. I was going to say, sir, I don't think there was anything in my statement—

The CHAIRMAN. No; I said it was not in your statement.

Mr. BIEMILLER. We were just raising—

The CHAIRMAN. I know what you are raising; I just think you have come here with conclusions that are not based on facts.

Mr. BIEMILLER. That is an honest difference of opinion between you and me.

The CHAIRMAN. Well, certainly. You know when a lawyer is trying a case, if he hasn't got the facts with him, he argues the laws as vigorously as hell, and he gets just as specific as he can and I don't think you have the facts with you; therefore you are making some very strong statements which you are entitled to make.

Senator MATHIAS. Mr. Chairman, pursuing the line of the Chairman's last remark, there is a statement that concerns me on page 5.

Mr. BIEMILLER. Five?

Senator MATHIAS. Five. You say this: "In short, we oppose Mr. Rehnquist on the ground that he does not know what the Constitution is all about."

Now, I assume, you are not going to his competency as a lawyer?

Mr. BIEMILLER. Not referring to his competency for a moment.

Senator MATHIAS. I would suspect you and I agree that what the Constitution is all about is a chain of government; this is the great glory of the American system.

Mr. BIEMILLER. Right.

Senator MATHIAS. And opposed to practically any other governmental system in the world, the Constitution describes what the Government cannot do?

Mr. BIEMILLER. We agree.

Senator MATHIAS. It guarantees freedom to individual citizens from interference by government?

Mr. BIEMILLER. That is the glory of the American system of government.

Senator MATHIAS. Even in Britain and its House of Commons, an order could be issued that every redhead be murdered tomorrow.

Mr. BIEMILLER. Right.

Senator MATHIAS. And there would be no restraint against the power of government to do it?

Mr. BIEMILLER. No restraint.

Senator MATHIAS. But in this country government does not have that power?

Mr. BIEMILLER. Thank the Lord.

Senator MATHIAS. And I think we understand that.

Is this the ground of your objection that you feel Mr. Rehnquist does not share that concept with us?

Mr. BIEMILLER. Yes, precisely. We don't understand some of his views that have been brought out both in our statement and in the colloquies here regarding what we consider the protections of the Bill of Rights. There is a very interesting colloquy that undoubtedly has been called to your attention before, between Senator Ervin and Mr. Rehnquist on the whole question of the surveillance of government employees, for example.

Senator MATHIAS. Have you got—have you in the course of your observation, either as a member of Congress or as a representative and spokesman for labor, have you ever had an opportunity to observe the track record of justices after they reach the bench?

Take Justice Goldberg, for example. Do you have any observations on his track record as to the kind of decisions in which he participated and opinions that he wrote as to whether or not they displayed a tendency to favor or to prejudice any particular group in our economy or our society?

Mr. BIEMILLER. I am not as familiar with the voting records of justices as I am of members of the Congress.

Senator MATHIAS. I am very well aware of that.

(Laughter.)

Mr. BIEMILLER. But certainly I saw nothing in what I am aware of in Justice Goldberg's record that he showed any particular bent in any direction. But he came on the bench, in our opinion, with a full understanding of what the American system of government is all about.

Senator MATHIAS. Of course we are in the position of where we do have some track records of which the American people are generally familiar. Would you say that Justice Frankfurter, for example, had changed from the time of his appointment by President Franklin Roosevelt or did the American scene shift under him? In other words, who changed who?

Mr. BIEMILLER. Well, I have never seen any exhaustive study. I presume they exist. But there is nothing that I have come across on Justice Frankfurter's overall record. I have discussed Justice Frankfurter at times with some of my legal friends, many of whom insist that he did not change his views at all, and that practically, you may be right that it was the question of the changing of the general social and economic conditions that seemed to brand Justice Frankfurter as a conservative in his later years on the Court. But I am frankly not competent to pass judgment on that.

**Senator MATHIAS.** That does happen.

**Mr. BIEMILLER.** Of course it can happen.

**Senator MATHIAS.** I am wondering this: You have raised some questions about Mr. Rehnquist's positions which give you these doubts about his ideological foundation. These are largely related to administration positions, administration statements in which he has either been the spokesman for the administration or has participated at some level of either enunciating or perhaps formulating administration policy. In many cases the record is clear. I have shared your concern.

**Mr. BIEMILLER.** Right.

**Senator MATHIAS.** But is it fair to equate what Mr. Rehnquist has said as an advocate of positions with which you and I may not necessarily agree, and base a judgment of his competency and his fitness purely on our disagreement with the positions of his clients?

**Mr. BIEMILLER.** Well, I don't see, Senator, why we aren't entitled to say that a man who has expressed the points of view that we have been referring to is not automatically clear of any responsibility for those points of view. I recognize that he, in part, is hiding beyond that lawyer-client relationship, but I don't think that this should be a protection for a person who is being considered for a lifetime position on the U.S. Supreme Court; and, very frankly, as we say in this statement, we are disturbed with the whole thrust of the current administration, which we think is moving toward more executive power.

I am reminded just as another example of a concern I share with my good friend Senator Ervin. Those pocket vetoes of a couple of years ago that were not really, in our opinion, legitimate pocket vetoes, are the kind of things that bother us and if this is the kind of attitude we are going to be up against, I don't like it.

Now, I also remember that at one time President Nixon said he wasn't ever going to appoint a Cabinet member to the Supreme Court. I know Mr. Rehnquist is not in the Cabinet per se, but he is in what generally is referred to as the Little Cabinet; and I don't see where there is any difference in this situation. A member of the Cabinet or the Little Cabinet is, I think, absolutely responsible and has to stand with the position of that administration, or he resigns or occasionally he gets fired as in the case of Mr. Hickel; but this is a situation where I think we have a proper right to assume that these are the positions that Mr. Rehnquist has taken.

**Senator HRUSKA.** Will the Senator yield at that point?

**Senator MATHIAS.** I will be happy to yield.

**Senator HRUSKA.** We have witnessed many, many appointments from either the kitchen cabinet or cabinet or subcabinet or innercabinet—my mind just goes back—and I am sure others with a more retentive memory could probably supplement the list in a hurry. But every one of the following names fall in that category in recent history: Clark, Murphy, Jackson, White, Fortas, Marshall, Goldberg, Byrnes—all of them were in the administration or close to the administration and transferred therefrom immediately to the Supreme Court. If there was any charge of Executive dominance made at that time, I have no recollection of it. It goes back to President Roosevelt's attempt to legislatively pack the Supreme Court. He didn't have to do it because Father Time took care of the problem he was able to do it in another way.

Now, here are these people—I have named only eight—but all within the last 30 years.

Mr. BIEMILLER. Senator, the only point I was making was that President Nixon said he was not going to appoint any member of his Cabinet to the Supreme Court. I didn't say that members of the Cabinet haven't been appointed to the Supreme Court, but President Nixon did once make that statement. That was the only point I was making.

Senator HRUSKA. Maybe he has been a little more candid than some of his predecessors regarding Supreme Court appointments because they were possessed of even a more firm conviction that it was their mission in life to impress their type of philosophy on the Supreme Court, but they weren't candid enough to say so and President Nixon did say so. He said so before the campaign, during the campaign and since.

Mr. BIEMILLER. Absolutely.

Senator HRUSKA. He said, "There must be some sense of balance; there must be some change in the philosophy on the Court and I intend to try to do something about it." He was probably more candid. Isn't that a fair appraisal?

Mr. BIEMILLER. He has been very candid about it. That is one of the things that bothers us in this whole situation.

Senator HRUSKA. And Meany agreed with the President in that regard because he said that the appointment of these two men is an attempt by President Nixon to appoint to the Supreme Court—I am now paraphrasing him—men who will reflect the type of judicial philosophy that Mr. Nixon believes in and wants to have extended. Isn't that just about what Mr. Meany says?

Mr. BIEMILLER. I have repeated that in the statement this morning.

Senator HRUSKA. So you agree with him, too; that makes it almost unanimous, doesn't it?

Mr. BIEMILLER. Yes.

Senator HRUSKA. Thank you very much.

Senator MATHIAS. Thank you.

Mr. BIEMILLER. Thank you.

Senator HART. I know the chairman and all of us want to move on. I think it is not out of order to note that while we generally describe the great constitutional rights as restraint on government—and it is a proper description—there also are a set of affirmative obligations on the part of government. We ought not to forget that as we analyze any nominee.

There is an affirmative obligation to do something about racial imbalance in schools; there is an affirmative obligation to do something about getting service in drugstores; there are a lot of affirmative obligations. Now, when you ask whether a nominee can be fair, you are, admittedly, shopping for a crystal ball nobody can buy. But fairness to one person is the application of affirmative action by government; fairness to another person is to regard that as an intrusion on private rights, whether it is a drugstore or a local school district, and it is critically important that we try to identify which is the tendency of any nominee. That is what this is all about.

Mr. BIEMILLER. We hope you will continue to pursue that investigation.

Senator HRUSKA. If the Senator will yield, I don't think the record should be allowed to stop at a point where there is only a single note,

to wit: Fairness. If my statement would be recalled, it will be: "Will you be fair in deciding this case on the basis of the law, the evidence, and the Constitution?" And if that does not include the Bill of Rights then I am afraid we are not talking about the same document. But fairness has to do with the discarding of certain loyalties and certain strongly held notions by a man in another capacity, whether he is a labor lawyer or whether he is a minority group's lawyer or NAACP lawyer and the ability to shed himself of those proclivities, those tendencies, those predilections, and go on from there in an effort to be fair, but always judging the case and making decisions on the basis of the Constitution, the law, and the facts.

**Senator HART.** I think it may not be in appropriate to personalize this. It is a question of "will a man be fair" and "will a substantial segment of society believe that he is fair." Let me personalize it. I have not read and have no intention of reading the too many speeches I have made in the time I have been in politics, but I can think of significant and responsible and balanced segments of our society who would think it unlikely that I would be fair. They might not question—they probably would, too—but they might not question my intellectual capacity or my desire to be fair, my desire to read equal protection of the law and due process in a fair fashion. But if I were a pharmaceutical manufacturer, I would wonder whether Hart could be fair because of things I have said, or auto manufacturers, good friends, personally. You know we have all got a track record here and neither the auto manufacturers nor the pharmaceutical industry is deprived or weak. But is there in a man's track record positions or statements or attitudes which would suggest to the weakest among us, those who most desperately need the protection, affirmative and negative, of the Bill of Rights, that that man can be fair no matter how smart or how sincerely he tries; and that is part of our responsibility here and it is all I am suggesting.

**Senator MATHIAS.** Mr. Biemiller—

**Senator HART.** I should add I think when Clarence Mitchell counsels us about this, an I know how hurtful it is these days for a white man to speak well of a black man, but I think when he voices concern and suggests a likely attitude of that group for whom he speaks, we do have to give it very careful consideration.

**Mr. BIEMILLER.** We concur.

**Senator MATHIAS.** Following on the remarks of the Senator from Michigan, Mr. Biemiller, and I think he said what he felt was the glory of the Constitution and that is, the liberty that it guaranteed to every individual, a personal human liberty which is assured to us Americans. The strength of the Constitution prevents changes by government from totally encompassing any individual and binding him as had been the unhappy experience of other people in the past.

But, maintaining the climate of liberty and maintaining the guarantee is, of course, the affirmative duty of government—what this union is all about and what the union is.

Within the guarantees of the Constitution and within this individual liberty there is implied a wide and diverse spectrum of views and I think that is, of course, what's troubling here to this committee whenever it considers the question of an executive nomination. I think this was a very useful discussion for us to have.

Mr. BIEMILLER. I have been very happy to have it.

Thank you again, Mr. Chairman.

The CHAIRMAN. Now there is a representative of the UAW present. Will he come forward and identify yourself for the record, please, sir?

**TESTIMONY OF WILLIAM DODDS, POLITICAL ACTION DIRECTOR,  
UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLI-  
MENT WORKERS OF AMERICA, ON BEHALF OF LEONARD WOOD-  
COCK, PRESIDENT**

Mr. DODDS. Yes, sir. My name is William Dodds. Mr. Woodcock would not be here and asked that I read his testimony.

The CHAIRMAN. What is your connection?

Mr. DODDS. I am the political action director of the United Auto Workers.

The CHAIRMAN. You may proceed.

Mr. DODDS. We appreciate the opportunity to present our views on behalf of the international union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW. We urge the Senate, through its Judiciary Committee, to decline consent to the nomination of William H. Rehnquist to the Supreme Court of the United States.

The UAW represents about a million and a half members and their families. In the crises of recent years, the UAW has had no choice but to respond not only to the direct needs and problems of those whom we directly represent, but also to the challenges we all face in today's world.

We join with others to recognize the pressing need to preserve the Supreme Court as the last refuge and the great hope of the poor, the oppressed, and the powerless. Every nomination to the Court should be scrutinized with great care because of the tremendous potential of the Court for long-range good or evil. It is with these criteria in mind that we express our opposition and not for any special, parochial interest.

Garry Wills, the syndicated columnist, wrote in his piece printed in the Detroit Free Press of October 29, 1971:

Indeed, he called Rehnquist "The President's lawyer's lawyer," which is a cruel charge when we remember who the President's lawyer is and the strange views he takes of the law.

Ability to function compatibly with this Justice Department might in itself be considered a disqualification for the Court. It means that Rehnquist has worked with officials bringing wild conspiracy charges, using Federal grand juries as fishing expeditions, introducing illegal evidence in Chicago, illegally arresting Leslie Bacon, illegally detaining thousands last May, making flimsy charges against Daniel Berrigan—only to drop them, using bail and parole laws to bring about de facto preventive detention while asking for de jure preventive detention, along with extensions to bugging and tapping.

Quite a record this Department has made, and if Rehnquist is proud of it, he does not belong on the Court. Too close a working relationship with this Department of Justice could make a man permanently insensitive to justice.

We believe, based on our study of Mr. Rehnquist's speeches and other writings, that he possesses neither the breadth of vision nor the humanity which is required of a Supreme Court Justice. Certainly he demonstrated neither of those qualities when he opposed a law forbidding racial discrimination at lunch counters. His opposition to a

public accommodations ordinance in the city of Phoenix, Ariz., in 1964, 7 years after the Court's decision in *Brown v. Board of Education*, was never publicly disowned until he appeared here before this committee. We believe that men can change their minds and we want where possible to give them the benefit of the doubt, but the UAW is always been leery of eve-of-confirmation hearings conversions.

We express our deep concern over the values and views which seem to have shaped the consistently far-right record of the nominee. We are, however, even more concerned over the way he expresses his views and values. In contrast, Mr. Lewis F. Powell, Jr., a conservative southerner, has commanded much respect from those who do not agree with many of his views, but who find his discussion of legal issues to be thoughtful, scholarly, and moderate.

But the Rehnquist speeches, articles, and letters are not marked by the same qualities as those of Mr. Powell. For example, Mr. Rehnquist, in taking issue with a Washington newspaper over its editorial opposition to the Carswell nomination, wrote that what the paper really wanted was a restoration of the Warren Court's majority which he said would have the result of "not merely further expansion of constitutional recognition of civil rights, but further expansion of the constitutional rights of criminal defendants, of pornographers, and of demonstrators." We submit that these hyperbolic and loaded words tell the Senate a good deal more about the one who uttered them than they do about the Warren Court.

In announcing his most recent choices for the Supreme Court, the President emphasized the importance of his role in staffing the Supreme Court. He neglected, however, to mention the crucial role of the Senate with respect to Supreme Court Justices. The Nation has come to expect the Senate to take seriously its advise and consent duty with respect to Court appointments. The President's own words—"Presidents come and go, but the Supreme Court through its decisions goes on forever"—attest to the critical task now before the Senate. We urge the Senate to reserve its consent for those who are qualified and open hearted and who will enrich the Supreme Court.

Even the President now seems to recognize that the Supreme Court of the United States is not a remote institution known only to government, academia, and the bar. As final arbiter of the Constitution, the Court plays a significant role in the life of every American. It is imperative that its members represent not only the best available legal talent but also that they demonstrate allegiance to basic human rights and traditional American values. We must never forget that to protect the rights of all of us, the Court must protect the rights of the least of us.

Whenever a President tries to pack the Court with those who are unqualified, whether by virtue of ability, character, or commitment, the UAW will urge the Senate to perform its constitutional duty and advise the President that it will not consent to any such nomination.

It is in that spirit we urge the Senate not to confirm William H. Rehnquist.

Senator HART (presiding). Mr. Dodds, thank you. I sense that even those who would disagree with your conclusion would commend you for the balance and moderation of the statement; and yet you speak very clearly to your conclusions.

Senator Kennedy?

Senator KENNEDY. I am sorry I was not here to hear your whole testimony, Mr. Dodds, but I appreciate very much your taking the time to be with us. Obviously the UAW has had a long tradition of being interested not only in questions of wages and hours of their employees. It also has been willing to speak out on important questions which are before us and which has been helpful to the Members of the Senate in reaching our own decision. I want to express my personal appreciation for your appearance here and say I look forward to looking through your testimony in its entirety.

Mr. Dodds. Thank you very much.

Senator HART. Senator Burdick?

Senator BURDICK. I want to thank you, too, Mr. Dodds, for the contributions you make. I have no questions.

Senator HART. Senator Hruska?

Senator HRUSKA. Thank you for coming. Please express to Mr. Woodcock our regrets he was not able to come, but also tell him he sent a good representative.

Mr. Dodds. Thank you very much, sir.

Senator HART. Next we shall hear a representative of the National Women's Political Caucus, I believe Mrs. Kathryn Herring. If the others would join you, fine, and for the record if you will identify them and the organizations.

#### TESTIMONY OF BARBARA GREENE KILBERG, ATTORNEY, NATIONAL WOMEN'S POLITICAL CAUCUS

Mrs. KILBERG. Gentlemen, my name is Barbara Greene Kilberg, rather than Katy Herring. She was a member of our staff.

I am an attorney and am pleased to testify today on behalf of the National Women's Political Caucus. We are a multipartisan, national organization whose goal is to bring about full and responsible participation of women in local, State, and Federal Government.

Our caucus initiated the campaign several weeks ago to press for the appointment of a woman to the Supreme Court. We were joined in this goal by a wide variety of organizations and thoughtful individuals throughout the country, among them: the First Lady, Mrs. Pat Nixon; Mrs. Martha Mitchell; Mrs. Lucy Benson, president of the League of Women Voters; Mrs. Margaret Laurence, president of Women United; the following Congresswomen: Hon. Florence P. Dwyer, Hon. Leonor H. Sullivan, Hon. Edith Green, Hon. Julia Butler Hansen, Hon. Charlotte T. Reid, Hon. Patsy T. Mink, Hon. Margaret M. Heckler, Hon. Shirley Chisholm, Hon. Bella S. Abzug, Hon. Ella T. Grasso, Hon. Louise Day Hicks and Hon. Martha Griffiths; former Chief Justice Earl Warren and former Associate Justices Arthur Goldberg and Tom Clark; members of the National Federation of Republican Women; the American Bar Association Committee on Rights of Women; Common Cause; the National Council of Catholic Women, B'Nai B'rith Women; the National Council of Negro Women; the National Federation of Business and Professional Women's Clubs; the Ripon Society; and the National Board of the YMCA of the U.S.A.

We asked that a woman be appointed to the Court because we are the majority group in this country, because there are qualified women

who would serve the Court well, and because we, for too many years, have been excluded from those deliberations which have had significant and often detrimental effect on the shape of our own lives. We are distressed that a woman nominee is not before you for confirmation today.

In his address to the Nation on the evening of October 21, President Nixon stated that he believed, as he was sure all Americans did, "that the Supreme Court should in the broadest sense, be representative of the entire Nation." It is impossible, in our opinion, to have a broadly representative Court when 53 percent of the electorate does not have representation on its bench. While the President accurately observed that every group in the country cannot be accommodated since the Court is composed of only nine seats, we maintain that the appointment of a woman should have as high a priority as the appointment of a Justice from a particular geographic region, a particular racial, ethnic or religious background, a particular age category or with a particular judicial philosophy.

In his address, the President set out two criteria that should be applied in naming people to the Supreme Court: First, he stated that "the Supreme Court is the highest judicial body in this country. Its members, therefore, should above all, be among the very best lawyers in the Nation." There are eminently talented and experienced women attorneys and jurists who are among the very best in the Nation. The President's second consideration was the judicial philosophy of those who are to serve on the Court. There are highly qualified women in this country who fit within the definition of a conservative judicial philosophy.

As the President himself noted, the Supreme Court is continuously engaged in balancing the many interests of a diverse society. The late Justice Felix Frankfurter, a judicial conservative, in explaining the necessity of weighing these conflicting interests stated that it requires an ability at both "logical unfolding" and "sociological wisdom." We believe that a woman would bring to the Court a perspective on "sociological wisdom" that could not be duplicated by any man and that would constitute a valid and important input to Supreme Court decisions, both on issues that involve women's rights and those that deal with the general body politic, which has been seriously lacking to date.

As women, we are well aware that our secondary role in society has not been determined primarily by Supreme Court decisions. We have been placed in a subordinate role by an endless array of discrimination that begins from the time we are very young. In the legal field, the statistics speak for themselves: There are today only 9,103 women graduates of law schools, 2.8 percent of the total law school graduates. In the last 2 years, the average scores of women on the law school admission test have been higher than the average scores for men, yet the proportion of women admitted to law schools is smaller than the proportion taking the test. It is estimated that the nationwide entering law school class in 1971 consisted of about 10 to 11 percent women. There are only about 150 women judges on the local, State and Federal levels out of a judiciary total of over 5,000. On law school faculties only 2.3 percent of the full professors are women.

As the 10 to 11 percent student figure indicates, a number of law schools in the last few years have begun to open their doors to women in larger numbers and I am confident that the male dominance in law

school admissions is on the road to being reversed. In law faculties, in the judiciary and in the practicing legal bar, however, women have been and continue to be severely restricted in both access and advancement. This is a discrimination that is being addressed by the ABA's Committee on Rights for Women and it is one of the areas in which the National Women's Political Caucus intends to pressure adamantly for redress.

As we stated above, there are women of distinguished legal backgrounds who deserve nomination to both the Supreme Court and to the lower courts in much greater number. We deeply believe that courts should be institutions in which no vestige of discrimination, sexual as well as otherwise, should be permitted to exist.

The National Women's Political Caucus has come to testify before this committee today because the Senate is a part of our representative system and we believe you should have an accurate picture of the opinion of the constituency that you are elected to represent. Women are a majority part of that constituency. In your role of advise and consent, we are not asking you to reject either Mr. Powell or Mr. Rehnquist for the Supreme Court because of their sex. However, we have taken this opportunity to express the discontent of a large segment of the population that a woman has not been nominated as a Justice of the Supreme Court and we wish to state before this committee, as we have expressed in writing to the President, that we fully expect the next Supreme Court vacancy, whenever it shall occur, to be filled by an outstanding woman. We note in closing that our testimony is being delivered to an all-male committee. We would like to issue a friendly warning, gentlemen, these are no longer all-male times.

**Senator HART.** You don't have to remind me. I recognize it and I feel guilty.

[Laughter.]

**Senator HART.** Mrs. Heide, do you have a statement?

**Mrs. HEIDE.** Yes, I do.

**Senator HART.** Might it not be better if we heard both and then if we have any questions—

#### TESTIMONY OF WILMA SCOTT HEIDE, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN, INC.—NOW

**Mrs. HEIDE.** Fine. My appearance here today is an indication that I am nearly incurably optimistic of women receiving justice from this Judiciary Committee, the U.S. Senate, the Congress and the U.S. Government, most evidence being to the contrary. If my statement and recommendations are undervalued or ignored by this committee and the Senate, my remaining optimism about justice for women may be cured. To be candid, I am not certain that the Senate Judiciary Committee, perhaps with some exceptions, without any life experience of living as a woman in an androcentric society, has the capacity or desire to fully understand what I intend to share with you. For the moment, I will give you the benefit of considerable doubt.

I am Wilma Scott Heide, president of NOW, the National Organization for Women, Inc., a behavioral science consultant and a member of the National Equality Committee of the American Civil Liberties Union, the last being for identification only.

The symbol of justice in the United States is a blindfolded woman. The women's movement for rights, liberation, participation and justice is removing the blindfold to challenge the grievous injustices to women and balance the scales of justice. Those excluded from and/or disabled by the law must have a say in rewriting, defining, and interpreting law. If the Senate confirms the Presidential nomination of William H. Rehnquist and Lewis F. Powell, Jr., for the U.S. Supreme Court, justice for women will be ignored or further delayed which means justice denied.

Now, as I begin and develop my testimony, please note my awareness that both nominees are probably bright, decent people as that is traditionally understood and implemented and probably not anti-woman in any conscious, intentional or overtly destructive way of which they are aware. It is precisely the nonconscious, institutionalized, traditional, narrow view of intelligence and decency vis-a-vis women that is the problem and the nominees have demonstrably internalized that behavior and thinking. Let me emphasize: my testimony is not intended and must not be characterized as an attack on the nominees per se as isolated sexists but as a challenge to the institutionalized sexism they manifest being further perpetuated on the Supreme Court and, by extension, throughout society.

To understand my theme that the criteria for qualifications for Supreme Court positions must be fundamentally changed to disqualify sexists and sexism, first, you must understand sexism.

Senator KENNEDY. Miss Heide, could I just possibly interrupt for a question? I am going to have to leave the hearing and I was wondering if I could interrupt just for a question?

Mrs. HEIDE. As long as I may comment afterward.

Senator KENNEDY. Yes, of course.

I was interested in either or both of your responses to the procedures which were followed in the consideration of Judge Mildred Lillie. Are you prepared to make any comment as to the process by which she was selected? Are you prepared to make any comments as to what your evaluation would have been if she had been nominated, or do you prefer not to? We have sort of gone past that, and perhaps you would prefer not to make any kind of judgment on it.

Mrs. HEIDE. My inclination would be, and that is part of the rest of my statement, would be to address ourselves to the criteria and to the method of selection, and that could include any of the announced favorites or possibilities for nomination to the Supreme Court and not directly to any particular individual.

Senator KENNEDY. I know your statement does; I appreciate that. I was just wondering, beyond the statement, whether there was anything you would want to say with regard to her selection as one of the six initially?

Mrs. HEIDE. I think that what we are saying, if I interpret my colleague here accurately, is that we think quite enough has been said about all of those candidates. The issue now is the present nominees, and from those points of view the criteria.

Mrs. KILBERG. I think the caucus would share that viewpoint.

Mrs. HEIDE. Sexism, as I was going to define, and I would like to continue, is behavior applied to the entire social structure and system, including justice, based on beliefs that some physical differences between females and males naturally justifies stereotyping by sex of

learned human roles, beyond the two crucial biological exceptions. You should know that sex role stereotyping of human roles has no valid means of scientific support. Further, sexism accepts implicitly if not explicitly that control of society, its societal value judgments, and its resources by the male sex. The oppression, exclusion, the control of women are predictable and tragically inevitable consequences whether manifested by assumptions that women should be the primary child rearers—a human role, artificial sop of an immobilizing pedestal, or the privatization of the so-called “feminine” virtues proclaimed on Mother's Day and honored in the breach in societal behavior the other 364 days.

Sexism assumes that the concerns of men, while ostensibly the generic word for people but actually meaning males, are the concerns of society when the other half, females, are virtually excluded, that is, are conditioned to know our place. Let me guide you to put sex in its place and understand that justice requires that the transcending humanness of women and men cannot countenance nonconscious or conscious assumptions or behavior about anyone's place. Furthermore, there can be no place on the Supreme Court for anyone who is sexist, however nonconscious and whether male or female.

Next, I want to describe how the behavior of the two nominees should disqualify them for the Supreme Court by virtue of their acts of commission and omission. I want to include the basic injustice of the President's criteria for nomination, the consequences of “strict constructionist” philosophy, the effect of unawareness on apparent “justice,” the masculine mystique as part of the problem of injustice, some questions to ask yourselves and the nominees, the values of the feminist criteria for justice and society, and urgent recommendations to you, the Senate, the nominees, and the President.

The dimensions of what I intend to develop include and transcend the potential absence of women from the Court and thus require your patient attention to allow and indeed encourage me the time to guide your reconceptualization of the Supreme Court, its role and membership. That means I will not docilely countenance an abbreviation of my oral testimony however aware I am that the committee, not I, is conducting the hearings. Any attempt at abbreviation will be, in fact, an injustice that would deny you and others interested the opportunity to reconceptualize justice for the entire human family.

First, the President's criteria for acceptable nominees included finding the best man as stated by his press secretary until corrected by the protests of the National Women's Political Caucus on whose national policy council I function. The President and his staff since watch their language, if not their behavior. Next, the President emphasizes the need for “strict constructionists.” However that is interpreted, it is unjust for women. “Strict constructionism” sometimes means a literal interpretation and application of the Constitution and its guarantees. When the Constitution was written, a Negro male was considered three-fifths of a person and no woman was considered any fraction of a person in a legal sense. Women were excluded from the writing, the content and intent of the Constitution. The myopic vision of our forefathers, the exclusion of our foremothers, remains virtually unchanged and any “strict constructionist” could apply that concept of justice with impunity today and tomorrow until and unless the 48-

year-old proposed equal rights amendment to the Constitution passes the Congress and is ratified by the appropriate number of States. More on that later.

Another interpretation of the "strict constructionist" is that a court would be guided by precedent. Still, women would be virtually without hope for human justice. Let me cite only a few of the numerous examples. Remember most sex discrimination is so pervasive, considered so normal if sexist as to not arrive at any court let alone persuade the Supreme Court to even hear and conceivably rule justly on their merits in the context of even existing human rights laws. The Supreme Court in 1948 in *Goesaert v. Cleary*—335 U.S. 464, 1948—ruled in the opinion of otherwise enlightened Felix Frankfurter that women had no right to be bartenders. Sixty-eight years earlier, the denial of occupational opportunity based on national origin was "the essence of slavery itself" according to the Supreme Court, quite correctly ruling 85 years ago—*Yick Wo v. Hopkins*, 118 U.S. 356, 370, 1886. Eighty-five years ago occupational exclusion of or limitation of a Chinese male was slavery, yet 62 years later and even today the same treatment of women is viewed as morally, legally and socially appropriate to protect women's special responsibilities for home and family. Slavery is slavery whether the victims are Chinese, Negroes, or women of every race.

Again, in the U.S. Supreme Court case of *Hoyt v. Florida*—368 U.S. 57, 1961—as recently as 1961, found no suspicion of denial of equal protection of the laws when only 10 of 10,000 jurors were women and justified this because "woman is still regarded as the center of home and family life" and even coopted women in their own limitations by requiring women not men to affirmatively register for jury service if she determines this "consistent with her own special responsibilities." Stereotyped psychological conditioning momentarily aside, this is blatant sex discrimination. If the courts are going to adjudicate the place of all nonescaping women but of no men, then the Government has the responsibility to publicly legislate this subtle slavery and provide fair labor standards including wages and promotions for all "housewives" and mothers, not leave it to the largesse of their males privately.

Bringing the Court up to date, by calendar but not conceptually, within the past year the U.S. Supreme Court in *Phillips v. Martin Marietta*—91 U.S.C. 496, 1970—showed remarkable lack of sensitivity to, insight about, and acceptance of women's human rights under title VII of the 1964 Civil Rights Act. NOW and other women's rights groups filed amicus curiae briefs in that case. The court ruled that Martin Marietta, in denying employment to a woman with preschool age children but not to men with preschool age children, had a different hiring policy based on sex and this could not be allowed. However, in vacating and remanding the case to a lower court for more facts, the Supreme court's decision also allowed that sex-plus discrimination could be legally allowed as a policy.

The plus factor is the presence of preschool age children. This is sex discrimination when applied to women only whatever the traditions. It is precisely the time-honored but discriminatory traditions the law was designed to eliminate.

However, at least as unjust and insensitive as the Court's sexist action and avoidance of the issue was, the Courts' approach and behavior, with the partial exception of Justice Marshall, who also

happens to be the only Justice with a female law clerk. One suspects he also understands things about discrimination that few white males comprehend. There are 10 recorded cases of laughter in the proceedings and in none of these instances is there a laughing matter at issue. I invite your reference to an article in the Women's Rights Law Reporter for a frightening verbatim account of much of the oral argument on that case. Also, a Harvard Civil Rights, Civil Liberties Law Review article commenting on one typical exchange notes:

This exchange, which may accurately reflect the dominant attitude toward sex discrimination in the United States, does not augur well for the major doctrinal expansion that will be necessary to reverse the historic patterns of legal inequality.

Finally, for this point, I ask you to carefully consider the following profound observation from my friend Jean Witter, president of Pittsburgh NOW:

It is possible to make a case that all Supreme Court decisions which involved women are unconstitutional, since there has never been a woman on the Supreme Court.

This line of reasoning follows directly from the Supreme Court's own decision, *Hernandez v. Texas*, 347 U.S. 475-478, 1954.

In this case Hernandez who was of Mexican descent was acquitted by the Supreme Court decision because the selection of the jury that convicted Hernandez violated the 14th Amendment in that citizens of Mexican descent were excluded by practice from jury service.

Certainly women have been excluded by practice from the Supreme Court since a woman has never been appointed to the Court. If the Supreme Court in *Hernandez v. Texas* is valid for jury selection, perhaps the same reasoning can be applied to the appointment of Supreme Court justices.

If the selection of appointed justices excludes a certain large class of people, not a small minority, then that group by exclusion is denied the equal protection of the 14th Amendment.

Furthermore, the Supreme Court's frequent decisions not to hear cases of sex discrimination must be considered suspect. Again quoting Jean Witter:

By not nominating a single woman to the Supreme Court, the President has violated his own Executive Order 11478, Equal Employment in the Federal Government, August 8, 1969, which states:

"SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in the federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex or national origin."

Senator BAYH. Miss Heide, may I interrupt?

Would it also be helpful to point out that, although the decision in the *Phillips v. Martin Marietta* case was right in the eyes of those of us who feel that Mrs. Phillips had been discriminated against on the basis of sex, the basis for presenting that case and the Government brief did not argue the constitutional question, but that the ground was the equal employment section of the 1964 civil rights statute?

Mrs. HEIDE. Yes; that is correct. However lengthy what I am saying, it may be I am only hitting some of the highlights so you are bringing up one other.

Senator BAYH. That is a critical distinction, I think, when you are talking about how the Supreme Court looks at women. Reference to a statute should have been unnecessary because women should be given the equal protection guaranteed in the 14th amendment of the Constitution.

Mrs. HEIDE. I think I have already indicated the Supreme Court has never accepted that and I think this is simply one more manifestation.

Now if I may—

Senator BAYH. I suggest—since we have our fingers crossed—that it doesn't strengthen your case to say that at this moment they are not taking any cases because we know that there are several up there and we have our fingers crossed.

Mrs. HEIDE. Yes; they have taken some. I don't think I have said they have not taken any.

Senator BAYH. You were quoting Mrs. Witter to that effect, were you not, on their refusal to take cases?

Mrs. HEIDE. I think it is a refusal to take some cases, not all cases, and I think that is an important distinction.

[Reading:]

Again, President Nixon in his memorandum of March 28, 1969, states: "I am determined that the executive branch of the Government leads the way as an equal opportunity employer."

In summary, the President's search for Justices who will exercise judicial constraint not activism addresses itself only to criminal law, only parts of civil rights law and absolutely ignores the need for understanding of and commitment to existing civil rights laws for all citizens and the need for creative law interpretation to balance the systematic injustices to women much of it by law itself.

I hereby publicly protest the President's disregard of the letter and spirit of his own Executive order and civil rights laws, his own manifest unawareness of the depths, dimensions, and pervasiveness of injustice to women. I only regret that he is apparently beyond the law and redress of our grievances, short of impeachment. Perhaps he and you could only understand his patronizing of women if we reversed the Cabinet from all-male to all-female, invited the Cabinet members to bring their husbands to a meeting and then said, "I am proud of the men who don't hold office but hold the hands of the women who do." If women were in a position to do that, it might be called matronizing and it would be equally as undesirable and sexist as if he, in fact, did vis-a-vis his own Cabinet.

Next, I will speak to the injustice of unawareness and sloppy work as evidenced first by Mr. Rehnquist and acts of omission that reflect the record of Mr. Powell to portend injustice likely for women if these two were confirmed for the Supreme Court.

First, Mr. Rehnquist's April 1, 1971, testimony on the proposed equal rights amendment to the Constitution and the Women's Equality Act are models of equivocation, unscholarly research, and lack of clarity that makes one wonder if the date of his testimony is prophetic of the kind of opinions he might write in the tragic possibility of his appointment. Members of the House Judiciary Subcommittee were confused as indicated in their questions:

Mr. McCLOY. Since the answer to the question with regard to whether or not women would be subject to the draft seems to be yes, it would be helpful if the Attorney General would express some kind of positive opinion on what the impact of the Equal Rights amendment would be, because I can't interpret your answer to indicate one way or the other, and I would like to know. I think it is important to us to know what our highest legal authority feels.

Mr. REHNQUIST. I fully agree with you, sir. Unfortunately, the Attorney General works with the same language everybody else works with and the value of

his opinion generally comes just like the value of any lawyer's opinion, from an examination of precedents and other similar cases and in this situation he is, unfortunately, writing on a clean slate. To simply take these words and say they do or do not apply to a particular situation is not the sort of opinion that a lawyer ordinarily feels very comfortable giving.

Now, the language of the Equal Rights amendment, I think, is very clear. It says equality of rights under the law shall not be denied or abridged by the United States or any of the States and it means simply the sex, race, color, creed, national origin, height, weight, education, economic resources, or anything is a violating criteria for denial of or abridgment of rights.

Obviously, we should spare Mr. Rehnquist from the opinion—writing of momentous Supreme Court opinions for which there is no opportunity to ask clarifying questions and additional clarifying addendum as the House Subcommittee Chairman Edwards needed to do. I refer you to study the full record of Mr. Rehnquist's appearance which further includes this exchange:

Mr. WIGGINS. Let's directly confront the question. Do you feel the Constitutional amendment is necessary to implement the Federal policy you have enunciated, that is, no discrimination on the basis of sex?

Mr. REHNQUIST. No, I don't. I think one could do it by statute.

Mr. WIGGINS. Then, I think my observation is correct. Your answer indicates that the amendment is unnecessary and my query is why are you in support of an unnecessary amendment?

Mr. REHNQUIST. Because the President has committed himself to it and the importance of a general statement in the Constitution establishing the principles of equality of women outweighs the disadvantages that might flow from enactment of the amendment.

Senator Hruska indicated that Mr. Rehnquist had said he, if he were at odds with the position of the administration, would resign. I think this statement indicates that he is at odds and he has not resigned.

Clearly with friends like this, proponents of the amendment and women's justice need no additional enemies. On August 10, 1970, the first time the equal rights amendment passed the House, Congresswoman Martha Griffith stated:

There never was a time when decisions of the Supreme Court could not have done everything we ask today. The Court has held for 98 years that woman, as a class, are not entitled to equal protection of the laws. They are not "persons" within the meaning of the Constitution.

Mr. Rehnquist does not think the amendment necessary, accepts the assignment to speak for the administration's alleged favoring of it, says he prefers the legislative approach, is equivocal or in opposition to some of that proposed legislation, knows the administration is not an active advocate of such legislation, and yet this man is a confirmation away from being a Supreme Court Justice. We are not so stupid or uncaring about human justice to accept such a nominee of either sex. That must be your view.

Furthermore, we are concerned about Mr. Rehnquist's knowledge about the importance of legislative history. His statements in hearings on the equal rights amendment indicate that he does not consider legislative history of any great importance in interpreting constitutional amendments. He said:

Second, while the legislative history may be a valuable tool in both drafting a statute and interpreting it, its use in conjunction with a Constitutional amendment is more doubtful. Logically, it would appear that legislative history would not be particularly persuasive unless it could be shown that not only the

Congress but the ratifying legislatures of three-quarters of the states were fully aware of an ambiguity in the language of the amendment, and of the legislative reports or debates which purported to clarify that ambiguity. (Reference page 312 of House hearings.)

In serving as a Supreme Court Justice, how much weight would he give to the intent of Congress in interpreting the equal rights amendment or other constitutional amendments?

That constitutional history is very important is supported by Antieau's Modern Constitutional Law, pages 711-714; *Jones v. Mayer Co.*, 392 U.S. 437; *Brown v. Board of Education*, 347 U.S. 483; and *U.S. v. California*, 332 U.S. 92, 1946. The constitutional law professors testifying for the amendment believed the legislative history to be quite important. See page 164, 351, and 401 of the 1971 House hearings.

There are numerous other concerns Mr. Rehnquist's testimony raises, of which I will include only a few more, but I am quite willing to go into them in as much detail as you accept as necessary, but remind you that his documented statement show unawareness of problems affecting women, when documented material is even more readily accessible to him than those of us from miles away working as volunteer activists economically disadvantaged, is profoundly disturbing and another reason for disqualification. Anyhow, in his statement on the equal rights amendment, he assumes there are statistically reliable sex and race differences in the likelihood a mortgage applicant will repay a mortgage. He stated that—

The goal of ending race discrimination was given a higher priority by Congress in passing the 1968 act than whatever increment in accuracy was gained by using race as a predictor. The decision whether the goal of ending sex discrimination is to be given a similarly higher priority should be made in the light of more information than we have about the financing practices affected.

There are several things about this statement that bother us. What factual basis did he have for the assumption that race or sex are factors in repayment of mortgages? What evidence is there that "future income" is a factor as contrasted with present income?

Mr. Rehnquist's testimony on alimony and support reflect lack of scholarship and of insight to the real status of women.

The only nationwide study of support and alimony was made by the Support Committee of the Family Law Section American Bar Association in 1965. Monograph No. 1 of the Family Law Section sets forth the results of a survey of 575 domestic relations court judges, friends of the court and commissioners of domestic relations. This study indicates that alimony is awarded in a very small percentage cases. A California judge states, page 3:

In this country permanent alimony is given in less than 2 percent of all divorces and then only where the marriage has been of long duration, and the wife is too old to be employable, the wife is ill, particularly if the husband's behavior was a contributing cause, or other highly unusual factors exist. Temporary alimony is given, pendente lite or for some portion of the interlocutory period in less than 10 percent of all divorces, chiefly to give the wife a breathing space to find employment.

A Nevada judge comments:

A healthy young woman should not be permitted to go on indefinitely living on alimony. Her outlook is more healthy and her life a good deal more full as an active member of the community and not as a kept woman.

The Foote, Levy and Sander textbook on family law, referred to above, found alimony "infrequently sought and even less often obtained," page 937.

The wife's capacity to earn was taken into account in setting alimony by 98 percent of the judges in the Quenstedt-Winkler study. The leading cases in Arizona on alimony list as the primary factor to be considered the needs of the wife and her ability to support herself. A 1970 case states specifically:

The husband should not be required to pay alimony unless the court finds it necessary for the support and maintenance of his wife. *Reich v. Reich*, 474 P. 2d 457.

The evidence available thus clearly indicates that men are not responsible for supporting divorced or separated wives without regard to their capacity to support themselves.

With respect to child support, the data available indicate that payments are less than enough to furnish half of the support of the children. A chart submitted by a Michigan court—Quenstedt-Winkler study—indicates that with three dependents, including the wife, the family support payments would be approximately half of the man's net income, net after income tax, FICA, hospitalization, life insurance, union dues, and retirement plan payments, none of which are specifically provided for women. It is clear that these payments would not furnish half the support of the children in most families. Even these small payments are frequently not adhered to. One court commented:

However, we find that in the great number of cases we are unable to adhere to the chart because of excessive amounts of financial obligations and limited earnings; also in many cases the man has more than one family.

In a survey referred to in Foote, Levy and Sander, page 937, made in Maryland and Ohio in the early 1930's, in half the cases the weekly alimony and support payments were between \$5 and \$9 per week, equivalent to \$11.65 and \$20.97 in today's dollars. The median was \$33 per month, equivalent to \$76.89 today.

I would like to insert in the record here a letter from a woman in Elvria, Ohio, which is typical of the complaints we hear. She is a clerk-typist working fulltime with a takehome pay of \$310 per month. Her former husband is employed fulltime as a carpenter, earning overtime. The court awarded her \$15 per week for each of two children. Her husband is \$410 behind in payments, which she is unable to collect. The children have not had dental care for 2 years and she finds it difficult to buy books, proper food and clothing for the children. It is obvious her husband is not contributing half the support of the children, let alone supporting his wife. This case also illustrates the lax enforcement of support laws, which all authorities agree is a major primary problem.

In summary, Mr. Rehnquist's glib and unsupported statements about a husband's duty to support his wife without regard to her ability to support herself perpetuate a legal myth that has done great damage to this country, especially to its women.

When the latest data indicate that 27 percent of the women who entered into teenage marriages in the past 20 years are divorced, it is high time that our girls be apprized of the facts about alimony and

child support and likelihood of divorce in teenage marriages. Perhaps more of them would prepare themselves vocationally and wait until they are older for marriage. The divorce rate for women married after the teens was 14 percent.

I do not suggest that Mr. Rehnquist was deliberately misleading. I do suggest that this handling of this subject is symptomatic of his philosophy, which concerns itself with the welfare of the white middle-class male—and his wife and daughters as adjuncts to him. We have noted in reviewing some of the court cases relating to alimony and child support that very generous property, alimony, and child support settlements are made among the wealthy. However, these cases and other materials leave the impression that in middle and lower income groups the welfare of the husband and his prospects for remarriage are given much greater weight than the wife's and children's welfare and that no weight whatever is given to her prospects for remarriage. In other words where the divorce results in economic hardship, greater hardship is visited on the wife and children than on the husband.

Rather than resulting in diminution of support rights for women and children, I would like to suggest that the equal rights amendment could very well result in greater rights. I believe a case could be made under the equal rights amendment that courts must require divorced spouses to contribute in a fashion that would not leave the spouse with the children in a worse financial bind than the other spouse.

Mr. Rehnquist's conclusion that alimony laws allowing alimony only to wives would be invalidated is not supported by any legal authority or the legislative history—only by Mr. Rehnquist's also unsupported belief that legislative history is of limited importance in interpreting a constitutional amendment.

In summary, we find that Mr. Rehnquist's testimony on the Equal Rights Amendment does not indicate a scholarly approach or a broad concern for all economic classes.

Mr. Rehnquist's myths permeate our society, consciously or unconsciously influence females' educational, occupational, aspirational choices and opportunities, lead to grief for millions of women and is significantly responsible for the size of our public assistance roles, 65 to 85 percent of which include women and their dependent children, a tragically disproportionate percentage of which are already unjustly disadvantaged minorities. Further, these recipients are grudgingly granted mere survival relief, insulted for needing it, and are not recognized as part of the larger society of all the rest of us, everyone of whom receives public welfare in the form of public transportation, libraries, higher education, highways, et cetera, et cetera.

The facts, stripped of legal sophistry with which antiwomen and thus inhumane people garb them are that the average woman, employed only as housewife-domestic, living with her husband can get only what he wants to hand out; a separated or divorced woman is unlikely to get any alimony and if she has children, she is likely to have to contribute more than half to their support and if she has finessed her societal oppression, will work incredibly hard to be absolutely independent of her former spouse in spite of systematic documented employment discrimination.

As a civil libertarian, but not speaking for the American Civil Liberties Union, I deplore Mr. Rehnquist's acceptance and/or advocacy of:

- (1) Pretrial detention of criminal suspects;
- (2) Endorsement of illegally obtained evidence;
- (3) Government data banks on people in violation of rights to privacy;
- (4) Arrest of suspects without warrants or due process of law;
- (5) Muzzle of free speech of government employees;
- (6) Denial of first amendment rights of free assembly;
- (7) Defending the legality of reviving the Subversive Activities Control Board and giving it Justice Department powers to designate organizations as communistic.

Indeed, the thrust of Mr. Rehnquist's views are a proclivity or compulsion to control other people and limit or narrowly conceptualize human rights for all who are not affluent white males, that is, those outside the economic-legal-judicial system of the white patriarchy. This kind of thinking-behavior-control of other reflects remarkably, in the legal context, the "white masculine mystique" that has knowingly or unknowingly created or perpetuated injustices for the majority of our citizens. I have detailed only a few of Mr. Rehnquist's known acts of commission that have or can guarantee perpetuated human injustice. His acts of omission, that is, affirmative steps that he might have taken to extend justice but didn't, are relatively less well known to me, besides I think I have made NOW's case for Mr. Rehnquist's own disqualification of himself to fully serve justice of the full human family on the U.S. Supreme Court. I trust he will have the intelligence and fairness to withdraw his name and, if not, you must not confirm his nomination.

Mr. Rehnquist's documented objections to legally opening public accommodations to all citizens and integrated education are not known to have changed from 1967. NOW supports opposition to him on these substantial grounds. As an individual, formerly a Pennsylvania human relations commissioner who chaired the Education Committee working constantly for integrated education, I find this nominee's views narrow, lacking in insight about the requirements for the freedom he thinks he espoused and yet two more reasons to view his appointment as an unjust act.

The instance of Mr. Lewis F. Powell's nomination speaks more to the acts of omission of justice referred to above though I have no evidence that Mr. Powell's views of women are other than the normal, that is, sexist by internalization of cultural biases. The absence of any documented evidence of his affirmative action vis-a-vis women as president of the male-dominated and influential American Bar Association alone disqualifies him or any comparable nominee to serve on the Supreme Court. To do nothing for a class of people is no better than doing something overtly and unjustly against a class of people. At least, the latter galvanizes people to indignation and action.

Therefore, in the 1960's, when Mr. Powell was in active leadership in the American Bar Association, the Senate Foreign Relations Committee, on recommendation of this Bar Association Committee, did not approve the United Nations Convention on the Political Rights of

Women which means a belief in the right of women to vote and hold national office. The ABA has not supported the equal rights amendment, and prominent members vigorously have opposed it with irrelevant sexual hangups about concern for separate restrooms when the issue is privacy of separate toilet units that other countries, airlines, buses, and trains manage nicely. ABA members have also protested the amendment on the false issue of so-called protective legislation for women which is superimposed restriction of employment opportunity.

That issue itself is moot with the supercedence of title VII of the 1964 Civil Rights Act and increasing numbers of State attorney generals are forced by evidence to rule earlier State acts repealed or impliedly repealed. If Mr. Powell was aware or cared, where was his leadership, his testimony for justice?

During Mr. Powell's ABA presidency, on what issues affecting women did ABA take a stand? What was that stand? Where did Mr. Powell stand? Or was there any concern by Mr. Powell for the overt and covert discrimination against women and the need for profound, systematic change in the legal profession to make it hospitable to women? How many recommendations did he make of women for judgeships? There are still only 4 of the 5,000 Federal judges who are women. Did he ever recommend an affirmative action program for women in the Federal or State judiciary? Does it bother him that there have never even been female pages in the Supreme Court? Has he facilitated or resisted the activism of feminists to humanize and androgynize—which is balance by sex—the legal profession? Does the paradox of women as moral arbitrars proclaimed on Mother's Day and near exclusion from public moral and judicial leadership strike him as inconsistent and of significant issue to require national action or at least his own?

What is the situation of women in Mr. Powell's own law firm? Are there any? What assignments do they receive? Is he an affirmative action employer for all excluded minorities including women, the cultural minority? Where was Mr. Powell's voice as president of the ABA in 1964 when House Rules Committee Chairman Howard Smith, of Powell's own State of Virginia, inserted sex into the 1964 Civil Rights Act in an attempt to kill it? That was an insult to every ethnic, racial, and religious minority and to every female in the country. A sensitive president of the ABA would speak his outrage, if indeed, he was.

We are told Mr. Powell is a millionaire, a stockholder in some 30 companies, a director of several. Questions of corporate social responsibility are therefore relevant. Has Mr. Powell ever voted for independent stockholder resolutions? Has he ever initiated any especially in the area of corporate social responsibility? Has he ever voted against any management resolutions which are frequently pro-status quo or pro-profits whatever the consequence to people? Are there any women let alone parity of the sexes on any of these boards of directors and if not, has Mr. Powell used his considerable prestige to promote this? What, if anything, has been his role in insisting the companies of which he is stockholder and/or director be affirmative action employers including women of all races?

Has Mr. Powell promoted cumulative voting so small stockholders can be heard? Has he facilitated access to meetings for all interested

parties? Has he upheld, promoted, or resisted proposed secret stockholder ballots so, for example, employee-stockholders can vote their wishes without fear of reprisals?

Getting back to the ABA, does Mr. Powell recognize that the very existence of a national association of women lawyers is still present reflection of their segregation and unmet needs within the ABA? Does Mr. Powell realize that man must stop using their sex to gain unearned prerogatives in the law and elsewhere? Because we have no evidence that Mr. Powell exercised positive action-leadership in acts of commission, we must conclude his acts of omission vis-a-vis women disqualify him to make the Constitution a living document to balance the scales of justice. We oppose Mr. Powell's confirmation for appointment to the Supreme Court, in the event he himself does not voluntarily withdraw as disqualified based on the reasonable criteria we advocate.

Finally, we would remind this Judiciary Committee that one does not have to be a lawyer to be a member of the Supreme Court. A behavioral analysis, and that is my profession, of the job of Supreme Court Justice reveals the following to be true: A Justice or Associate Justice is in the business of value judgments. A social behavioral scientist is professionally better qualified on many grounds than a lawyer. The was merely codified standards of what the people at any given time have considered appropriate social behavior and relationships. Legal scholars, law clerks, lawyers as technicians can and do the legal research necessary for a Supreme Court Justice.

Some of my best friends are attorneys. Many tell me frequently the nonlawyer, unencumbered by legal jargon and technical encumbrances, comes up with the most profound insights vis-a-vis the law. Jean Witter, quoted earlier, is one of many such nonlawyer examples of refreshing approaches to justice. Knowing many of you on this committee are attorneys, I have no wish to embarrass anyone here today. Even less do I, speaking for NOW, intend to countenance the continued exclusion, oppression, limitation, impoverishment of our sisters, mothers, and daughters consequent to the "masculine mystique" view and concept of justice whether exercised by men or women.

This country, this world, need the behavioral revolution of the women's movement for full justice. We will not be defined by male-oriented law as a class based on our sex. Anatomy for women, as for men, is a part of our destiny. Our child-rearing, homemaking, bread-winning, and leadership responsibilities are no greater and no lesser than that of our partner sex. Our decisions about life roles, life styles, life options—will be our own, not superimposed. We care too much for ourselves, for whatever children we choose to have, and the potential of men to be humane for us to allow it to be otherwise.

The myth and the reality that behind every great man is a woman is potentially manipulative and immature. For a society, not merely an individual to be great, a more mature model of women and men as equal partners in and out of the home will be created. We are not advocating uni-sex, we are creating uni-people. Stereotyping of people by sex, race, nationality, religion, polarizes people. Far from killing so-called love between the sexes, we intend to end the battle of the sexes and create a society in which women and men can live fully, freely, independently and/or together as friends, lovers, sisters, and brothers unencumbered by false poses, superimposed duty, psychological, legal, or any other oppression.

Concluding, President Nixon reportedly saw Ibsen's play, "The Doll's House," the tale of a woman expected to be a doll-like wife and her struggle to be an adult. Afterward, he was quoted as saying, "It's a part any woman wants to play, on the stage or in real life." If Mr. Nixon and you believe this, then the following are feminist actions you must take. The feminists might be the only believers in true democracy, and as I have sat here for these 2 days of hearings I had the distinct impression we were talking about an all male club.

The definition of a feminist is a person who believes women are people; that human rights are indivisible; a person who is committed to creating the legal, economic, social, political, and religious equality, not sameness, of the sexes as "A matter of simple justice," which happens to be the title of the President's own Task Force Report on Women's Rights and Responsibilities. I am a feminist. You, the Senate, the President, the suggested nominees, can behave like feminists by having the courage to:

(1) Reject/withdraw the names of William Rehnquist and Lewis F. Powell, Jr., for membership on the Supreme Court;

(2) Insist on the feminist criteria of justice and justices for any role in the Federal judiciary.

Such is the nature of my incurable optimism. I did not come here for a cure. I came here to be treated and to demand that my sisters, mothers, mothers-in-law, and daughters be treated as persons, not a sex who is a subclass of men, generic or specific. Sooner or later everyone must be a feminist. We will not be co-opted by pleasantries or patronizing. We intend to co-opt you, the President, and everyone else.

Now, I want to publicly thank all the dedicated feminists-humanists whose inputs are part of this testimony. It is they and all the anti-feminists and therefore antihumans in other ways who motivate me to press on. It is still true this country and no individual can be healthy when half slave and half free however subtle that slavery and when the freedom is more apparent than real. As a matter of democratic justice, now insists that you act affirmatively on our just recommendations. As senators for all the people, you can do no less; as leaders speaking to the future, you have the opportunity to do more.

I would like to ask permission to have appended to my testimony for the record the following:

Mr. Chairman, if I may, I would like to include an article "The Double Standard of Justice: Women's Rights Under the Constitution," from the Valparaiso University Law Review.

I would like to—you indicated earlier I could—include the letter of the woman from Elyria, Ohio.

I would like to include the median earnings, Department of Labor and other Government bureaus.

I would like to include an item from the Marriage and Divorce Committee of the New York National Organization for Women Chapter, called "Reflections on Contemporary Dilemmas in American Family Law."

I would like to include the study I cited earlier, "What are our Domestic Relations Judges Thinking?" Monograph of the Section of Family Law, American Bar Association.

Thank you very much.

Senator HART. Without objection, they will be received.

(The material referred to was received and is on file with the committee.)

**Senator HART.** If I respond by saying that you speak the truth, we do our thing as if in fact it is a man's world, I hope you will not say that is the kind of pleasantries and patronizing remarks that you don't want to hear. I do understand. I understand it more clearly today than I did 5 years ago. My wife speaks very eloquently to me of examples of my own failures. I am aware of the deeply held discrimination, unconscious in most cases, against women, and the price that our country pays for it. If I say much more you are going to jump me for being either patronizing or mouthing pleasantries.

**Mrs. HEIDE.** Mr. Hart, I have no intentions to jump you or anybody else. I have no desire to see any manifestations of any individual guilt. What would persuade me, and what will persuade the increasing number of aware women and men, is that we have found our voice, and effective action. In this instance on the case of nominations for the Supreme Court and the criteria of Justices, they have excluded large human and humane dimensions. It is the actions that will persuade us.

**Senator HART.** If our actions fail of perfection, would you nonetheless say that it is better that we seek to find some indication, in one or both of these nominees, of the need to apply the 14th amendment even when it involves the reversal of customs which have become embodied over a long history in this country? Isn't that in part a description of the plight of women in this country?

**Mrs. HEIDE.** That is part of it. We certainly have continuing hope for the application of the 14th amendment and all amendments in the interest of women. But even that is no guarantee without an equal rights amendment to the Constitution if that is what you are getting to, because that might be applied at the discretion of any particular Supreme Court and we have no evidence at this point in time that we can count on that discretion.

**Senator HART.** I did note your comment—I can't find it at the moment—about Justice Thurgood Marshall who perhaps himself having been on the receiving end is pretty hard-nosed about discriminatory practices. I had in mind such an indication of a greater sensitiveness to discrimination being directed against others.

**Senator Bayh?**

**Senator BAYH.** Mrs. Heide and Mrs. Kilberg, I appreciate the fact that you gave us the benefit of your thoughts for the record.

Some might say that the rather detailed and thorough discussion which you have brought to the committee relative to the feeling of frustration of women today has no direct relationship to the qualifications or lack thereof of a given Supreme Court Justice. I don't share that view. I would hope the President would take advantage of an opportunity like this not only to speak eloquently of women on the Court but also to nominate a woman to the Court, not because she was a woman or not just because of tokenism which many of you have been subjected to, but because a well-qualified legal mind, a compassionate human being with all the qualities necessary to sit on the Court, also happens to be a woman.

**Mrs. HEIDE.** You realize, Senator Bayh, we are talking about women and not just a woman. I know you know it.

**Senator BAYH.** Yes, but I was hopeful that a woman would be appointed, not just any woman, but one who would have the legal credentials and the human compassion that should be embodied in any nominee to sit on that Court. It seems to me that in 200 years of

history, if we are really looking at everybody equally, we could find someone who would have those credentials and also a woman. If not, this is an indictment of the decisionmaking process by which people are put on the Supreme Court.

I remember very well when news reached me at Rutgers University of Justice Black's decision to retire and I immediately turned to an aide and said, "Let's get busy and let's suggest, send to the President, the names of three or four women who are examples of the kind of women he would find qualified and suggest that he appoint that woman to the Court." We did send a letter but, unfortunately—perhaps this was overstepping my boundary when I did this. I would just like to make one observation: We have been working together to try to get the equal rights amendment passed and it seems to me to be totally inconsistent to argue, on the one hand, the sensitivity of a judge relative to women's rights is not important and, on the other, to argue that the women's rights amendment is important.

I would just like to go one step further: I feel it really is not an answer to the problem to amend the Constitution with equal rights amendment. If we do not have judges on that Court who have compassion and concern for the problems that confront women, we will face the same type of discrimination that existed for 100 years after those famous amendments were put in the Constitution following the Civil War that directly prohibited discrimination on the basis of race. And so I think your concern over the sensitivity of nominees that will interpret this amendment, if we get it in the Constitution, is very well taken.

Mrs. Kilberg, as a lawyer, let me just ask you one quick, specific question.

Could you give us a bit of personal experience about the manner in which the "system" discriminates against women who are law students and prospective attorneys? Could you give us your personal experience or the experience of others that you have communicated with so far as this discrimination is concerned?

Mrs. KILBERG. I would be pleased to give you my personal experience. I got out of college in 1965 and spent a year in graduate school and then decided, in 1966, I wanted to go to law school. I found that many, many law schools, very, very substantially discriminated and discouraged women applications completely. At Vassar College where I went to college, I do not believe any law schools came onto the campus to recruit as they did in most of the male and coeducational institutions. Once at law school, I found I was one of nine girls out of a class of 165.

Senator BAYH. Where did you go to law school?

Mrs. KILBERG. Yale in New Haven. Yale is very proud of its record. My math is terrible, but that is less than 5 percent. It is less than one-twentieth of the class. But the year after that they began to draft boys out of the first year of law school to go fight in the war, and while Yale raised their next year's entering class up to 300, and Harvard did the same and has approximately 500 students in the class, you can see it is really a small percentage. But one of them—I don't want to misquote him—one of the admission deans at Harvard said, "We might as well take women, rather than homosexuals or cripples." At the time it seemed very funny but it is not funny at all.

In the last year in law school, many firms, New York and California firms in particular, would come and interview students, and were less than pleased to see a woman come to the door. Their first questions were: "When are you going to get married? When are you going to have children? You are going to go where your husband goes; you are not interested in practicing long with this firm."

Others unfortunately—it was not unfortunate, it was usual—had their cocktail parties at Morey's. Well, those who have gone to Yale Law School know that Morey's is an all-male establishment and women are not allowed in. Again, I am not accusing them of being conscious of it; but it was something that hit me hard and certainly hit some of my classmates, who were more serious than I was about a law firm, very hard, and some of the brightest girls in our class had very great difficulty either in getting a clerkship or going into a law firm.

One thing has nothing to do with law at all. When I first came to Washington, I discovered that I would make phone calls and not get any answers back. I discovered finally that when I didn't have a secretary—I didn't have one for the first 3 weeks—I didn't get an answer. When I placed my secretary on the phone I would get the answer back because the guy realized that I was not a secretary. When you call up somebody on a Senate staff and say, "My name is John Smith," then you get a response. When you call up and say, "My name is Bobby Green," which it was at that time, they call you back and say they are busy or in conference. The guy's secretary is part of the problem. She has been conditioned automatically to assume the person she is talking to is not a professional and therefore does not deserve an answer. I think that attitude has to change also. Those are some very small examples. I could go on and on but I wouldn't want to take up the committee's time.

Senator BAYH. Have either of you noticed any improvement in this practice over the last couple of years?

Mrs. KILBERG. To a certain degree I think there has been an improvement, because I think we have raised people's consciousness. I am not convinced today there has been an improvement that men have really felt. You know, they do it because it is now more appropriate and they are more sensitive about the question because they have been beat over the head by us a little bit. I am not sure they really believe what they say today but I would like to give them the benefit of the doubt.

Mrs. HEIDE. I would like to comment on that. I think one can point to some quantitative changes. I think that the significant qualitative changes are yet to come. I would like to suggest that fully to understand what we are talking about, and I am sure you know, both of you Senators, at least, know, that we have hardly cleared our throats on this issue here today. That before you understand what we are talking about, people, women and man, must begin to accept and prepare both our boys and our girls to accept all the responsibilities and opportunities in life; and to boys and men particularly that must include child rearing. I think that is probably the toughest issue and the gut level one that they have to face, because they assume that women are going to be the primary rearers and then, if they can manage, to squeeze something else in their life.

Is it that new change that we look at child rearing as a human role for people, and stop depriving men of the potentially humanizing experience of nurturing another individual on a day-to-day basis that I think is fundamental. The stereotyping begins with the assumption that there are certain roles for women, when with the crucial biological exceptions that we all know this is simply a matter of tradition, a matter of practice, that does not have any scientific, human validity.

Senator HART. I don't apologize or explain for asking the question. I am confident you will not misinterpret my purpose. It is for a better understanding. Given that explanation, is there any American male over 21 who is free of this fault?

Mrs. HEIDE. I won't accept that; I don't think that those who have been conditioned to believe and behave as what we call sexist in shorthand are confined to the males, and I don't think it is a matter of all males not understanding and that all females do.

Senator HART. I am sure there are some females who do not have this hangup. I am pursuing this question—

Mrs. HEIDE. Are you saying any man?

Senator HART. Is there any man?

Mrs. HEIDE. Of course.

Senator HART. Over 21?

Mrs. HEIDE. Oh, yes.

Senator HART. Who has grown up in our culture who is not subject to the criticism of having this sexist attitude?

Mrs. HEIDE. Well, there are men who are feminists just as there are women. You remember that my definition said person. I think that it is virtually impossible with the pervasive nature of sexism for you to take the arbitrary age of 21 to be absolutely free of it. But to the extent possible in our conscious behavior, yes, there are both women and men who are feminists, and I think it is clear that we are not talking about men versus women at all.

Mrs. KILBERG. I would like to add that some of us are married to such men, as I am.

Mrs. HEIDE. Yes, I wouldn't be married to any man who was not.

Senator HART. I am not sure what my wife would say with respect to it. I have hope, I have my fingers crossed, but you are describing clearly a rare exception. Are we not all the inheritors of our culture, our geography, our century? And is there anything more apt to be predictable than the result to an individual in 1970 who has lived in the 20th century? Isn't it almost a certainty that that person will be unconscious of it even though he believes himself to be sensitive of some of the denials?

Mrs. HEIDE. I don't think we are in disagreement with you. I suspect you may be more optimistic than you sound. You did say that we asked people to behave like feminists even if they did not at this point fully believe in it. Simply the behavior in ways that affect other people will be a giant step.

Senator HART. Thank you.

Senator BAWN. I don't know a Member of the Senate who is more concerned about examining the depths of his own soul than my friend from Michigan. He sets a commendable example for the rest of us. I appreciate the contribution you have made.

I am tempted, Mrs. Heide, because I think I know you well enough, to ask if maybe the term "feminist" itself isn't self-defeating in what you are trying to accomplish?

Mrs. HEIDE. Well, it is the language we have to work with, although one of the things, as you know, that we are trying to do is to create a new language. What we have now that you call English is manglish, but that is the only tool we have to work with.

Senator BAYH. In the culture we all have become accustomed to, a "feminist" implies prejudice to all males and "sexist" implies prejudice to all females. Maybe we need some other words that indicate there are both men and women who fit into both of those categories and that what we are after is to look at everybody equally, which has not been the case for our society.

I appreciate the contributions both of you have made.

Senator HART. Thank you very much. At the direction of the chairman, we are recessing until 2:15.

(Whereupon, at 1:15 p.m., the hearing was recessed, to reconvene at 2:15 p.m., this date.)

#### AFTERNOON SESSION

The CHAIRMAN. We have a Congressman to testify.

Mr. McCLOSKEY. Thank you.

The CHAIRMAN. Mr. Congressman, identify yourself for the record.

#### STATEMENT OF HON. PAUL N. McCLOSKEY, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. McCLOSKEY. Mr. Chairman, I have known Bill Rehnquist for over 20 years, since we attended Stanford Law School together in 1950.

I believe him to be a man of the highest character, integrity and professional ability. Both his personal and professional reputation in the Stanford legal community, among fellow students, professors, and lawyers, reflects my own belief and the personal respect I have expressed.

Mr. Rehnquist's stated political philosophy is probably diametrically opposed to my own. We disagree on the most basic and deeply held views in the field of civil rights, on the powers of the President, the relationship between the executive and the Congress with respect to the war in Indochina, and on the balance between the Government police powers and individual rights.

In the single instance in which Mr. Rehnquist has appeared before my own Subcommittee on Governmental Information in the House of Representatives, we have sharply disagreed and debated the executive's historic claim of executive privilege with respect to information necessary to congressional deliberations.

Nevertheless, it is my opinion that the greatest base for our national strength and security remains the absolute separation between political beliefs and law. We are a government of law, not of men. Perhaps the highest judicial obligation of a Supreme Court Justice is to insure that their judicial opinions respect this separation between politics and law. I consider it the most basic element in maintaining public respect for the law that it be absolutely divorced from political influence and opinion.

In my judgment, Mr. Rehnquist has a respect, a reverence, for the law in our constitutional history which will cause him to bend over backward to prevent an intrusion of his political beliefs into his judicial decisions.

He meets the three exacting tests that I would impose on a nominee to the High Court. His legal intellect and integrity are of the highest excellence. He has demonstrated the kind of judgment and tempered advocacy which indicates a good judicial temperament. Finally, I believe him openminded in his search for solutions to the constitutional and legal interpretations which this Nation will face in the years ahead.

It seems imperative to me that, as a Nation, we once again achieve a common respect for the law and respect for the Supreme Court as the ultimate decisionmaker in our system of justice, and that respect requires the recognition of politically liberal and politically conservative justices that they properly contribute to the national welfare so long as they respect the Constitution and interpretations as being more important than their individual political viewpoints. I am confident Mr. Rehnquist will honor that separation.

That concludes my statement. Thank you.

The CHAIRMAN. Thank you.

I understand we recessed until 2:15. I did not know, so we will wait until 2:15.

Thank you, sir.

The Chair would like to make this statement. There has been a question of an investigation by the FBI in Arizona on voting practices. Now, there was such an investigation by the FBI. I have seen it. It in no way involved Mr. Rehnquist. At no place in the file does his name or anything that would suggest that he had anything to do with it appear.

Mr. Orfield?

#### **TESTIMONY OF GARY ORFIELD, ASSISTANT PROFESSOR OF POLITICS AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY**

The CHAIRMAN. Mr. Orfield, now, you have got a prepared statement?

Mr. ORFIELD. Yes, I do, Senator. I provided it to your office yesterday.

The CHAIRMAN. Let us put this in the record, and you take about 10 minutes.

Mr. ORFIELD. All right.

The CHAIRMAN. We will admit it into the record.

(The prepared statement referred to follows:)

#### **STATEMENT BY GARY ORFIELD**

The Senate faces a unique historical responsibility in deciding on the nomination of William Rehnquist to the Supreme Court. No earlier President facing an opposition Congress has had so many appointments in such a short period of time. Never before has the Senate had so clear a responsibility to protect the Court from a sudden and drastic imposition of a minority philosophy. While all of the President's appointments have been aimed at strengthening the conservative position on the Court, Mr. Rehnquist is the youngest and most rigidly doctrinaire nominee so far. He is a judicial activist of the right who narrows and expands his interpretations of the Constitution like an accordian to suit his political objectives. His nomination, like those of Judge Haynsworth and Judge Carswell, is further tainted by a record of serious insensitivity to the principle

of equal opportunity. I urge the members of the moderate majority in the Senate to exercise their Constitutional responsibility and reject this nomination.

Only six Presidents have had the opportunity Mr. Nixon has had to name four Justices in three years. In each of the earlier cases, the President's party controlled Congress and there was a clear majority in the nation. Washington, Jackson, Lincoln, and Franklin Roosevelt used their extraordinary opportunities wisely, naming Justices who made lasting contributions to our Constitutional tradition. The other two Presidents, Taft and Harding loaded the Court with rigid reactionaries, Justices who were largely responsible for the great constitutional crisis of the mid-30s. Today, in my judgment, President Nixon is using his power in the tradition of Taft and Harding. President Nixon, however, lacks their Congressional majorities. He is the first President to be elected without carrying either house of Congress since 1848. The President lacks a popular mandate and he faces a moderate Senate majority whose mandate was renewed in last year's elections. The Senate must now decide whether to permit Mr. Nixon to continue his efforts to construct a rigid conservative majority on the Court, a majority representing only the right wing of his own party. The Senate has both the Constitutional right and the political support to reject nominees hostile to the broad consensus of American values. Mr. Rehnquist is such a nominee.

My testimony today has two basic purposes. First, I will describe the Constitutional rights of the Senate in the appointment of Justices, reviewing the historic exercise of these rights. Second, I will analyze Mr. Rehnquist's social views and political philosophy and describe how they have shaped his legal judgments. My testimony will show that the Senate has frequently made political judgments in rejecting nominees and that it has every right to do so. Examination of Mr. Rehnquist's record will show that Senators concerned about the ability of our political system to make real the promise of equal protection of the laws and to keep alive the protections of the Bill of Rights must vote the Rehnquist nomination down.

#### THE SENATE'S POWER

During the period from 1930 till 1968 the Senate confirmed every Supreme Court nomination submitted by a President. It seemed that Senators had almost forgotten their traditional role in the selection process. In actuality, Presidents had been careful to anticipate Senate reaction and the period had seen no highly controversial nominations presented to a hostile Senate. This period ended with the Fortas filibuster in 1968. In the last four years, Presidents have nominated eight men—Fortas (for Chief Justice), Thornberry, Burger, Haynsworth, Carswell, Blackmun, Powell, and Rehnquist—but only two have so far been seated. Three other candidates President Nixon was prepared to name—Poff, Lillie, and Friday—were eliminated even before their nominations were announced. The power of the Senate has become unambiguously clear.

The Senate's authority rests on the most solid of Constitutional grounds. At the Constitutional Convention the issue was intensively discussed and there was wide support for giving exclusive authority over Court appointments to the Senate. The final compromise was intended to make the Senate a co-equal power in the appointment process. The Senate, Alexander Hamilton suggested in the *Federalist Papers* would provide a "check on the spirit of favoritism of the President . . .".

From the first, many of the confirmation fights have turned on questions of political beliefs. Senators, recognizing the essential difference between executive branch appointments and lifetime appointments to the country's highest tribunal, have rejected a higher proportion of appointees for the Court than for any other office.

Washington and Madison lost appointments on political grounds and Tyler was defeated four times after he broke with his party. Jackson faced bitter fights and Congress cut the size of the Court to deny Andrew Johnson appointments. In the years after the Civil War nominees' record on racial issues was a major consideration in several battles. In this century, civil rights issues have played a major role in each of the three defeats. In two of these cases, labor issues were also significant.

In contrast to the civics book view of the Court as a solemn impersonal assemblage, most Presidents have understood and acted on the fact a man's past experience and his settled beliefs will almost inevitably affect the way in which he views the great and unprecedented issues the Supreme Court must continually decide. In the past several years a large number of Senators have recognized

beliefs. In each case, however, the question was partially obscured by other arguments—the ethics question and the incompetency issue. In Mr. Rehnquist's case their responsibility to evaluate the fundamental beliefs of the nominees, men who will determine the meaning of the broad general phrases of the Constitution in a variety of future circumstances no one can foresee. During the Haynsworth and Carswell controversies this responsibility was crucial and the floor debates reveal that many Senators were very strongly influenced by the nominees' social the Senate must face its responsibility directly.

Judges, Presidents, and historians of the Court have time after time recognized the fact that a judge's settled values, even if they are unconscious, influence his decisions. In fact, Mr. Rehnquist has gone further in his only article on the Court. He has argued that even the unconscious biases of law clerks influence the Court's work and conceded that he himself "was not guiltless on this score." In a 1969 letter to the *Harvard Law Record*, Mr. Rehnquist applied this doctrine to the Court itself, arguing that if "a different interpretation of the phrases 'due process of law' or 'equal protection of the laws,' was desired, then men sympathetic to such desires must sit upon the high court."

Perhaps the best description of the way in which judges' values shape the law comes from the pen of Mr. Justice Holmes. He described the beliefs of judges as "the secret root from which the law draws all the juice of life." Most important cases, he said, pose questions of public policy. In answering these questions, judges draw on "the unconscious result of instinctive preferences and inarticulate convictions."

Another of our greatest jurists, Mr. Justice Frankfurter, believed that the very nature of the Supreme Court's work made it appropriate for the Senate to examine a nominee's philosophy:

The meaning of "due process" and the content of terms like "liberty" are not revealed by the Constitution. It is the Justices who make the meaning. They read into the neutral language of the Constitution their own economic and social views. Let us face the fact that five Justices of the Supreme Court are molders of policy, rather than impersonal vehicles of revealed truth. The Supreme Court's work is dominated by cases which cannot be solved by reference either to unambiguous words in the Constitution or to established precedents. Such cases can be handled in the lower courts. The Supreme Court must provide the final answers for large new questions, which often have produced deep divisions among the lower courts and among legal scholars. A Justice is continually confronted with broad choices among contending legal theories. Inevitably his experience and his settled values influence the choices he makes. Charles Warren, the greatest historian of the Court, makes a very similar observation. Justices, he says, "are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and environment and by the impact of history, past and present . . ."

Presidents have understood these facts and acted upon them. In the midst of the Lincoln-Douglas debates, after the country had been deeply polarized by the Court's *Dred Scott* decision on slavery, Abraham Lincoln quoted Thomas Jefferson on the danger of a Court out of touch with national values. "Our judges are as honest as other men, and not more so," said Jefferson. "Their power," he wrote, "is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control."

President Theodore Roosevelt, in a message to Congress, recognized the great political power possessed by American judges:

Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. . . . for the peaceful progress of our people during the twentieth century we shall owe most to those Judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.

His successor, President Taft, saw the appointment of extremely conservative judges as perhaps the central accomplishment of his Presidency. Defying the progressives in his own party, he set out to appoint a Court majority which would preserve the status quo in spite of a change in the nation's political values. Later, during the 1920 campaign, he wrote an article arguing that the strongest reason for Harding's election was the need to maintain conservative control of the Court. "There is no greater domestic issue in this election," he said, "than the maintenance of the Supreme Court as the bulwark to enforce the guarantee

that no man shall be deprived of his property without due process of law." After Harding's election Taft became Chief Justice and Harding followed his advice in making his other appointments. The result of this process was the creation of a Court so rigidly conservative that it incapacitated the government when the President and the Congress sought solutions to the new problems of the Great Depression.

President Nixon has been attempting to redirect the Court and he has succeeded in greatly strengthening the Court's right wing. During his first year of service Chief Justice Burger was the most conservative member of the Court. A study of the decisions from October term of 1970-71 year showed that Justice Blackmun and Justice Burger voted together in 98 out of 102 cases and occupied the extreme right of the Court's political spectrum. Nixon's appointees make those of the last GOP President seem almost liberal. A President who campaigned as a moderate is giving the nation a Court representing only the right. With confirmation of the Rehnquist and Powell nominations, this new group of Justices would approach control of the Court.

For several reasons, the Rehnquist nomination is an extremely important challenge to the prerogatives of the Senate. If these nominations are confirmed, the available evidence suggests that Rehnquist will be the most doctrinaire of the President's appointments. He will also be the youngest. Finally, he would be the only one confirmed with a clear record of hostility to laws protecting the rights of black Americans. If Rehnquist serves to the average retirement age of twentieth century justices, he will be on the Court until 1994. History shows that he has a reasonable chance of serving into the next century. Long after this Administration is gone, after the next President has written his memoirs, and the Administration succeeding him is gone, Mr. Rehnquist would probably be casting one of the nine votes which will determine the meaning of the Constitution and the ability of our governmental structure to adapt to tumultuous changes. Senators must ask themselves whether Mr. Rehnquist is the kind of man who can be securely entrusted with vast power not only in this generation but in the society which will serve our children and grandchildren.

#### REHNQUIST'S RECORD

In announcing his choice of Mr. Rehnquist, President Nixon described him as a conservative "only in a judicial, not in a political sense." The nominee's record, however, shows that the President was wrong on both scores. Mr. Rehnquist has extremely conservative political views, but he is anything but a "strict constructionist", particularly when it comes to interpreting the Bill of Rights. His legal writings show little respect, for example, for the kind of strict literal interpretation of the Bill of Rights that characterized Mr. Justice Black's jurisprudence. He seems disposed to view narrowly the responsibility of both courts and legislators in protecting minority rights. In fact there is damaging evidence of his hostility to the rights of black Americans. While Mr. Rehnquist's writings suggest that he would narrowly interpret some sections of the Bill of Rights and the Fourteenth Amendment, he has often read the Constitutional grants of power to the executive branch very broadly indeed. He is loath, for example, to put any limits on the government's power to spy on its own citizens. As you follow his reasoning from issue to issue, he expands and contracts the Constitution like an accordion to accommodate his extremely conservative political views.

During the past two years, members of this Committee and the Senate as a whole have shown deep concern in examining the record of nominees on racial issues. In a period in which segregation in our cities is spreading rapidly, in which there is growing racial polarization, and in which the President refuses to enforce civil rights laws, Senators concerned with maintaining the possibility of a peaceful bi-racial society in the United States are well aware of the explosive symbolic consequences of putting a segregationist on our highest court. This concern was repeatedly reflected in the Haynsworth and Carswell debates. Now Senators must face up to the fact that Mr. Rehnquist has perhaps the most inexplicable and dismal record of any of Mr. Nixon's nominees on this central question.

Mr. Rehnquist, living in a state with 3 percent black population and holding no office which put him under public pressure, actively fought a modest public accommodations ordinance in Phoenix. Only seven years ago, just as the Senate was completing action on the 1964 Civil Rights Act, Mr. Rehnquist was one of a handful of Phoenix citizens who saw the local ordinance as a severe threat to

white mens' freedom. At a time when almost three-quarters of the Senate voted to prohibit public accommodations segregation across the country, Mr. Rehnquist was a lonely Western voice echoing the arguments of the Deep South. A decade after the *Brown* decision, Mr. Rehnquist was still outside the broad national consensus on this issue, a consensus which included more than three-fourths of the American public. He served as a local spokesman for a small minority on the right.

The Phoenix ordinance was designed to protect the rights of the sixth of the local population which was Mexican-American, the twentieth which was black, and the local Indian groups. Local Phoenix leaders had sponsored voluntary desegregation in 1960 and most restaurants had integrated without any problems. After one owner insisted on segregation in 1963, the city council decided to pass a local ordinance.

This idea so worried Mr. Rehnquist that he not only wrote a long letter to the local paper but also appeared before the city council to argue his case. He saw the idea as a "drastic restriction" on private property rights. While conceding that few wished to segregate, he said that their right to continue actions which "displease the majority" was more important than protecting people from blatant inequality and personal humiliation. He described the law as an "indignity on the proprietor" which sacrificed part of "our historic individual freedom." He was deeply offended by the idea that anyone could be forced to serve a family from an unpopular racial or ethnic group. There is nothing to indicate sensitivity to the rights of victims of discrimination.

Contrary to some reports that Mr. Rehnquist was merely a local Goldwater sympathist, the same ordinance which he deplored was actively and proudly supported by Senator Goldwater. While Mr. Goldwater opposed *Federal* legislation on the issue he endorsed the *local* Phoenix law. In his 1964 campaign book, *Where I Stand*, the Arizona Senator said that "just this year, I spoke out in favor of an improved public accommodations ordinance." Senator Goldwater was far behind the national majority on civil rights, but Mr. Rehnquist made Goldwater look like a civil rights activist.

Later, just four years ago, Mr. Rehnquist again injected himself into a local civil rights controversy when he attacked a voluntary local desegregation effort suggested by the Phoenix school superintendent. In 1967, after intensive discussion in the local press, the Phoenix school official suggested some relatively minor changes intended to reduce the high level of local segregation. Rehnquist attacked his proposals and argued that there was nothing wrong with the existing segregated schools.

The Phoenix school system had been officially segregated by state law until shortly before the Supreme Court's 1954 school decision. Segregated and terribly unequal schooling was commonplace in Arizona both for blacks and chicanos and conditions were particularly severe in Phoenix. Arizonans with Spanish-surnames typically completed only 7 years of school and in Phoenix they received an average of only six years of education. The smaller groups of black and Indian students in the system typically received 30 percent less formal education than the white students. The average white student in the city finished high school and began college. Achievement levels in the segregated schools were far below those in the white schools. The schools were failing miserably in holding and training the minority students.

Segregation of minority groups was a serious problem. Phoenix had a whole set of schools built and operated as ghetto schools. Even their names—Dunbar, Bethune, and Booker T. Washington—were the classic ghetto school names. The city had a long-established pattern of segregating its black faculty members largely in black schools. In a lengthy and carefully researched series of articles in 1967, the *Arizona Republic* exposed the extent of segregation, discussed the educational damage produced by separate education, and outlined possible remedies.

Phoenix school officials proposed no frontal attack on segregation, but called for freedom of choice desegregation with students paying their own bus fares to attend other high schools. The local superintendent also called for more exchanges between the various schools. Similar plans had failed to produce significant change in any city and had long since been rejected as meaningless tokenism in the South by Federal judges and HEW officials.

These modest proposals stirred Mr. Rehnquist's wrath. In a letter to the newspaper he claimed that the existing system had "served us well for countless years." Desegregation proponents, he said, "concern themselves not with the great majority, for whom it has worked very well. They assert a claim for special privileges for this minority, the members of which in many cases may

not even want the privileges which the social theorists urge be extended to them." In fact, local figures showed that the schools had served "us" well only from the perspective of an observer who thought "us whites" could be identified with the whole community. The school desegregation movement, in Phoenix as in other communities, was not intended to give special privileges to chicano and black students but only the basic right to an equal education. Phoenix was under a special obligation to provide this right, since it had long operated officially segregated schools and since local public housing segregation was the decisive factor in the segregation of several elementary schools. Finally, like many Southern segregationists, Mr. Rehnquist suggested that blacks really liked segregation, a proposition resoundingly rejected in every recent poll of black opinion.

The most important thing about Mr. Rehnquist's position on the school issue is what his letter reveals about his general attitude toward racial justice shortly before he assumed his present office. Thirteen years after the Supreme Court's historic conclusion that separating children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," Mr. Rehnquist still had no consciousness of the terrible results of segregation. He saw the whole issue as one of protecting the "freedom" of whites to attend all-white schools and preserve the status quo. He wrote:

... We are not more dedicated to an 'integrated' society than we are to a 'segregated society: . . . we are instead dedicated to a free society in which each man is equal before the law . . .

Mr. Rehnquist seemed dedicated to a society in which whites were free from any legal obligation to desegregate and blacks were free to enjoy the fruits of segregation.

Mr. Rehnquist's defenders may respond that his testimony before this committee the other day shows he had a change of heart on the racial issue. Two responses are necessary. First, Supreme Court nominations seem to provide verbal renunciations of past insensitivity. Judge Haynsworth and Judge Carswell made similar but far stronger statements before this committee. Rep. Poff and others under consideration for nominations issued statements strongly supporting equal rights. After the events of the past two years no man is going to come before this committee and the nation admitting prejudice or insensitivity. In this light, Mr. Rehnquist's tepid statement that he now realizes the "strong concern of minorities for the recognition of their rights" is hardly reassuring. Belated support for nonsegregated public accommodations, seven years after this has become uniform national practice, does nothing to show that the nominee will deal fairly with the new legal issues emerging in the civil rights field.

After he came to Washington, Mr. Rehnquist's Arizona record of insensitivity to the rights of blacks and Mexican-Americans expanded to incorporate insensitivity to the rights of students, of those accused of crime, of citizens desiring privacy, of women, and even to the rights of Congress.

Mr. Rehnquist, who the President described as a nonpolitical lawyer's lawyer, was the author of one of the Nixon Administration's most strident attacks on campus activists. He also wrote a long argument recommending Congressional defeat of the 1970 legislation which gave 18-year-olds the vote in Federal elections. The "lawyer's lawyer" gave a speech describing protesters as the "new barbarians" and he claimed they were as threatening to American society as big city crime. His talk was part of the Administration's concerted effort to make political gains by polarizing Americans against the young.

While Mr. Rehnquist was extremely concerned about a very small minority of students, he opposed legislation designed to give the great majority of young people who are committed to our political system the right to full participation. In a long statement he argued against Congressional passage of the Mansfield-Kennedy amendment to the 1970 Voting Rights Act. The 21-year-old limit, he said, did not discriminate against young citizens. He suggested that a change be postponed until the extraordinary majorities required for a Constitutional amendment could be obtained. Had Mr. Rehnquist's views prevailed, young citizens would still be excluded from the electorate.

In stating his position Mr. Rehnquist disagreed with the broader interpretations of Congressional power prepared by leading Constitutional lawyers and accepted by the great majority of Senators. Among the strict constructionists who disagreed with his narrow interpretation was his political mentor, Senator Goldwater.

Where it suited the Administration's purposes, on other sections of the Voting Rights Act, Mr. Rehnquist's convenient Constitutional accordian produced justifications for broad Congressional regulation of other aspects of state electoral purposes, such as literacy tests and registration deadlines.

In the field of women's rights, Mr. Rehnquist gave testimony supporting the Equal Rights Amendment but opposing important sections of the proposed "Women's Equality Act of 1971." He was against prohibiting sex discrimination in the housing market and refused to face the question of unequal opportunity in separate men's and women's school receiving Federal aid. He opposed granting the Equal Employment Opportunities Commission administrative enforcement power to prohibit job discrimination and recommended against authorizing the administrators of the Fair Labor Standards Act to enforce an equal pay rule. At the very least, his comments showed limited awareness of the seriousness of a group of problems of discrimination which will surely often come before the Supreme Court.

Mr. Rehnquist's reluctance to employ governmental power against discrimination is a striking contrast to his bold assertion of almost unlimited executive prerogatives in the pursuit of conservative objectives. On several occasions his positions have brought him into conflict with members of the Senate concerned with protecting the rights of individuals and upholding the prerogatives of Congress. He has, for example, sweepingly upheld the President's right to start wars without consulting Congress and opposed Senate efforts to regain some control of the process. By asserting the President's right to pocket veto legislation during very short vacation recesses of Congress he has laid the groundwork for expanded use of a form of veto which Congress cannot override. He strongly supported the flagrant violations of due process in the mass arrests of thousands of citizens during the May Day demonstrations. Judicial action is dismissing almost all of the resulting cases has been a powerful comment on the weakness of his position.

It is difficult to believe that the Senate would place on the Supreme Court a man who this year asserted an unlimited executive right to spy on private citizens and even on members of Congress. Mr. Rehnquist's dangerous doctrine about the inherent executive power granted by the Constitution was best answered by Senator Ervin: "There is not a syllable in there that gives the Federal Government the right to spy on civilians."

At a time when many Americans are worried about the activities of secret bureaucracies possessing elaborate technologies for invading privacy. Mr. Rehnquist's confirmation would be a cause for alarm. The nominee's statement that it would be perfectly appropriate for the Justice Department to spy on a United States Senator is certainly a high point for an Administration which has been notably insensitive to the rights of a coordinate branch of the government.

The members of this committee and the Senate must focus their attention not on all the details of the individual disputes but on the general pattern of Mr. Rehnquist's policy conclusions. His reading of the Constitution is obviously profoundly influenced by his extremely conservative political views. He construes the document as loosely as necessary to sustain executive power. At the same time he is very reluctant to employ public authority against various forms of discrimination. The accordian contracts and expands.

*The Senate's Duty.* Once again the Senate faces the unhappy necessity of rejecting one of the President's choices for the nation's highest bench. It is time for the Senate to teach the President that it will exercise its Constitutional prerogative to protect the nation's faith in the Supreme Court's devotion to the Bill of Rights and to equal protection of the laws. Mr. Rehnquist is a man behind his time, a man who failed to understand the movement for human rights and who would narrow the scope of our most cherished civil liberties. It would be a serious failing for the moderate majority of the Senate to put significant influence over our society's future in his hands.

**Mr. ORFIELD.** My name is Gary Orfield. I am assistant professor of politics and public affairs at Princeton University.

**Senator GURNEY.** What university?

**Mr. ORFIELD.** Princeton University.

I come here as a political scientist who has studied the role of Congress in Supreme Court confirmation proceedings——

**The CHAIRMAN.** Speak a little louder.

Mr. ORFIELD (continuing). Since the Founding Fathers, and also as one whose main interest in the field of scholarly activity is in civil rights law and civil rights enforcement.

I believe that in the nomination of Mr. Rehnquist to the Supreme Court the President has brought before the Senate a candidate who challenges the Senate in a particular fashion.

The President has had an opportunity that has been denied to all but six Presidents in American history to nominate four men to the Supreme Court in 3 years. He is the first President ever to have this opportunity who did not control Congress. He is, in fact, the first President since 1848 without controlling either House of Congress.

This division of political power between the Congress and the Presidency at the same time offers a time to reshape the Court and it puts the Senate in a position of particular responsibility. I believe that the Senate's responsibility is according to the constitutional convention and our political traditions coequal with that of the President and the Senate must make a judgment on the future of the Supreme Court.

This responsibility is very heavy in the case of the nomination of Mr. Rehnquist because with this nomination the President has not only chosen a candidate with a political philosophy which, I believe, is repugnant to most Americans but also with a political record which is tainted with serious insensitivity to the principle of equal opportunity.

Since my statement will be entered in the record, I will pass over many of the historic sections on the Senate's power. There has been a good deal of discussion on these issues already in these hearings and Senator Mathias submitted an able analysis of this question on November 4 in the Congressional Record which I call to the committee's attention.

I would like to go to the discussion of what I consider the most serious facts about Mr. Rehnquist's political record before coming to Washington and then to discuss some of his positions after arriving in Washington, positions which I think require very, very serious scrutiny of this nomination by Members of the Senate, and which I believe fully justify rejection of the nomination.

In announcing his choice of Mr. Rehnquist, President Nixon described him as a conservative "only in a judicial, not in a political sense." The nominee's record, however, shows that the President was wrong on both scores. Mr. Rehnquist is an extremely conservative individual in his political views, but he is anything but a "strict constructionist." He has anything but a conservative approach to precedent, particularly when it comes to interpreting the Bill of Rights. His legal writings show little respect, for example, for the kind of strict literal interpretation of the Bill of Rights that characterized Mr. Justice Black's jurisprudence. He seems disposed to view narrowly the responsibility of both courts and legislation in protecting minority rights. In fact there is damaging evidence of his hostility to the rights of black Americans. While Mr. Rehnquist's writings suggest that he would narrowly interpret some sections of the Bill of Rights and the 14th amendment, he has often read the constitutional grants of power to the executive branch very broadly indeed. He is loath, for example, to put any limits on the Government's power to spy

on its own citizens. As you follow his reasoning from issue to issue, he expands and contracts the Constitution like an accordion to accommodate his extremely conservative political views.

I want to go to a discussion of his record on the two central issues on race relations that were present in Phoenix during the time he lived there. I believe that this record is peculiarly disturbing because Mr. Rehnquist came from a State which had a minor racial problem, which had a consensus of a basically conservative community to do something about it, and with which there had already been a record of successful achievement of an integrating of all public accommodations in the community which the community was ready to move on. This background makes the radical nature of Mr. Rehnquist's hostility to equal rights self-evident.

Living in a State with only 3 percent black population, holding no office which would put him under public pressure, he actively fought a modest public accommodations ordinance in Phoenix. Only 7 years ago, just as the Senate was completing action on the 1964 Civil Rights Act, Mr. Rehnquist was one of a handful of Phoenix citizens who saw the local ordinance as a severe threat to white men's freedom. At a time when almost three-quarters of the Senate voted to prohibit public accommodations segregation across the country, and the critical vote was 5 days before Mr. Rehnquist's speech in Phoenix, Mr. Rehnquist was a lonely Western voice echoing the arguments of the Deep South. A decade after the *Brown* decision, Mr. Rehnquist was still outside the broad national consensus of this issue, a consensus which included more than three-fourths of the American public. He served as a local spokesman for a small minority on the right.

The Phoenix ordinance was designed to protect the rights of the sixth of the local population which was Mexican-American, the 20th which was black, and the local Indian groups. Local Phoenix leaders had sponsored voluntary desegregation in 1960, and it worked fine. It was not a new discovery that integration of public accommodations would work, something Mr. Rehnquist only discovered the other day; it worked for 4 years in Phoenix before this ordinance came before the city council.

According to a study published by the University of Arizona, there was only one restaurant in the entire town which desired to segregate. Because that restaurant desired to segregate, the local council decided to pass an ordinance.

The idea of passing this ordinance so worried Mr. Rehnquist that he not only wrote a lengthy letter to the local paper but also appeared before the city council to argue his case. He saw the idea as a "drastic restriction" on private property rights. While conceding that few wished to segregate, he said that their right to continue actions which "displease the majority" was more important than protecting people from blatant inequality and personal humiliation. He described the law as an "indignity on the proprietor" which sacrificed part of "our historic individual freedom." He was deeply offended by the idea that anyone could be forced to serve a family from an unpopular racist or ethnic group. There is nothing to indicate sensitivity to the rights of the victims of discrimination.

Mr. Rehnquist often talks about freedom. You often wonder whose freedom.

Contrary to some reports that Mr. Rehnquist was merely a local Goldwater sympathist, the same ordinance which he deplored was actively and proudly supported by Senator Goldwater. While Mr. Goldwater opposed Federal legislation on the issue he endorsed the local Phoenix law. In his 1964 campaign book, "Where I Stand," the Arizona Senator said that "just this year, I spoke out in favor of an improved public accommodation ordinance." Senator Goldwater was far behind the national majority on civil rights, but Mr. Rehnquist made Goldwater look like a civil rights activist.

Later, just 4 years ago, shortly before coming to Washington, Mr. Rehnquist again injected himself into a local civil rights controversy when he attacked a voluntary local desegregation effort suggested by the Phoenix school superintendent. In 1967, after intensive discussion in the local press, the Phoenix school official suggested some relatively minor changes intended to reduce the high level of local segregation.

The CHAIRMAN. Have you got much more? Your time is up.

Mr. ORFIELD. I will be done in about 2 minutes, Senator.

The CHAIRMAN. All right.

Mr. ORFIELD. Mr. Rehnquist attacked his proposals and argued that there was nothing wrong with the existing segregated schools.

The Phoenix school system has been officially segregated by State law until shortly before the Supreme Court's 1954 school decision. Segregated and terribly unequal schooling was commonplace in Arizona both for blacks and chicanos and conditions were particularly severe in Phoenix. Arizonans with Spanish surnames typically completed only 7 years of education. The smaller groups of black and Indian students in the system typically received 30 percent less formal education than the white students. The average white student in the city finished high school and began college. Achievement levels in the segregated schools were far below those in the white schools. The schools were failing miserably in holding and training the minority students. All this record was laid out in the Arizona Republic in a long series of articles to which Mr. Rehnquist was reacting.

Segregation of minority groups was a serious problem in Phoenix. Phoenix had a whole set of schools built and operated as ghetto schools during the time when there had been segregation under State law, patterns similar to that encountered in many Southern cities today. Even their names—Dunbar, Bethune, and Booker T. Washington—were classic ghetto school names.

The city had a long-established pattern—

The CHAIRMAN. Sir, your time is up.

Mr. ORFIELD. Thank you.

The CHAIRMAN. Place the rest of your statement in the record. We thank you very much for your testimony.

Are there any questions?

Senator HRUSKA. I have no questions, Mr. Chairman.

The CHAIRMAN. Barbara Hurst of the Ad Hoc Committee of Brown Students.

Please identify yourself for the record.

**TESTIMONY OF BARBARA HURST AND JONATHAN ROGERS, AD HOC COMMITTEE OF BROWN STUDENTS**

Miss HURST. Senator Eastland, does the committee have copies of our statement? They were to be distributed.

My name is Barbara Hurst. I am a senior at Brown University. With me is Jonathan Rogers, who is a sophomore at Brown University.

We represent the Ad Hoc Committee of Brown Students, which is a small group of students who heard Mr. Rehnquist speak last March and felt that it was important for the committee to know what Mr. Rehnquist said and to hear general student reaction to him.

Our statement is brief. It is in two parts, one part which Mr. Rogers will cover, is what Mr. Rehnquist said at Brown. I believe the Brown speech has been referred to in the transcript and Mr. Rauh referred to it yesterday.

Mr. Rogers was on the panel with Mr. Rehnquist.

The latter part of the statement, which I would like to present, is a brief discussion of student opinion.

We do have with us a petition signed by a thousand members of the Brown community—students, faculty, and administrative officials—opposing the nomination of Mr. Rehnquist and we would ask that our statement and the petition be received by the committee for insertion into the record.

The CHAIRMAN. It will be received for the committee's files.

Miss HURST. Thank you.

Mr. ROGERS. Our testimony here today is relatively narrow, Mr. Chairman. We speak only of what we, ourselves, experienced, even on what Mr. Rehnquist said or of our reactions to the statement.

There are several other witnesses who preceded us who have ably, I think, delved into his past and shown to the members of the committee doubtful "abiding fidelity to the Constitution," in Senator McClellan's words. Again, we are not speaking as generally as some of the other witnesses but only of that in which we had a part.

On March 11, in the Providence Journal, Mr. John Tiffney stated as one of the goals of the four Justice Department officials, who went to Brown University to find out "what the students are concerned about"—

The CHAIRMAN. Do I have a copy of your statement? Have you got a written statement?

Mr. ROGERS. Yes, we do; but we have important additions to it that we would like to make, if it is all right with you.

The CHAIRMAN. That is all right.

Mr. ROGERS. I believe the written statement has been distributed to the members of the committee.

The CHAIRMAN. Proceed.

Senator HRUSKA. It will be included in the record, in full; will it not?

The CHAIRMAN. Yes.

Mr. ROGERS. Thank you.

To repeat briefly, one of the goals of the Justice Department officials was to "find out what the students are concerned about."

We are concerned about Mr. Rehnquist, deeply concerned, and upset at the possibility of his sitting on the Supreme Court of this country.

The positions defended by Mr. Rehnquist in informal discussion and also during a panel discussion centering on wiretapping and surveillance provoked great student concern and dismay. In light of these views and his subsequent nomination to the Court, Mr. Rehnquist has himself become a vital issue.

Our purpose in making this statement is not primarily to inform members of the Senate Judiciary Committee about Mr. Rehnquist's views. The positions he defended are by now familiar. He reiterated the claim made earlier to a Senate Judiciary subcommittee that there is absolutely no constitutional bar to governmental surveillance of individuals who "might" be engaging in "possible" criminal conduct.

At the time, Mr. Rehnquist expressed no worry about the chilling effect such surveillance has upon constitutionality protected speech and association. He stated that in cases of national security wiretapping of domestic groups without prior judicial approval is entirely justified, arguing that the Justice Department often does not have the evidence necessary for wiretap authorization.

I refer the committee again to the Providence Journal article of March 11 of this year. A local attorney questioned the Department's practice of not obtaining judicial permission before installing wire taps in cases of national security. Mr. Rehnquist said in these cases the Department must protest against foreign intelligence or subversive domestic elements, yet it often does not have the evidence of criminal activity which would be an answer to the wire tap arguments.

Again Mr. Rehnquist expressed little concern about the obvious threat to individual's rights to privacy inherent in this procedure. In reply to many objections that such wiretapping and surveillance practices threatened the very spirit of a free society, Mr. Rehnquist stated that the protection of citizens' constitutional rights would depend and actually could depend upon the self-restraint of governmental officials. He indicated little awareness that rule of law means at least this: that rights are not at the mercy of fragile governmental benevolence but are safeguarded by bringing government under the law.

I refer now to an article in the New York Times of March 10 of this year concerning a statement that Mr. Rehnquist made before the Subcommittee on Constitutional Rights of this committee. At that point, Mr. Rehnquist stated and repeated almost the same words to us at Brown "the Justice Department will vigorously oppose any legislation which, whether by opening the door to unnecessary and unmanageable judicial supervision of such activities or otherwise, would effectively impair this extraordinarily important function of the Federal Government," that function being wiretapping and surveillance of citizens.

I refer the committee to, I think, an important answer to that statement before a subcommittee of the Senate Judiciary Committee by a member, Senator Mathias. He said, and again referring to the New York Times:

"The primary checks"—this is Senator Mathias—"the primary checks against abuse have been bureaucratic self-restraint, and the energies of the press. We need far more reliable and consistent controls."

If I may paraphrase Senator Mathias, he indicated that the Justice Department abided not by laws but by men, and at Brown University

the following day, Mr. Rehnquist repeated this assertion that he had made, to which Senator Mathias replied, indicating that he would like to do his best to keep it that way within the Justice Department.

Our purpose in making this statement here is to bring to the attention of the Judiciary Committee our grave concern at the prospect of approval of a Court nominee with such radical views on the role of law—or perhaps lack of role—in guarding rights we hold precious. In the years to come many complex issues regarding electronic and other means of surveillance, and other invasions of privacy, will come before the High Court. We do not wish to see such matters settled by one whose answers are predicated upon a simplistic and dangerous philosophy of trust in the discretion of men rather than the greater absoluteness of law.

Miss HURST. With your permission, may I read the latter part of the statement?

The CHAIRMAN. Certainly.

Miss HURST. As a result of the most recently enacted constitutional amendment, several million young voters have been enfranchised. Across the country, 18-, 19-, and 20-year olds are registering to vote and preparing for the first time to enter the democratic processes which govern this Nation.

Many sociological and psychological studies have been made of this new electorate; it has been theorized that our first political memories—of an assassinated leader—have made us instinctively distrustful of these processes and unwilling to place our trust in a Government or in men which we conceive, rightly or wrongly, as having so tenuous a hold on life and reason.

It must be true that events of the last several years have done much to alienate today's youth. We have seen our fellows beaten on the streets of Chicago, killed on the campuses of Ohio and Mississippi, and arrested en masse on the streets of Washington, D.C.

Yet a number of us feel to give up on these millions of young people—to assume that the alienation and distrust which we feel is so deep as to be irreversible—would be a grave mistake. Lack of hope and distrust of our leaders are feelings which do not sit well with youth in general. Youth perhaps more than any other faction of society, wants so desperately to believe in the ideals of our system that we are willing to reverse the feelings we have come to hold at the slightest inclination that perhaps they are wrong, that perhaps there does exist in this society a way back to a brief decade ago when we were indeed one Nation, unified by the hope that the United States was indeed solving its problems and that the dream of a great and fair society could be reached.

The youth of this Nation are not so naive as you may think. We realize that ideals such as liberty, justice and due process for all peoples are difficult to obtain and that our seeming loss of these values could not be remedied overnight. However, we do demand that these goals be always pursued and that the direction to them be cleared. We believe as wholeheartedly as any that the tools to reach these goals are available to us. We believe in the Constitution and we believe equally in the foresightedness and ability of Congress to give us legislation which will encourage our way toward a society which firmly holds to the tenets of that great document.

What we see now is a threat to that prospect.

We see the U.S. Senate faced with the decision to confirm the nomination of one who we firmly believe does not see that the road to domestic peace lies in expanded civil liberties and protection of the laws.

Mr. Rehnquist has affirmed time and time again that governmental functions such as law enforcement must take precedence over justice to the individual. He is one who, in this area, has tried to convince us that we should place our trust in men rather than in the Constitution which we have always felt to be supreme. Mr. Rehnquist has told us that the Supreme Court—long held by us to be the ultimate preserver of human rights—should no longer be allowed to preserve those rights, at least in the area of Government surveillance and wiretapping. He tells us that the courts must bow to the administrative process of which he has been a prime member for the past several years.

We are taught in our universities that what makes America great is that our Government is of laws and not of men; that we are guaranteed certain rights which no man or group of men can take away. Among these rights we have always considered freedom of speech, the right to privacy, and the right to due process. Yet we see a man whose comments at least to us last spring seemed a before-the-fact justification of the techniques used in the arrests of thousands of our fellows under conditions which in no way could fall under the due process and equal protection of the laws implicit in the Constitution.

We have seen the Justice Department attempt many times to stifle that dissent which we have always thought was one of the finer traditions of this Nation, and we have heard Mr. Rehnquist in particular call dissenters "barbarians." We are not here to advocate some of the activity that went on in Washington last May. We concede that some of that activity was unjustified and in fact was against the law. However, we do affirm that illegality must not be met with illegality. That demonstrators do occasionally break the law—the exception and not by any means the rule—does not by any standard acceptable to us justify the ignoring of the law which we saw on the part of the police. As one demonstrator remarked after the whole agonizing mess was over: "This city has become Saigon West. We were willing to take the consequences under the law, but they threw out the law on us."

We assume that the actions of the Justice Department on this and other occasions are more a reflection of Mr. Rehnquist's own thought than not. In fact, he told this committee that had he strongly disagreed with Justice Department policy he would not have remained in its employ.

We are not only willing but are anxious to place our trust, our faith, and our hope in this Government. We are willing and anxious, as we demonstrated in the 1968 presidential campaigns, to enter the democratic process with open minds and with whole hearts. But we do demand that that system reaffirm for us and show a firm commitment to the values of civil liberties and human rights which are necessary for this Nation to survive.

We have all studied hard what we heard Mr. Rehnquist say to us last March 10, and we have come to the conclusion, that at least in one very large area of law he does not believe in ideals which we think are mandatory for the United States to pursue. We therefore urge this committee to commit itself to those ideals and to reject the nomination of William H. Rehnquist to the U.S. Supreme Court.

The CHAIRMAN. Thank you.

Miss HURST. The committee will accept our petitions into the record?

The CHAIRMAN. Yes. Of course, I have said it would go into the record.

Miss HURST. Fine.

Senator BAYH. May I ask just one question, Mr. Chairman?

The CHAIRMAN. One. [Laughter.]

Senator BAYH. I did not have the privilege of hearing your statement, but do you feel, Miss Hurst and Mr. Rogers, that you are capable of making a judgment that the statements and the colloquy involved surrounding the statements at Brown did indeed constitute Mr. Rehnquist's own personal views?

Miss HURST. We assumed at the time, and had made the naive assumption, that what people say, especially with the force of Mr. Rehnquist, they do believe, or if they do not believe in those statements they make it clear. Since that time, of course, we have read parts of the transcript, and since that time Mr. Rehnquist has justified some of the tactics used at the May Day Demonstration, and we have heard him say, or we read the transcript and he said to the committee that had he not believed in Justice Department policy he would have resigned. We, therefore, more strongly believe that these were a reflection of his personal sentiments.

Senator BAYH. Thank you.

The CHAIRMAN. Thank you.

Mr. Forer, National Lawyers Guild.

Do you have a prepared statement?

#### TESTIMONY OF CATHERINE G. RORABACK, PRESIDENT, NATIONAL LAWYERS GUILD

Miss RORABACK. Yes; we do, Mr. Chairman.

My name is Catherine Roraback. I am the president of the National Lawyers Guild, and I am here on behalf of the guild to present our views in connection with the proposed nomination of Mr. Rehnquist and Mr. Powell to the Supreme Court. I believe our statement was filed with the committee.

The National Lawyers Guild is an association of attorneys and legal workers national in scope, as its name indicates, and in our meetings of the national executive board a week ago we went on record at that time in opposition to the nomination of both of these gentlemen, and the board asked me to present this statement to this committee.

Although the qualifications of these men appear to be an improvement over previous nominees who were overwhelmingly rejected by the people of the country and the Senate—

The CHAIRMAN. You are testifying against both nominees?

Miss RORABACK. That is correct, Senator; yes—in fact, both of the nominees have revealed by their conduct and public expression of their political beliefs that they are incapable of taking the oath required by their office to support the Constitution.

The views expressed by both men make it clear that they would be incapable of dealing fairly and impartially with issues arising out of the most pressing problems of our times: the struggle of blacks, other third-world people, women and other oppresses groups for social, political and economic equality.

As the Constitution is now interpreted, there appears to be room for these struggles to operate within "the system." The National Lawyers Guild suggests that the reinterpretations promised by Messrs. Power and Rehnquist would have the effect of foreclosing these struggles, or forcing them outside the system.

Senator GURNEY. May I inquire what "third-world people" means?

Miss RORABACK. Yes; it covers any of the minorities, and this is a sort of word, a phrase, that has been adopted generally to cover such persons as Puerto Ricans, Chicanos, and other oppressed minorities who are not included within the phrase black.

Senator HRUSKA. Is third world as far as you would go? Senator Eugene McCarthy insists there is a fourth world, and he is about to prove it with his effort to be preferred for public, high public, office. Would you agree that three world is not enough, there should be more than that?

Miss RORABACK. Well, I suppose we might have millions of words, but for a short-time phrase to cover the group we are talking about, this is the reason for the words.

The CHAIRMAN. Proceed.

Miss RORABACK. Mr. Powell's views on some aspects of these struggles have been recorded by him in an article which originally appeared in the Richmond, Va., Times Dispatch on August 1, 1971, and which has since been reprinted in the October 1971 issue of the FBI Law Enforcement Bulletin and the New York Times on November 3. Since Mr. Powell has never held judicial or public office, and hence lacks a public record to examine, it is essential to closely scrutinize this article in order to ascertain whether he is fit to serve on the highest court of the land.

In the article, Mr. Powell goes into great detail about the Government's burgeoning use of wiretaps in the absence of prior court order. In this, as in other areas, his position is in basic conflict with the tenets of the Constitution. To support such untrammeled invasions of constitutionally protected privacy, Mr. Powell uses the rationale that "there are only a few hundred wiretaps annually," and that "law-abiding citizens have nothing to fear."

Aside from the fact that, by his statements, he has prejudged one of the most sensitive issues currently before the Supreme Court for adjudication at this time and hence is incompetent to pass upon it, should he be appointed, Mr. Powell's position reflects a total nonunderstanding of and/or lack of regard for the history and theory underlying the fourth amendment's prohibition against unreasonable searches and seizures.

The fourth amendment was written into the Constitution to guard against the possible repetition of the colonists' experiences with massive and unrestricted searches of their homes by English authorities conducting investigations into subversive activities. The fourth amendment was to act as a barrier against official lawlessness; the constitutional barrier it creates is not dependent upon Mr. Powell's assessment of who is law abiding and who is not. The constitutional protections guaranteed by the fourth amendment were designed to protect all citizens from all arbitrary, unreasonable, and unlawful governmental activity.

Mr. Powell's justification of such unconstitutional activity by the Government warrants the closest examination. Having determined the crucial issues of whether domestic dissident groups are included within the category of threats to national security, by asserting:

... There may have been a time when a valid distinction existed between internal and external threats. But such a distinction is now largely meaningless.

He legitimizes the lawless actions of unsupervised wiretaps on the grounds of the need for secrecy. Mr. Powell heightens the urgency, in his view, of ignoring the Constitution by quoting from Attorney General Mitchell:

Prohibition of electronic surveillance would leave America as "the only nation in the world unable to engage effectively in a wide area of counter-intelligence activities necessary for national security."

To begin with, Mr. Powell's use of Attorney General Mitchell's hyperbolic statement is at best irrelevant and at worst hypocritical and misleading. The issue is not now and never has been whether the Government has the power to wiretap; the issue is whether this power is to be supervised by an independent judiciary that will insure that the constitutional requirements of the fourth amendment--the requirements of probable cause and reasonableness--are met, or whether the power will be used by executive fiat without judicial supervision.

This issue is key. Mr. Powell's willingness, even eagerness, to entrust the enforcement of the protections of the 4th amendment exclusively to the executive branch of Government would undermine one of the firmest foundations of our constitutional form of government: that of the separation of powers and checks and balances. From the very beginning of our Nation, it has been the genius of our form of government to clearly divide and separate the powers of government into separate and equal branches, and to balance one branch's power against the power of its equals.

To place on the bench a man who would have the judiciary totally abdicate its constitutional mandate under the 4th amendment to supervise the actions of the executive branch in this most sensitive area of individual privacy and liberty and who would give untrammeled power to the executive would be to gravely endanger our entire system of checks and balances and the separation of powers. Such a man is a far cry from the strict constructionist President Nixon claimed to have wanted.

Mr. Powell's apparent bias in favor of the executive branch to the detriment of the legislative and judicial branches is further evidenced by his glib dismissal of the allegations of several Senators and Congressmen that their telephones were being tapped or that they were under surveillance.

Despite the FBI campaign, recently discovered in the Media, Pa., FBI files, to instill the chilling fear in all Americans that there is an "FBI agent behind every mailbox," and that is a quote that came from those files, Mr. Powell blindly assesses that all such charges are "apparently . . . a part of a mindless campaign against the FBI."

An unstinting bias in favor of governmental action at the expense of constitutionally guaranteed rights is further evidenced by Mr. Powell's justification and commendation of the Government's policy of mass arrests in Washington, D.C., during the antiwar activities last May. He approves of the decision of the Justice Department to make

thousands of unlawful arrests, and then points to the wholesale dismissal of charges as an example of the soundness of our judicial system, a system he would have remain safely out of sight until after the damage of lawless governmental actions has ended.

In his article, Mr. Powell has passed judgment on several of the most important issues currently pending or that will probably come before the Supreme Court, in addition to that of the wiretap cases. Among other prejudgments, he states that, "the Kunstlers and others" are trying to disrupt trials and discredit and destroy our system. Not only does this libel courageous lawyers willing to defend unpopular clients and causes, but it indicates an attempt to intimidate others from doing the same.

Moreover, Mr. Powell may be called upon some day, if he were confirmed for the Court, to hear the contempt convictions of Mr. Kunstler and others now pending in the court of appeals and to hear cases of their clients. In his political views, Mr. Powell does not "bend" or "twist" the Constitution, to use the President's language. Rather, he totally ignores it.

Mr. Rehnquist has had greater opportunity to demonstrate his disregard of the Constitution, and demonstrate it he has clearly done. His invention of the fiction of "troop protection" to justify President Nixon's illegal invasion of Cambodia exhibited his attitude of total subordination of the legislative to the executive branch.

Mr. Rehnquist's views on the subject of wiretapping without prior court authorization for the purposes of "national security" are well known. Although he opposes integration in schools and public accommodations on the ground of maximizing individual freedom, he nonetheless supports gross invasions of first and fourth amendment rights by unsupervised wiretaps and governmental surveillance on the unproved grounds of governmental necessity.

Mr. Rehnquist's refusal to answer certain questions before this Senate Judiciary Committee on the ground that certain views were not his "personal views but rather those of a government advocate"—New York Times of November 4—is, at best, disingenuous. He was not forced into governmental service and was free to leave his employment at any time his conscience felt bruised. It seems safe to assume that the Nixon administration's policies on wiretaps and surveillance, policies that pose the greatest threat to liberty our Nation has faced in recent years, are clearly embraced by Mr. Rehnquist.

Furthermore, Mr. Rehnquist's public record of opposition to integration in schools and public accommodations alone is sufficient to disqualify him from sitting on the Supreme Court, since it reflects a complete disdain for basic constitutional rights that have been upheld by the Supreme Court in unanimous decisions for the past decade and a half.

Mr. Rehnquist's timely and recent disavowal of his opposition to a Phoenix public accommodations ordinance—New York Times of November 4—is not, we believe, as accurate an indication of his views as his original opposition. Many issues are and will be before the Court involving the legitimate demands of racial and other minority and disadvantaged groups for full equality on our society.

It woud seem that Mr. Rehnquist's often-stated position that "we give up a measure of our traditional freedom"—Rehnquist letter, 1964,

quoted in New York Times, November 3, 1971—whenever the courts read the 14th amendment as encompassing classes of citizens excluded from full participation in economic and political life would preclude him from determining such cases in such a way as to bring oppressed groups within the purview of equal protection of the law. As Mr. Rehnquist himself has stated :

It is no accident that the provisions of the Constitution which have been most productive of judicial lawmaking—the “due process of law” and “equal protection of the laws” clauses—are about the vaguest and most general of any in the instrument. \* \* \* If greater judicial restraint is desired, or a different interpretation of the phrases “due process of law” or “equal protection of the laws”, then men sympathetic to such desires must sit upon the high court.

That is a quote from an article which he wrote in the Harvard Law Record.

It seems quite clear that Mr. Rehnquist would be just such a Justice and it is completely legitimate for the Senate and the American people to ask whether our country can afford such a narrow, insensitive, and unjust approach at this time. The National Lawyers Guild strongly believes that we cannot.

In a very concrete way, the appointment to the Supreme Court of two men who will read the protections of the 14 amendment in the most rigid and narrow fashion will serve to perpetuate the disadvantaged position of women and racial and economic minorities in our country. “Strict construction” in regard to the 14th amendment assures the continued exclusion of women and blacks, and other third-world persons, from full participation in our economic, social, and political system because of institutionalized sexism and racism. Such a position is intolerable in 1971 and should, by itself, serve to disqualify both Mr. Rehnquist and Mr. Powell from the Court. In addition, the complete inactivity and silence of the ABA on the question of equal rights for women while Mr. Powell was president, and Mr. Rehnquist’s equivocal testimony on the equal rights amendment, demonstrate that both of these men are at best neutral and at worst hostile to the completely timely and legitimate demands of women for full equality in our society.

We believe it is important to put the issue of what qualities are minimally necessary for a prospective Supreme Court Justice into a theoretical as well as practical framework.

In his message announcing the nominations of Mr. Powell and Mr. Rehnquist, President Nixon states that one of the criteria he had used in making his selections was that the nominees have a conservative “judicial philosophy.” In explaining what he meant by this, the President developed an elaborate dichotomy between a judge’s judicial philosophy on the one hand and his personal political philosophy on the other. He states that a judge “should not twist or bend the Constitution in order to perpetuate his personal, political, and social views.” (Transcript of Presidential announcement, New York, October 22, 1971.) Such a dichotomy is a complete denial of reality. There are indications that the President himself is aware of the unreality of the separation, since the examples he cited of what a judicial conservative would do included reversing the balance “against the peace forces, against Governors and mayors, against the police and courts.” (Nixon, quoting Walter Lippmann with approval, in announcement, New York, October 22, 1971.), all of which are highly

political issues involving a Justice's social and political views of where the proper balance of rights between the society and the individual should be drawn.

In the past, Mr. Rehnquist has recognized how much a jurist's judicial philosophy is but the mirror of and funnel for his social and political beliefs. He recognized this explicitly when he wrote, "the law of the Constitution [is not] just 'there,' waiting to be applied in the same sense that an inferior court may match precedents." (Rehnquist, Harvard Law Record, 1969, quoted in New York Times, Nov. 3, 1971.)

Since the law is not just "there," a judge must bring to its interpretation all of his own social and political views. Mr. Rehnquist's views as stated in the Harvard Law Record would seem to be a more accurate guide to how he will function on the Supreme Court if approved, than his more recent statement, made under questioning by this committee, that he would "totally disregard [his] own personal beliefs in construing the Constitution and laws," (New York Times, Nov. 3, 1971.)

Before he became a nominee, Mr. Rehnquist had urged the Senate to "thoroughly inform itself of the judicial philosophy of a Supreme Court nominee before voting to confirm him." (New York Times, Nov. 3, 1971.) The National Lawyers Guild urges nothing less than what he recommended: that the Senate carefully scrutinize the judicial philosophies of the nominees before consenting to their appointment since those philosophies will help forge the political path our Nation is to take for many years to come.

The simple truth is that the Constitution has continued to survive as a viable instrument for the governance of our Nation because the Supreme Court has over the years had a majority of Justices who believed in interpreting the deliberately vague and flexible provisions of the Constitution in such a way as to begin to encompass some of the legitimate demands of oppressed and disadvantaged groups for full, equal, and meaningful participation in the economic, social, and political life of our Nation. The struggles of these groups have really only begun, but they have obtained sufficient momentum that they will not be turned around or suppressed. To revert at this time in our history to the days when the Supreme Court sanctioned and supported official governmental policies of racial inequality, injustice, sex discrimination, and gross economic disparities and deprivations would not only be morally indefensible but politically impossible as well. The Supreme Court requires today, as never before, the appointment of statesmen to it.

In confirming or rejecting nominees to the Court, the Senate, as a coequal of the President, is charged with the responsibility of insuring a qualified, independent bench. Such a role is far different from the one the Senate plays in passing upon the President's appointments to positions within his own executive branch of the Government. There the President's assessment of a nominee's qualifications carries far greater weight. A Supreme Court Justice is, instead, an independent servant of all the people and his qualifications must be assessed by the Senate within this context.

The Senate has rightly considered Mr. Powell's ownership of \$1 million in stocks as a legitimate area of inquiry because of the effect such holdings might have on his ability to render impartial decisions

in cases involving such financial interests. The National Lawyers Guild believes that the social and political philosophies of both nominees are of far more critical importance in assessing whether they are fit to serve on the highest bench of the land, since the effect of their philosophies, while perhaps less tangible than that of financial holdings, will be far heavier and more pervasive when they decide issues and cases of the greatest importance.

The CHAIRMAN. Would you place the rest of your statement in the record?

Miss RORABACK. I just had one other interpolation I wished to make. I was down to the last two sentences.

The CHAIRMAN. All right.

Miss RORABACK. Nominees can divest themselves of their financial holdings; they cannot divest themselves of their social, political and economic prejudices and beliefs. And, in that connection, I would like to note that I saw a newspaper report of hearings before this committee since the preparation of this statement that Mr. Powell indicated he would disqualify himself in all cases involving his financial holdings, but on the question of the wiretap issue he saw no reason why he could not participate. This seems to me crucial in what we are saying that Mr. Powell and Mr. Rehnquist, because of their beliefs and biases, should be found by this committee to be unfit for service in the highest Court and, accordingly, I urge this committee to reject the nominations.

Might I also, if it has not been made a part of the record, submit a copy of the article by Mr. Powell as part of my statement.

The CHAIRMAN. It will be made an exhibit.

(The article referred to was filed with the committee.)

(Short recess.)

The CHAIRMAN. Let us have order.

I see here that John W. White, next on the list, is from Washington. I am going to take Mr. Paul O'Dwyer and then go back to Mr. White.

Senator BAYH. Mr. Chairman, while the next witness is coming to the table, could I make one observation, please?

The CHAIRMAN. Sure.

Senator BAYH. I apologize for being late and not being here when the committee started for the afternoon session. I understand that reference was made to a FBI report about the alleged voting irregularities supposedly involving Mr. Rehnquist.

The chairman has mentioned that Mr. Rehnquist's name was not contained in that report. I have had the opportunity of reading it myself, and while no validation is necessary of the chairman's assessment, I do want to say that Mr. Rehnquist's name is not in that report.

I think it could be further said without disclosing any of the privilege contained in the report, that this report covered only one precinct, the Bethune precinct, in one election in the 1962 elections.

The CHAIRMAN. Yes; it covered the whole FBI investigation.

Senator BAYH. Of the one precinct.

The CHAIRMAN. Correct.

Senator BAYH. In the one election in 1962

Mr. O'DWYER. Mr. Chairman, did you say Mr. White or Mr. O'Dwyer?

The CHAIRMAN. No; I said we would take you first and take him next.

Mr. O'DWYER. I see. Thank you, sir.

The CHAIRMAN. Senator, you are not leaving the inference there that Mr. Rehnquist was in any way involved?

Senator BAYH. No; quite the contrary.

The CHAIRMAN. In any other election?

Senator BAYH. I wanted to make it very clear, first of all, that I concurred in your assessment of what was not in the FBI report.

The CHAIRMAN. That is right.

Senator BAYH. His name was not in the report.

The CHAIRMAN. I think we ought to bring it all out now. The FBI keeps a cross-reference, and any time a man's name is mentioned in any investigation, when they begin a full field investigation, they show it in there, but there is no election matter that his name was mentioned.

Senator BAYH. Other witnesses have suggested voting irregularities. I asked Mr. Rehnquist himself. I do not know of any other FBI reports, I suppose there are none, but inasmuch as the allegations—and they may be totally erroneous; I suggest they are until we have proved the contrary—but allegations have been made. I have here clippings alleging various allegations, and I think many—if not all—of these allegations are politically motivated, having nothing to do with this nominee. But these allegations cover elections from 1962, 1964, 1966, and 1968.

The only FBI report we have, and the only FBI report that I can attest to, is the one concerning Bethune precinct in 1962.

The CHAIRMAN. Well, of course, there has been a full field investigation of Mr. Rehnquist, and he certainly came through with flying colors.

Mr. O'Dwyer, how long do you want, sir?

#### TESTIMONY OF PAUL O'DWYER, ATTORNEY, NEW YORK CITY

Mr. O'DWYER. About a half hour, sir.

The CHAIRMAN. I'm going to trade with you; let us make it 20 minutes.

Mr. O'Dwyer. I am afraid that I will be halfway through, and I was very much impressed by the dialog between the Senators and the witnesses today. I think they sharpened up the issues, and I would hope we would have similar dialog between myself and the committee.

The CHAIRMAN. I cannot promise you unlimited time.

Mr. O'DWYER. We will see how it goes along, Mr. Chairman.

The CHAIRMAN. Sir?

Mr. O'DWYER. We will see how it goes along.

The CHAIRMAN. All right.

Mr. O'Dwyer. I am here at the request of the New York Americans for Democratic Action, to submit a statement to the Senate committee in connection with the candidacy of Mr. Powell for a position on the U.S. Supreme Court, and I would like to offer that without reading it, so we have saved about 10 minutes there, Mr. Chairman.

The CHAIRMAN. That will be admitted.

Mr. O'Dwyer. I would like to express my thanks to the committee for the opportunity to speak in opposition to the nomination of Lewis F. Powell, Jr., to the Supreme Court of the United States.

I have noted, with a measure of chagrin, the list of supporters for President Nixon's latest nominees to the Court, Mr. Powell, of Virginia, and William H. Rehnquist, of Arizona. Both have been eloquent spokesmen for wiretapping and other insidious governmental techniques designed to stifle dissent and to challenge personal liberties guaranteed by the Constitution and the Bill of Rights.

Mr. Rehnquist is perhaps better known for his thoughts, which are, in my opinion, in complete and absolute contravention of the Constitution. But Mr. Powell also shares the same philosophy as his colleague from Arizona. The effect of the massive criticism of Mr. Rehnquist has had the unsettling effect of diverting attention away from Mr. Powell. From what I have learned and read, the distinction between them is one of style.

Because I have been involved lately in preparing the defense for Father Philip Berrigan and others who are charged by the Justice Department with having plotted to kidnap Presidential Aide Henry Kissinger and to blow up Government heating plants in Washington, I am acutely aware of that Department's use of electronic surveillance. The Justice Department, by the way, has already admitted to tapping, without a court order, the telephone of at least one of the defendants in the *Harrisburg* case.

In the October 1971 issue of "FBI Law Enforcement Bulletin," Mr. Powell, among other things, negates the threats to civil liberties—which many contend are very real—and with shocking disregard for due process, continues the lies about the Berrigans, which has poisoned the case since before even an indictment was handed down.

On behalf of my clients, and the thousands of other Americans—some of whom are Congressmen and Senators—who have been subject to illegal Government surveillance, it is vital that voices be raised against these insidious practices in general and Mr. Powell's nomination in particular.

But let me get back to the Powell article, which he originally wrote for the Richmond Times-Dispatch on August 1, 1971, and which was reprinted not only by the FBI, but also by the prestigious New York Times on November 3, 1971. There are, indeed, many constitutional questions raised in his article, "Civil Liberties Repression: Fact or Fiction." Allow me to present a few of his more salient pronouncements:

The outcry against wiretapping is a tempest in a teapot. There are 210 million Americans. There are only a few hundred wiretaps annually.

**The CHAIRMAN.** Could we put that in the record now? It has been used a half dozen times by different people.

**Mr. O'Dwyer.** It should not be used merely a half dozen times, Mr. Chairman.

**The CHAIRMAN.** All right.

**Mr. O'Dwyer.** It should be used and used and used until every American hears it.

**The CHAIRMAN.** All right. Now you have got 10 minutes.

**Mr. O'Dwyer.** I would object to a limitation of time, Mr. Chairman.

**The CHAIRMAN.** Well, I don't care what you object to. I have to have some order in these hearings to hear everybody.

**Mr. O'Dwyer.** I would hope I am not too lengthy, and I think these are important enough for the Senate to hear, and I insist that I be permitted to speak from them. I represent clients who have been

maligned by the men whom you are going to vote for, and I insist on the right to be heard here. If I cannot be heard here, anywhere else—

The CHAIRMAN. You are not going to bluff us.

Mr. O'Dwyer. Neither is the Chairman going to bluff me, sir.

The CHAIRMAN. I am not trying to bluff you.

Mr. O'Dwyer. I hope not. It just is not going to work.

The CHAIRMAN. You only have 10 minutes.

Mr. O'Dwyer (reading) :

There are only a few hundred wiretaps annually, and these are directed against people who prey on their fellow citizens or who seek to subvert our democratic form of government. Law-abiding citizens have nothing to fear.

Nothing to fear? Every citizen certainly does have something to fear when the rights of any one are diminished and when any branch of Government fails to honor the law. Chief Justice Warren has spoken clearly on the subject:

Our Bill of Rights, [he wrote] the most precious part of our legal heritage, is under subtle and pervasive attacks . . . In the struggle between our world and Communism, the temptation to imitate totalitarian security methods must be resisted day by day . . . When the rights of any group are chipped away, the freedom of all erodes.

Or, hear the thoughts of Herbert H. Lehman, the first U.S. Senator to publicly condemn a fellow Senator at an earlier era, who also claimed that law-abiding citizens had nothing to fear.

Lehman wrote:

The threat to democracy lies, in my opinion, not so much in revolutionary change achieved by force or violence. Its greatest danger comes through gradual invasion of the Constitutional rights with the acquiescence of an inert people, through failure to discover that Constitutional government cannot survive where the rights guaranteed by the Constitution are not safeguarded even to those citizens with whose political and social views the majority may not agree.

Or, again, recall the exact wording of the fourth amendment. The authors of this amendment, prompted by Thomas Jefferson, held:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

I represent a number of defendants whose crime is their total opposition to a war which was unconstitutional in its inception and whom vast numbers of Americans, including Senators and Congressmen, have condemned as immoral as well as illegal and unwise. By Mr. Powell's pronouncement, their chances for a fair trial have been diminished. This, gentlemen, is unconscionable and I would hope that the Senators would question Mr. Powell again closely on this subject of great importance, not only to my clients but to all Americans and it must bear on his right to sit on our highest court.

In 1789, when the Constitution and the Bill of Rights were declared "in effect" by the Congress, each citizen was guaranteed the right of privacy. Constitutional scholars and the courts have long held that the right of the people to be protected against techniques, such as electronic surveillance, is inherent in the fourth amendment.

"A man is as safe in his home as a prince is in his castle," wrote James Otis, and neither man nor Government has any right to violate it without the due process of law. By his words, Mr. Powell rejects these sacred concepts.

Let me cite a court case having great bearing on the matter and scope of electronic surveillance. In *Katz v. United States*, 389, U.S. 347, 352, 1967, the Court, in a landmark decision, wrote :

Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any "technical trespass" under . . . the legal property "law." (Citing *Silverman vs. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 682, 5 L Ed 2d 734.)

Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

No less than an individual in a business office, or a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

The impression is being given to the public, by no less than the President of the United States, that new Supreme Court nominees are to reverse the trends developed by the Warren Court. This implies, for example, that outlawing interference into private conversations is the sole invention of the Warren era. But the history of the sacred right to privacy of the fourth amendment predates recent court decisions by two centuries and is deeply imbedded in American tradition. For one of the earliest challenges against unreasonable searches came when James Otis, a distinguished, brilliant patriot from Boston, argued in 1761 that under the writs of assistance, general authorizations for officers to break doors and ransack homes and stores was illegal "Upon the ground that they put the liberty of every man into the hands of every petty officer." Of Otis' denunciation of these flagrant violations to privacy, John Adams offered the following comment: "Then and there was the child liberty born."

And almost two centuries later, it became necessary for Congress to enact the Federal Communications Act of 1934, 47 U.S.C. 605, 1958, which prohibited under criminal penalties the interception and public divulgence of the contents of any wire communication or its interception and use for personal benefit. This provides coverage on both interstate and intrastate telephone calls. Evidence obtained must be suppressed in the Federal courts.

Back to Mr. Powell. He also writes that—

The Government also employs wiretaps in counterintelligence activities involving national defense and internal security. The 1968 Act left this delicate area to the inherent power of the President.

In an affidavit, Mr. Mitchell—who sees eye to eye with Mr. Powell—submitted to the U.S. District Court for the Middle District of Pennsylvania, on May 13, 1971, he made this startling admission pertaining to the Harrisburg case :

The surveillance of the telephone installation at the premises described was one authorized by the President, acting through the Attorney General and was deemed necessary to protect against a clear and present danger to the structure or existence of the Government of the United States. The decision to authorize such surveillance was based upon the information contained in a request of the Director of the Federal Bureau of Investigation which was considered in conjunction with the entire range of foreign and domestic intelligence available to the Executive Branch of the Government.

In other words, both Mr. Mitchell and Mr. Powell claim that the President is above the law, the Constitution, and the fourth amendment whenever Mr. Hoover claims the facts constitute "a national security case."

However, our Constitution provides a system of checks and balances to protect the citizen against any excesses of the executive branch. The Supreme Court and Congress provide that balance. But Mr. Powell would not assist in supplying that check. He has already taken sides with the executive branch. On the Court, he would be but their echo. And I contend, gentlemen, that the U.S. Senate should question Mr. Nixon's nominee to discover to what extent he will be the mouthpiece of the retrogression of this administration.

The question presented is not a differing legal philosophy but concerns deep-rooted commitments. The question is whether the new judge could possibly, in view of his firm positions, be an appropriate member of the judicial branch of Government, acting to protect the rights of citizens against the inroads of either the administrative or legislative branches of Government in contravention of the citizens constitutional rights. Mr. Nixon says he will not speak to the new jurist nor seek to influence his opinion. On the basis of the views openly expressed by Mr. Powell, briefing by the President would be totally unnecessary.

In the Omnibus Crime Act of 1968, 18 U.S.C. 2510, Congress recognized and sought to protect the privacy of telephone conversations and communications; 18 U.S.C. 2515 provides—

Whenever any wire or oral communication has been intercepted, no parts of the contents of such communication and no evidence derived thereon may be received in evidence in any trial \* \* \* If the disclosure of that information would be in violation of this chapter.

#### 18 U.S.C. 2516 reads:

The Attorney General \* \* \* may authorize an application to a Federal judge of competent jurisdiction for \* \* \* an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or by a federal agency having responsibility for the investigation of the offense as to which the application is made \* \* \*

So, as late as 1968, the Congress reaffirmed our most basic concepts of the law and the fourth amendment. If Mr. Powell is confirmed by the Senate, I believe all of us will wonder whether he will reaffirm what has been basic to this country from its earliest times, or lean toward the more recent efforts to whittle those rights until the words become meaningless rhetoric.

Getting back to the Powell article, let me cite another paragraph which challenges another basic constitutional right, the right to a free trial. Mr. Powell writes—

The radical left, with wide support from the customary camp followers, also is propagandizing the case of the Berrigans.

The guilt or innocence of these people remains to be determined by juries of their peers in public trials. But the crimes charged are hardly 'political.' In the *Davis* case, a judge and three others were brutally murdered. The Berrigans, one of whom stands convicted of destroying draft records, are charged with plots to bomb and kidnap.

As one of the attorneys for Father Philip Berrigan, I must condemn this statement both as an untruth and a flagrant violation of the defendants' right to a fair trial. For what Mr. Powell has done is to add his comments to the already building number of newspaper clippings and radio and television tapes, filed under the subject of prej-

udicial pretrial publicity. The Government, headed by J. Edgar Hoover and John Mitchell in the beginning, and now Mr. Powell, are the primary culprits. What Mr. Powell has done is to perpetuate lies already festering like cancer sores on the very Constitution he claims to cherish. Allow me to elaborate:

On November 27, 1970, J. Edgar Hoover issued a statement to the press, justifying his appeal to a Senate committee for \$14 million to hire additional FBI agents. Mr. Hoover wrote—

Willingness to employ any kind of terrorist tactics is becoming increasingly apparent among the extremist element. The principal leaders of this group are Philip and Daniel Berrigan \* \* \* The plotters are also concocting a scheme to kidnap a highly placed government official.

That was the opening gun, so to speak, of the Harrisburg indictment, the most recent case of which Father Philip Berrigan is one of the defendants. Two days after Mr. Hoover's pronouncements, the press had the rest of the news. The highly placed official was Presidential adviser Henry Kissinger. It takes little imagination to foresee the height of public interest generated by these announcements. All media, responding as they could be expected to respond, blasted the news across the country, including Harrisburg, Pa.

Almost immediately after Mr. Hoover's statements, a distinguished Congressman, the Honorable William Anderson of Tennessee, requested in no uncertain terms that Mr. Hoover either apologize for bandering the names of Father Philip and Father Daniel Berrigan, or produce evidence for an indictment. About a month later, an indictment was handed down, listing Father Philip Berrigan as a defendant and Father Daniel Berrigan as a coconspirator. But the indictment only brought further questions about Mr. Hoover's capacity, and in the spring a superceding indictment was handed down—this time all reference to Father Daniel Berrigan was removed altogether from the indictment.

It has been argued that the publicity had died down and Mr. Hoover's outrageous barrage might be forgotten. But Mr. Powell would not let that happen. His statement in a national newspaper and magazine would be unjustifiable even if true. The fact that it is demonstrably false makes it indefensible.

"The 'Berrigans,'" wrote Mr. Powell this month, "one of whom stands convicted of destroying draft records, are charged with plots to bomb and kidnap." Father Philip Berrigan is a defendant in the *Harrisburg* case. As I said previously, Father Daniel Berrigan is not.

I am told that Mr. Powell stands highly recommended by the ABA, which he once headed. Last year, the same American Bar Association finally gave its attention to the problem, and published a report entitled, "The Prosecution Function and the Defense Function." Chief Justice Warren E. Burger was then the chairman of the advisory committee. An admonition contained in the ABA report presents this guide to prosecutors—

The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

How the American Bar Association can reconcile its endorsement of Mr. Powell with his violation of its own lofty principle is difficult to understand. It would seem that a review of their decision by virtue of these disclosures would be a signal to all young practitioners that they may look to that august body for future inspiration.

Publicity associated with a case has held the interest of the courts in the *Sol Estes*, *Dr. Sheppard*, *Chicago 7*, and *Panthers* cases. Not only does Mr. Powell see no danger in pretrial publicity, but in violation of law and good practice does his share to pollute the Harrisburg atmosphere. I would think it right and proper for the Senate to question him on this subject in great depth.

The Reardon report, again of the American Bar Association, headed by Paul Reardon, associate justice of Massachusetts, was published in 1968. It dealt with free press and free trial questions. The preamble contained this paragraph:

It is our belief that this accommodation (first and sixth amendments) will be found principally in the adoption of limitations—carefully defined as to content and timing—on the release of information bearing on the apprehension and trial of criminal defendants by members of the bar and by law enforcement agencies with appropriate remedies available when there is a showing that a fair trial has been jeopardized.

How can a man behave impartially on the bench when he has violated the basic concepts laid down by such a distinguished committee for the behavior of lawyers.

As to Mr. Powell's claim that my clients will receive a fair trial by "a jury of their peers," if they do—

The CHAIRMAN. We will have a 5-minute recess.

Mr. O'DWYER. What did you say, Mr. Chairman?

The CHAIRMAN. I said we were going to have a 5-minute recess at this point. You are excused.

Mr. O'DWYER. What did you say, sir?

The CHAIRMAN. I said you are excused.

Mr. O'DWYER. Is the 5-minute recess for the purpose of getting me out of the room?

The CHAIRMAN. No.

Mr. O'DWYER. I had one page left to go.

The CHAIRMAN. Go ahead, that is all right.

Mr. O'DWYER. As to Mr. Powell's claim that my clients will receive a fair trial by a "a jury of their peers," if they do, it will be with no help, but much hindrance, from the President's nominee.

In another phrase. Mr. Powell asserts that the "radical left, with wide support from the customary camp followers, also is propagandizing the case of the Berrigans."

I contend that this kind of name-calling of any accused yet to be tried not only lacks good taste, but is grossly inappropriate for one whose ambition includes appointment to our highest tribunal.

We have long been plagued with men in high places who render lip service to the Bill of Rights, but with every fiber undermine its effectiveness by seeking to limit its application. Mr. Powell falls into that category. Whatever may be his usefulness in an adversary proceeding, he lacks the commitment to the spirit of our personal guarantees which would entitle him to your approval. There is a requirement of a judge that he be temperate. That is, that he withhold his opinion until he at least has heard the facts. This would seem to be a minimum requirement for a justice of the peace. Sounding off on a case pending before the courts where the very question of the effect of publicity on a fair trial has been raised, would be enough to disqualify a candidate unqualified irrespective of his background or education or skill.

Washington, Jefferson, Franklin, Otis, and Paine are names that will forever be revered, not only here but wherever men meet to discuss freedom. These hallowed leaders laid down a set of rules and bid us follow them if we were to inherit from their sacrifice. Your function must be to guard their gifts for us and for posterity.

Thank you, Mr. Chairman.

Senator KENNEDY. Mr. O'Dwyer, I have no questions. Because of the exigency of time, we won't talk about the Irish Revolution today.

Mr. O'DWYER. I will be glad to take it up with you, Senator.

The CHAIRMAN. I have a statement. I announced this morning that I hoped before the day is over to put in the record some discrepancies that were inaccurate in the testimony on yesterday. We have not yet received the transcript of the testimony of yesterday afternoon; we have received that of yesterday morning. I am going to have to complain to the reporting service that it is their duty to get the transcript of the testimony up to the committee the morning following the testimony. But it will be done just as soon as we can receive it and go over the transcript of the testimony yesterday afternoon.

Thank you, sir.

Senator KENNEDY. Mr. Chairman, could I ask, are those items you just mentioned comments about both Mr. Rehnquist's and Mr. Powell's responses to these charges or allegations, or are they—what is the nature of it? Is the material being introduced now into the record?

The CHAIRMAN. No, sir. I said I did not have it.

Senator KENNEDY. Will it be in behalf of those gentlemen?

The CHAIRMAN. I am just going to point out discrepancies that I consider in the testimony yesterday.

John W. White. Proceed.

#### **TESTIMONY OF JOHN W. WHITE, LEGISLATIVE DIRECTOR, NATIONAL ALLIANCE OF POSTAL AND FEDERAL EMPLOYEES**

Mr. WHITE. Mr. Chairman and members of the distinguished Senate Judiciary Committee, I am John W. White, legislative director for the National Alliance of Postal and Federal Employees.

I am accompanied by Mrs. Celeste Gee, my secretary.

Mr. Chairman, at this point I would like to identify my organization as being a member of the Leadership Conference, and further state that we agree with the position that was taken by Mr. Clarence Mitchell and Mr. Joe Rauh yesterday in this room.

The Alliance is a national industrial union of 45,000 members who work for the U.S. Postal Service and other Federal agencies throughout America. Membership is made up predominately of blacks, females, and other minorities. It is black-controlled and came into existence in 1913 to resist a conspiracy between a white racist postmaster general and a white union to eliminate black Americans from the postal service. It is an independent union which addresses itself to the total needs of all postal and Federal employees, without regard to craft, race, color, sex, or national origin.

Fifty-eight years of struggle for civil rights and civil liberties have forced this organization to remain alert to all threats to the freedom of all American citizens, and that is our chief reason for being here today because of our concern.

Freedom of speech remains a question of very high priority to postal and Federal employees, which brings us to nominee Rehnquist's reported statements in an address September 18, 1970, on "Public Dissent and the Public Employee", before the Federal Bar Association in Washington, D.C.

He stated—

The free speech guarantee of the First Amendment is probably the best known provision of our Constitution. It is entirely proper that this is so, since the right of freedom of expression is basic to the proper functioning of a free democratic society.

He later qualified this statement thusly—

Less well known, but equally important, are those restrictions on complete freedom of speech which result from the balance of competing interests in the jurisprudential scale—the need to preserve order, the need to afford a remedy to the innocent victim of libel, need of government to govern. It is the conflict between the latter and the free-speech clause with which we shall deal today.

Mr. Chairman, as an aside, since the reorganization of the U.S. Postal Service, the Postmaster General imposed a gag rule on postal employees which dared us even to come to our Senators, such as you and others, to attempt to seek redress for our problems where we worked and in the community and, of course, this makes us further sensitive to the possibility of having a Member of the U.S. Supreme Court who would follow this line of thinking and of action.

Speaking further about American citizens who work for the government, he said—

The courts have made it quite clear that just as the government does not have the freedom to deal with an employee in this area as would a counterpart employer in private industry, so the public employee does not have the same freedom from government restrictions on his public statements as would the employee's counterpart in private industry. The government as employer has a legitimate and constitutionality recognized interest in limiting public criticism on the part of its employees even though that same government as sovereign has no similar valid claim to limit dissent on the part of its citizens.

Public employees are second-class citizens if they are white and male because of the denial of freedom of speech and full political participation in the American elective process. They are third-class citizens if they are male and black or white and female. They are fourth-class citizens if they are female and black.

Mr. Chairman, my organization has long concerned itself with the plight of females in America, whether black or white, and they are the people, and other minorities, who will be hurt the most if Mr. Rehnquist goes to the Supreme Court. On the question of voting as a public servant, we are prohibited from seeking political office on a partisan basis.

Mr. Rehnquist's espousal of unilateral action against public expression by public employees and heightens the frustrations of employees in the private sector who embrace the first amendment concept of freedom of speech.

Contemplation of the nominee creates fears concerning his image. His appointment to the U.S. Supreme Court will do little to calm a disturbed America where blacks, females, the young, and others experience mounting frustrations because of the basic denials imposed on them.

The concept of harsh law and order enforcement and the denial of the freedom of speech are closely associated with Mr. Rehnquist by

members of this organization, and they represent 45,000 people throughout America, and this feeling about Mr. Rehnquist is associated with his public undemocratic statements and actions.

The nominee's active opposition to an ordinance, in Phoenix, Ariz., 7 years ago, requiring restaurant owners or other public facilities to admit people of all races and his opposition to busing to eliminate discrimination in education, identify him with the great white majority in power who make a mockery of the Bill of Rights, the American Constitution, and human dignity.

At this time, Mr. Chairman, with your permission, I would like further to identify myself with the statements of Mr. Joseph Rauh and Mr. Clarence Mitchell, which were made here yesterday. It is with a sense of bitterness that my organization expresses the view that the white majority in power in America is responsible for the social and economic conditions which now adversely affect us, which confuse us, and divide us.

The white majority in power has driven responsible minded blacks and other people to a point of frustration because of the knowledge that no action is taken many times by that majority to meet the needs of its citizens, particularly where they are black or other minorities, and I would plead with the chairman of this committee, and later, the Senate, to take the indicated action here to give us hope.

Confirmation of Mr. Rehnquist will further erode the confidence of the black, the young, the women, the foreign born, and those who work and pray for a better America. Continued nomination of individuals who place property rights above human rights feed the disillusionment.

It is significant that so many nominees must be forgiven for their past sins in race relations in order to receive confirmation to America's highest court. The nominee in this case must be forgiven or rejected. You are urged to vote against Mr. Rehnquist.

Mr. Chairman and members of the committee, it is a further insult to this organization to observe the President of the United States continue to submit the names of individuals who possess biased views and social and economic issues. This is an affront to people in this organization when he continues to send up such nominees, and it is puzzling that so much time is consumed in considering such individuals with poor records in racial relations, and it is wondered why we cannot reject them more readily and force the President of the United States to submit the names of people, of nominees for the Supreme Court, who have an appropriate background and who are responsive to the needs of all Americans.

Mr. Chairman, I thank you for this opportunity to appear before your august committee and I truly enjoyed being here.

**The CHAIRMAN.** Thank you.

Mr. HOLLOWAY. There are a number of witnesses here today who have indicated a desire to testify generally with respect to the abortion issue and who have indicated their intention to appear together before the Committee en banc.

They are, and if they would come forward, Lucille Buffalino, Margaret Devlin, Mrs. Florence Quigley, Annette Garkowski, Elizabeth Corbett, Imeld Jensen.

**The CHAIRMAN.** Ladies, we will put your statements in the record. We would like to hear your comments.

**TESTIMONY OF LUCILLE BUFFALINO, CELEBRATE LIFE  
COMMITTEE, LONG ISLAND, N.Y.**

Mrs. BUFFALINO. Honorable Chairman, honorable Senate committee members, my name is Lucille Buffalino and I represent the Long Island Celebrate Life Committee.

Many people in this country feel that abortion is at the head of their list of injustices in the world. The Rabbinical Council of America and various other faiths have also echoed their sentiments along this line.

This viewpoint has been embodied for many years in laws passed by State legislation. These laws regard the unborn child as a living human being, whose life is sacred, and entitled to the law's protection.

In recent years, attacks have been launched against laws which protect unborn life. Although at first these attacks in State legislatures were successful, of late they have been consistently defeated, as the great majority of the American people have asserted their sentiments that these laws should be preserved.

But those seeking to overturn laws protecting defenseless life have opened a second line of attack on laws protecting the unborn. They have filed lawsuits seeking to declare laws protecting the lives of unborn children "unconstitutional."

Normally a minority group seeks to preserve statutes giving it equal protection, but one of the largest minorities in the United States—its unborn children—cannot do so because they cannot speak. Our group has asked me to come here to ask you, the members of the Senate Judiciary Committee, and the Members of the U.S. Senate, to speak for the unborn and to preserve their lives.

This can be done by appointing to the U.S. Supreme Court men who will uphold the longstanding laws of the various States which protect the lives of innocent unborn children. No one has the right to destroy innocent, unborn life—not even a Justice of the U.S. Supreme Court—who may be disposed to reach for the label "unconstitutional" in order to strike down statutes to which he may, as a personal matter of philosophy, disagree.

We oppose the nomination of any man to the U.S. Supreme Court whom inquiry discloses is ready to substitute his own personal philosophy for the majority will of Americans, expressed for many years in statutes which regard unborn children as human beings whose lives are protected by law. If inquiry discloses that any of the present nominees are disposed to reach for the label "unconstitutional" to strike down laws protecting the unborn, or to weaken them by loose interpretations, we ask that such nominees be rejected.

**TESTIMONY OF MARGARET DEVLIN, WANTAGH, N.Y.**

Mrs. DEVLIN. Mr. Chairman and distinguished members of the committee:

My name is Margaret Devlin. I am from Wantagh, N.Y.

It is certainly not necessary to remind you that our Nation's founding fathers held as self-evident truths that all men are created equal and that they are endowed by their creator with certain unalienable rights, among which are liberty, the pursuit of happiness, and life it-

self. Nevertheless, it is out of concern for the continuing recognition of these rights that I address myself to your attention.

The fundamental human rights reorganized and guaranteed by the Constitution of the United States are the fruits of a culture nourished and made possible by the contributions of many traditions—most notably, the Hellenic, the Jewish, and the Christian. Through the influence of these traditions occidental man recognized the responsible exercise of freedom as a necessary aspect of its full development of human personality. As a result of the Judeo-Christian influence, he came to understand the unique dignity of human life in which each person bears the “image and likeness of his or her Creator.”

If the capacity to exercise freedom with responsibility is part of the grandeur and nobility of human life there, nevertheless, can be no guarantee concerning the intentions or goals with and for which it is exercised. Among the conditions of freedom are the possibilities of its denial and misuse. Men have traded human freedom—and life itself—for money, power, pleasure, and even for mere convenience. Tyranny still plagues men, as it has in the past—and as it will at least attempt to do in the future.

Tyranny in our century, however, promises to be different from anything known in the past—and the reason, Senators, is the vast increase of power—understood as controllable energy—made possible by advances in science and technology. The enormous power that is now in the hands of man can be used for public utilities or for destroying cities. Research in biochemistry can be directed to restoring men to health—or it can be directed toward the control of human behavior.

The great controversies of the latter part of the 20th century will concern the challenges to our traditional recognition of the rights of life and liberty by those who would sacrifice those rights in order to exercise power efficiently. There will undoubtedly be great problems and dilemmas arising from demographic and socioeconomic factors—but the fact remains that the justices who will sit on the Supreme Court of our Nation in the coming years will be called upon to render decisions regarding the relation of power and human life which will effectively preserve or destroy the fundamental precepts of our Judeo-Christian heritage.

In recent years attempts to enact legislation permitting abortion on demand, euthanasia, and mandatory sterilization, have emerged from fiction to become fact. There is little doubt that before very long the list of such legislation will include bills authorizing genetic and behavioral control.

Forty years ago, Bertrand Russell wrote a book called *The Scientific Outlook* in which he indicated the anticipated conflict between “Christian ethics” and what he referred to as the new scientific ethic. In that work he said, “The new ethic \* \* \* will be prepared to make individuals suffer for the public good without inventing reasons purporting to show that they deserve to suffer.”

In recent months, proponents of the “new ethic” have expressed themselves more freely than ever in books, editorials and public statements. One especially—an editorial appearing in *California Medicine*, September 1970—comes to mind as being especially worthy of being brought to your attention at this time.

The editorial notes that "it will become necessary and acceptable to place relative rather than absolute values on such things as human lives." As an example of the emergence of the new ethic, the editorial cites the changing attitude toward the abortion of unborn human babies and notes that "the result has been a curious avoidance of the scientific fact \* \* \* that human life begins at conception and is continuous \* \* \* until death." It later acknowledges that "one may anticipate further development of these roles as the problems of birth control and birth selection are extended inevitably to death selection and death control whether by the individual or by society."

Senators, I beseech you to make it a point in your inquiry, and in any subsequent inquiries concerning approval of nominees to the Supreme Court, to request the nominees to clearly state their positions and sympathies regarding the rights of all people regardless of color, religion, health, or age—including stage of fetal development—in the face of proposals to exercise a power which would effectively deny those rights. I, furthermore, beseech you to recommend strenuous disapproval of any candidate who is not determined to recognize and protect the inalienable right of all human beings enjoying the protection of our judicial system.

Thank you.

#### TESTIMONY OF IMELDA JENSEN, OLD BETHPAGE, N.Y.

Mrs. JENSEN. Mr. Chairman and distinguished members of this committee:

My name is Imelda Jensen. I represent Celebrate Life of Long Island, a nonsectarian organization dedicated to protecting the rights of millions of persons who cannot speak for themselves, the unborn, the aged, and the infirm.

The Supreme Court of the United States will be called upon in its next session and in the next decade to rule upon cases involving the right and authority of State and local legislatures to authorize the indiscriminate slaughter of prebirth children, overage adults, and socially unacceptable human beings generally on the twisted theory that permissive abortion and euthanasia are socially and morally desirable goals, instead of pernicious totalitarianism at its most ruthless.

I suggest that nominees for the very high office of Associate Justice of the Supreme Court should be closely questioned regarding their views of such legislation.

I come from a State whose legislature has made it the abortion capital of the United States. In the past 16 months hundreds of thousands of unborn children have been killed in our hospitals and clinics with the benign assurance of many of our States leaders that such mass homicide is, in reality, a zealous protection of the rights of women.

In Florida, some enlightened gentlemen in the State legislature have advocated laws giving the State the right to put to death those persons who no longer conform to the State's behavioral concepts for the aged and infirm.

I submit that the Senate of the United States must know the attitudes of the present nominees on the constitutionality of these legislative aberrations.

The inalienable right to life proclaimed by Thomas Jefferson, and the equal protection of the laws, secured to us by the 14th amendment, are not selective grants of governmental benevolence; they are inherent properties of each human being, whether unborn or aged or unable to care for himself. The glory of our constitutional system is that we recognize these principles as essential parts of man and not as gifts of the state. When misguided and illinformed advocates of women's rights or States rights seriously suggest that a mother, whether for economic, therapeutic or social reasons, or out of plain selfish self-indulgence, has an absolute right to kill her unborn child, or indicate that an elderly person who makes no contribution to social progress can be a candidate for murder with state approval, all Americans must be vitally concerned with how the Supreme Court of the United States will deal with these violent and distorted assaults upon human life and human dignity.

I urge this committee, therefore, to very scrupulously examine the views and philosophies of Mr. Powell and Mr. Rehnquist. I ask as well, to testify in response to those views.

Thank you.

**TESTIMONY OF ELIZABETH CORBETT, WESTCHESTER COUNTY,  
N.Y.**

Mrs. CORBETT. My name is Elizabeth Corbett from Yonkers, N.Y., and I represent the Westchester County Right to Life Committee.

In recent years, when Presidents have submitted Supreme Court nominations to the U.S. Senate, or to the American Bar Association, a number of questions have immediately been raised about the nominations. These questions have included: Does the nominee have judicial experience? Does the nominee have any history of conflict of interest during his legal career? What are the nominee's views on civil rights?

Westchester Right-to-Life Committee appears before you now to raise an additional question. What are the views of Mr. Powell and Mr. Relnquist about life itself?

Are the nominees persons who believe that the unborn child may be destroyed at will? Are they men who believe that the life of an aged or crippled or sickly person may be destroyed if that person is no longer able to work or produce for society?

Westchester Right-to-Life emphatically and categorically opposes any nominee to the Supreme Court who would hold such beliefs.

We raise these questions before you and ask you to inquire into this matter with regard to Mr. Powell and Mr. Rehnquist, because we are firmly convinced that the awesome power over the life of millions of Americans which is held by the Supreme Court Justices should not be entrusted to any man or woman who would write or join in an opinion which would allow the destruction of thousands of lives, whether of unborn children, or of the crippled or maimed, or of the elderly or of the sickly.

With great regret Westchester Right-to-Life notices that a clever, subtle campaign has been conducted within the Federal Government to promote abortion and other programs which seek to reverse the view of the sacredness of human life, the foundation of Judean-Christian civilization. Federal moneys support planned parenthood's

abortion and sterilization programs, and pay for abortions under the New York medicaid program.

In Congress the Cranston resolution, Senate Joint Resolution 108, seeks to set the stage for eventual governmental control over life. It would make zero population growth a national policy.

The Presidential Commission on Population Growth and the American Future, headed by John D. Rockefeller, seeks to lead American opinion into the belief that life is not really so sacred after all, and that the destruction of the unborn life must be accepted as a social necessity to stabilize population and solve social problems.

In courts, suits are pending to overturn longstanding statutes which afford legal protection to the unborn.

We protest. We oppose any nominee to the Supreme Court who doesn't hold any efforts to destroy life as repugnant. We approve only those nominees who are totally committed to the preservation of human life. We approve only those who will defend the unborn.

Thank you very much.

I wonder if we could have this included with our testimony?

The CHAIRMAN. It will be admitted.

(The document, "Life Before Birth" was filed with the committee.)

The CHAIRMAN. That is a rollcall vote and we will have a recess. (A short recess was taken.)

The CHAIRMAN. You may proceed.

#### TESTIMONY OF ANNETTE GARKOWSKI, L.I.F.E. COMMITTEE, NEW YORK

Mrs. GARKOWSKI. My name is Annette Garkowski and I represent L.I.F.E., New York.

The Lutheran theologian, Dietrich Bonhoeffer, martyred by the Nazis, summed up the viewpoint of Judeo-Christian society on abortion when he wrote—

To raise the question whether we are here concerned already with a human being or not is merely to confuse the issue. The simple fact is that God certainly intended to create a human being and that this nascent human being has been deliberately deprived of his life. And that is nothing but murder.

L.I.F.E. is an organization of over 2,500 women in New York State, who recognizes that the viewpoint expressed in Dr. Bonhoeffer's words, is being seriously challenged in American society. L.I.F.E. is convinced that the overwhelming majority of American women regard the woman's role, now and in the future, to be the protection and care of the weak, the defenseless, and those who cannot care for themselves.

We have come before you today to respectfully ask you to consider that your decision on the pending Supreme Court nominations bears directly on whether a certain class of weak and defenseless persons—unborn children—will live or die.

The Supreme Court is being asked to strike down laws prohibiting the destruction of unborn life, laws which have been in effect for many years. The ground being asserted by abortionists who seek to strike down these laws is that they are "unconstitutional."

What is "constitutional"? What is "unconstitutional"? Is a particular Justice of the U.S. Supreme Court to feel free to strike down a statute of long standing prohibiting or restricting abortions because

he personally feels there is nothing wrong with destroying unborn life? Or is he to be guided by the precedent of the long line of cases which have held that unborn children are living beings entitled to the protection of the laws?

President Nixon, in nominating Mr. Powell and Mr. Rehnquist, has indicated that he has chosen them because they are "strict constructionists," men who will not say a law is "unconstitutional" simply because they do not like it or would not have enacted it if they were legislators.

It is indicated that in regard to criminal laws or statutes, the nominees, Mr. Powell and Mr. Rehnquist, will follow precedent, and uphold policy decisions made by legislatures and Congress in enacting strong criminal statutes.

But will they be equally disposed to uphold policy decisions of legislatures which long ago decided that a child in the womb is a living human being, entitled to the laws of protection? Or will they in this case depart from the "strict constructionist" philosophy, and seek to emasculate these laws by interpretation or strike them down by employing the word "unconstitutional" to effectuate their personal point of view.

Legislators and Congress today, as always, must have the ability to perceive not merely the meaning of the laws they make, but the immediate and far-reaching implications and consequences of these laws. If they erase the law's protection of the right to life for any one section or group of human beings, what happens to the basic concept itself of man's right to life and duty of society to protect that right?

Regrettably, there has been very little time between the nominations and these hearings to ascertain whether Mr. Powell and Mr. Rehnquist have ever gone on record in this matter.

Therefore, our committee, LIFE, asks the members of the Senate and of this committee to check the background of Mr. Powell and Mr. Rehnquist in this area.

If it is ascertained that their disposition is to regard laws protecting unborn life as less worthy of judicial respect than laws in the criminal area, we urge rejection of Mr. Powell and Mr. Rehnquist. But if it is ascertained that laws protecting the unborn will be given the same respect as laws in the criminal area, we have no objection to their approval.

Thank you.

The CHAIRMAN. Our next witness is Mrs. Florence Quigley.

#### **TESTIMONY OF MRS. FLORENCE QUIGLEY, BROOKLYN RIGHT TO LIFE COMMITTEE**

Mrs. QUIGLEY. Mr. Eastland, and members of the committee, I am Mrs. Florence Quigley of Brooklyn, N.Y.

I speak in behalf of the Brooklyn Right to Life Committee, a group of thousands of New York citizens who support the position of our organization. Briefly stated, our position is one of total opposition to population control programs by Government and to any and all antilife, antimoral legislation or programs. By that we mean Government at any level promoting, implementing or funding with tax dollars, programs of contraception, sterilization, abortion, selective breeding, euthanasia and infanticide.

We believe in the Judeo-Christian concepts which recognize God as the Author of Life and we are unalterably opposed to legislative social engineering such as Senator Packwood's bill and the Cranston resolution which seek to create an antilife environment where the only logical choice becomes abortion on demand and, therefore, wholesale slaughter of innocent children. We feel it necessary to state that it is of critical importance to the Brooklyn Right to Life Committee and to the country to raise some questions about Mr. Powell and Mr. Rehnquist.

1. Do they regard unborn children as a complete, unique, human, genetic entity or do they regard these little ones as a glob of protoplasm, devoid of humanity to be aborted and discarded at the whim of a society that is fast losing its respect for all human life? The U.S. Constitution forbids cruel and unusual punishment. Is there anything crueler than scraping or sucking a child from the protection of his mother's womb, sometimes tearing him limb from limb or drawing him in a toxic solution, and having him suffer a cruel asphyxial death? At 7 weeks a child responds to stimuli. At 8 weeks there are recordable electric brain tracings. Aborted children feel pain.

2. Do these men believe that the quality of life is more important than the fact that a human life exists?

If Mr. Rehnquist and Mr. Powell hold fast to the Judeo-Christian principles upon which this country is founded, that each person, no matter how small or helpless, is entitled to his God-given right to life, then we ask confirmation of their appointment to the Supreme Court.

3. We ask one more question: Will these two men be critical and prudent enough to question the validity of the national committee to study the population situation in the United States when they realize that it is headed by the same man who has publicly stated his commitment to population control by Government and why not—this man holds the patent rights to one of the intrauterine devices widely used abroad? This antilife chairman, the brother of New York Governor Nelson Rockefeller, is John D. Rockefeller III. How objective and unbiased can the findings of this commission be?

If Mr. Rehnquist and Mr. Powell believe, as the antilife advocates do, that the Supreme Court should declare unconstitutional, or "water down" by loose interpretation, the State statutes which have traditionally regarded the unborn child as a human being and, therefore, entitled to protection under law, then we ask in the best interests of our country, that the Senate of the United States reject these men as being disqualified for appointment to the Supreme Court.

The CHAIRMAN. Thank you, ma'am.

Any questions?

Senator TUNNEY. I have one question, Mr. Chairman.

I was not able to tell from the testimony of any of you ladies if you have any evidence that would lead you to believe that Mr. Powell or Mr. Rehnquist is unqualified for service on the Court?

Mrs. BUFFALINO. May I answer?

Senator TUNNEY. Yes.

Mrs. BUFFALINO. Unlike many women in our society who claim to represent us, we women have great confidence in our Senators and our Judiciary Committee, and we are simply asking you if you would

inquire to determine whether or not these men are qualified to serve and uphold the Constitution.

Senator TUNNEY. Thank you.

Mrs. BUFFALINO. We will take care of the children.

Senator HRUSKA. Mr. Chairman, I have no questions, but I have an observation. It might be thought to be relevant and it might not, but I made inquiry as to how many attorneys were on the staff of Mr. Rehnquist and found there were 16, four of them being women, and Mary Lawton has been Assistant Attorney General in the Office of Legal Counsel, so he is aware of the existence of the talents in the weaker sex, and is employing them and relying upon them a great deal, I am sure.

When I say "weaker sex" that is an attempt to be facetious.

Senator TUNNEY. I was about to say, Senator, you have ruined everything. [Laughter.]

The CHAIRMAN. You are excused. You have made a fine contribution.

Mr. John J. Sullivan.

I want to ask, after this witness, if there is anyone here who wishes to testify.

Mr. Sullivan, how many pages do you have?

Mr. SULLIVAN. I would like to spend about 7 minutes, if you please. The CHAIRMAN. That is fine.

#### **TESTIMONY OF JOHN L. SULLIVAN, EXECUTIVE MEMBER. LONG ISLAND RIGHT TO LIFE COMMITTEE, INC.**

Mr. SULLIVAN. If you will correct my name to John L. Sullivan, it might impress Senator Tunney.

My name is Mr. John L. Sullivan, and I represent the Long Island Right to Life Committee, Inc.

We are a committee of 20,000 who are also concerned with the unborn.

I was impressed with the bevy of beauties up here preceding me. I know them and I am sure it is a pleasant respite for you gentlemen who have had to go through many tedious discussions today.

I am sure you are also disappointed that your rollcall came at a time when they were presenting it, because they were pleasant to look at.

I think the pleasantness to look at them also reflects the femininity which they bring to this fight to protect the unborn, and I think they have retained all of the basic ingredients that we gentlemen respect in our women, and they have shown this in their presentation to you today.

This letter to the committee was composed by a lawyer on our committee so, if you will bear with me, I will read it. I would like to comment just briefly that as a director of the family service division, I am quite concerned with the emphasis on splitting up the basic unit of our society, the family.

In New York State, from which I come, we have on the books for 1 year-plus now a law that has denied the rights of an individual. Three hundred thousand such individuals have been aborted in New York State, 60 percent of whom have come from outside of New York State from other States.

I think the other States are kind of pleased that we have our law on our books, because they do not have to face the issue.

I think, too, our contiguous States of Connecticut and Massachusetts—I am sorry, Senator Kennedy is not here—also have to look at what happens to these girls when they go back to their States.

Our statistics in the Bureau of Vital Statistics show there is a very small percentage of women harmed by the abortion procedure. I know of personal instances, one reported to me by a pilot who is in our big brother program, of flying a girl home to Chicago on the evening flight. She had come in the morning to have her abortion in New York, and she hemorrhaged on the way back to Chicago. He almost had to make an emergency landing but, fortunately, there was a nurse on board who was able to stop the hemorrhaging. The girl was 16 years old, was met at the airport by the putative father, and disappeared.

Who handles her statistics?

Hopefully, Senator Kennedy's State and the State of Connecticut will also handle some of these statistics to give us a realistic picture of what abortion is doing to our women.

Gentlemen, you are gathered here to consider the qualifications of two men who might be elevated to the highest judicial forum in the Nation. As Justices of the U.S. Supreme Court they, with their colleagues, will be called upon to render decisions affecting the life, liberty, and property of citizens of our country. The sequence of these three elements for consideration as they appear in the 14th amendment is in my opinion not accidental.

The priority which is given to the consideration of life before liberty or property is logical since life is a condition precedent to freedom or ownership of property. It is this question of life that I, as the representative of the Long Island Right to Life Committee, Inc., which comprises a membership in excess of 20,000 in the Nassau-Suffolk area, together with literally millions of others of like mind, wish to stress. In your evaluation of these nominees, it is important for us to know what these men believe with respect to the beginnings of life, the meaning of life, and the protection afforded to it by our Constitution.

I hasten to emphasize that we do not look to the Court for its attitude on social planning or its members' personal moral outlook on this issue, but rather for its assessment in terms of the traditional respect for life inherent in our institutions, customs, and particularly in our laws.

With respect to the latter, it is common knowledge in the field of jurisprudence that the unborn infant is recognized as being a human life possessing rights which can be exercised in a court of law. This is the case where a child is injured in the womb as a result of one's negligence. Here the child has a cause of action. Also, in the laws of the distribution of decedents' estates, the child in the womb is recognized as living and having rights.

Under the circumstances any law which permits the destruction of the unborn is violative of the same 14th amendment. It does then, in effect, discriminate against a substantial number of our citizens and deprives them of not only their civil rights but their basic, fundamental human rights.

The gentlemen who were here yesterday, who took an awful lot of time on civil rights, I respect their opinion, but without their right to be born, then civil rights are not even available to any of us.

Certainly candidates for our highest court must then, as men of the law, look to the equal protection aspects of our legal system when it confronts the phenomenon of abortion, the destruction of fetal life, fetus meaning "young one".

The logical question at this point is, When does this life, which the Court must protect, begin. We in New York State feel the answer has to come from the Supreme Court of the United States. We do not feel we can beat the law presently on the books in New York, where children continue to be aborted each day. It has to be the Constitution or the U.S. Supreme Court which is going to make that ruling.

The question is, When does this life, which the court must protect, begin. The answer is that it begins with conception and this is supported by all competent medical science and medical men. At the moment of conception, the geneological code has been established, whatever that person is going to be; race, sex, color, have been established, and it is just a development in the process of 9 months.

Even such experts as Dr. Guttmacher and Dr. Spock admit human life starts with the fertilization of the egg even though they are pro-abortionists.

No one seriously holds that the beginning of life is sometime subsequent to conception. In such case, the members of the court have a profound question as to what they will do when called upon to address themselves to who will have the right to life.

Gentlemen, thank you very much for your time. If you would, in behalf of the committee and people like us, ask the gentlemen who are nominated this basic question, we would certainly appreciate it, and we feel you are the only ones who can ask this for us.

The CHAIRMAN. Thank you, sir.

Are there any other witnesses on this list?

If not, the hearings are closed, and the committee will meet in executive session at 10:30 tomorrow morning.

(Whereupon, at 4:55 p.m., the committee adjourned.)

## APPENDIX

### ADDITIONAL QUESTIONS ADDRESSED TO WILLIAM H. REHNQUIST AND ANSWERS

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C., November 19, 1971.*

HON. JAMES O. EASTLAND,

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

DEAR MR. CHAIRMAN: Pursuant to the Committee's discussions yesterday, we are enclosing the questions we requested Mr. Rehnquist to answer.

We intend not to release these questions to the public until the answers are received, so that both the questions and the answers can be placed in the Record together. In the interest of time, we are transmitting a copy of these questions directly to the Department of Justice.

Thank you for your cooperation in this matter.

Very sincerely yours,

BIRCH BAYH.  
PHILIP A. HART.  
EDWARD M. KENNEDY.

### QUESTIONS ADDRESSED TO WILLIAM REHNQUIST BY SENATOR BIRCH BAYH, SENATOR PHILIP HART, AND SENATOR EDWARD KENNEDY

In your testimony at the Judiciary Committee hearings you stated that you had advised the Justice Department to abandon the argument that the executive branch has the inherent power to wiretap without prior judicial authorization in cases involving the national security. You said (p. 321): "I felt it was a mistake for the Government to take the position there was inherent power, and that the case could best be put forward both from the point of view of the Government in its more limited interests as an adversary and in the interests of the Government in the larger point of view framed in terms of whether it was an unreasonable search and seizure under the Fourth Amendment, rather than some . . . overriding inherent power."

(a) Would you explain for the Committee what you meant by "the interests of the Government in the larger point of view?"

(b) What in theoretical and in practical terms is the significance of abandoning the inherent power theory in favor of an argument of reasonableness under the Fourth Amendment?

(c) You refused to answer certain questions during the course of the hearings because of a claim of attorney-client privilege (see, for example, pp. 100, 101, 102, 132, 133, 135, 136, 212, 247). Please explain how revealing that you advised the Justice Department to abandon a public position on wiretapping differs from other situations in which you invoked the attorney-client privilege. In light of the answer you have quoted above, are you now willing to answer the questions you declined to answer by invoking the attorney-client privilege? If so, please do so.

2. In 1964 you wrote a letter to the *Arizona Republic* opposing a city public accommodations ordinance. You stated at the hearings that your views on this matter had changed and you added (p. 145): "I think the ordinance really worked very well in Phoenix. It was readily accepted, and I think I have come to realize since it, more than I did at the time, the strong concern that minorities have for the recognition of these rights. I would not feel the same way today about it as I did then."

(a) Can you provide the Committee with any indication that your public views on this matter changed before your nomination to be a Supreme Court Justice?

(b) When and why did you come to realize "more than (you) did" in 1964 "the strong concern that minorities have for the recognition of these rights?"

(c) Would your present views be different as to the desirability of such legislation if the ordinance had not been as readily accepted as it was?

3. Four years ago in a letter to the *Arizona Republic* you stated your opposition to proposals to alter the "de facto segregation" of the Phoenix schools. Professor Gary Orfield of Princeton University has told this Committee that the "integration program" you found "distressing" "proposed no frontal attack on segregation, but called for freedom of choice desegregation with students paying their own bus fares to attend other high schools. The local superintendent also called for more exchanges between the various schools." (p. 13 of prepared testimony)

(a) Does your recollection of the program you opposed comport with that which Professor Orfield described? If not, how does your recollection differ?

(b) Would you explain for the Committee in more detail why you opposed the plan?

(c) Did you regard the scope of that effort in Phoenix in 1967 as an excessive commitment to an integrated society?

4. Mr. Clarence Mitchell has submitted to the Committee an affidavit from State Senator Cloves Campbell which alleges that following your testimony in opposition to the Phoenix public accommodations ordinance in 1964 you said to Mr. Campbell "I am opposed to all civil rights laws" (see p. 465). Did you make that or a similar statement to Mr. Campbell as alleged? If so, would you please elaborate on the circumstances and on what you meant by that statement.

5. In response to a question which asked for "a thumbnail sketch" of "what in your . . . background . . . demonstrates a commitment to equal rights for all . . ." you answered at the hearings (p. 127): "It is difficult to answer that question, Senator. I have participated in the political process in Arizona. I have represented indigent defendants in the Federal and State courts in Arizona. I have been a member of the County Legal Aid Society Board at a time when it was very difficult to get this sort of funding that they are getting today. I have represented indigents in civil rights actions. I realize that that is not, perhaps, a very impressive list. It is all that comes to mind now."

(a) Would you care to add anything to that list which has come to mind since the hearings?

(b) Please explain in more detail the nature of the civil rights actions in which you represented indigents, and please tell the Committee how many such actions there were.

(c) Was your membership in the Legal Aid Society Board *cx officio* by virtue of your position in the county bar association?

6. You testified before the Committee as follows in response to a question concerning your role in the government's efforts to prevent publication of the Pentagon Papers: "It does seem to me that because the government ultimately took a public legal position and argued the matter in the courts, that I would not be breaching the attorney-client relationship to answer your question.

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

"When we reviewed it we came across *Near v. Minnesota*, and advised him that basically it was a factual question so far as we could tell, if the type of documents that were about to be published came within the definition of the language used by Chief Justice Hughes in *Near v. Minnesota* there was a reasonable possibility that the Government would succeed in the action.

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

(a) Did you have any involvement in the government's action in this matter which is omitted from this statement? Did you for example place any phone calls to any newspapers asking them to refrain from publishing the Pentagon Papers?

7. Various Supreme Court nominees, including yourself, have properly refused to answer questions put to them by the Senate which would require the nominee prematurely to state his opinion on a specific case likely to come before him once on the bench. Some nominees have also properly declined to answer questions concerning cases they decided or opinions they wrote while sitting on the bench because answering them would have jeopardized the integrity and independence of the judiciary. You invoked yet a third doctrine to decline to answer certain questions at the hearings: the attorney-client privilege. Are you aware of any precedent in the Senate's consideration of a federal official nominated to the Supreme Court or any legal precedent in decided cases or the canons of ethics or elsewhere, which supports a nominee's invoking the attorney-client privilege to refuse to give the Senate his personal views on matters of public importance on which he had advocated an Administration's position?

8. You and Senator Tunney had the following exchange during the hearings:

"Senator TUNNEY. Senator Ervin then went on to question you, 'don't you agree with me any surveillance which would have the effect of stifling such activities, namely, the first amendment, those activities which are privileged under the first amendment, would violate those constitutional rights?' Your answer was, 'No, I do not.'

"Mr. REHNQUIST. I am not sure I do agree with that now. I am inclined to think that it is a fact question and I was perhaps resolving the fact question in my own mind on the basis of the line of inquiry that Senator Hart made yesterday, where thousands of people came, knowing there was going to be such surveillance, on the basis of Judge Austin's decision in Chicago, where he found as a fact that there was no stifling effect.

"I do not think I would want to categorically say that such surveillance could not have a stifling effect. I think I would treat it as a question of fact.

"Senator TUNNEY. I appreciate your answer."

(a) When you said that you are not sure you would agree with your prior statement now, were you expressing a personal opinion or were you expressing a Justice Department position?

(b) If you were expressing a personal opinion, why in your view was this situation different from other situations in which you refused to state a personal view on positions you had taken as an advocate for the Administration?

9. At the time that you testified before Senator Ervin's Subcommittee on Constitutional Rights with regard to the government's intelligence-gathering activities, you said that it was "quite likely that self-discipline on the part of the executive branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering."

(a) Were you aware at that time as reported in the press, that Federal Bureau of Investigation agents in at least one part of the country had been instructed to conduct interviews for the purpose of making dissenters believe that "there is an agent behind every mailbox" (see, e.g., p. 425-26, 581)?

(b) Does this document give you any reason to alter your views that executive self-restraint will provide sufficient protection of first and fourth amendment freedoms?

10. Please describe in as much detail as possible your position (including title and the manner in which you were selected), responsibility, and activities in connection with Republican Party efforts to challenge Democratic voters in Arizona for each of the following elections, separately: 1958, 1960, 1962, 1964, 1966, 1968.

In addition, please answer the following questions concerning your position, responsibility or activities in each of the above-mentioned years:

(a) Did you personally engage in challenging the qualifications of any voters? If so, please describe the nature and extent of the challenging you did and the bases on which the challenges were made.

(b) Did you train or counsel persons selected to be pollwatchers or challengers about the procedures to be used in challenging? If so, please elaborate concerning how the persons were selected, and the training that you gave. Did you in any of the above-mentioned years train or counsel persons selected to be pollwatchers on the bases on which challenges could be made? If so, please elaborate concerning what you advised these persons were proper bases under law for challenges in each of the relevant years.

(c) Did you prepare, select or advise on the use of printed passages from the Constitution designed to be employed by challengers to determine the literacy of a potential voter? Did any such practice come to your attention? Did you think it proper and lawful? If not, did you take steps to curb such procedures?

11. To what extent are you able to confirm Mr. Richard G. Kleindienst's statement found in the *Arizona Republic* of November 7, 1962, that the Republican challengers who worked in 1962 "are the same persons, under the same instructions, who have been doing this in Maricopa and Pima counties since 1956?"

12. You testified that one of the roles you played in the Republican efforts to challenge Democratic voters was "to arbitrate disputes that arose" along with a Democratic counterpart (p. 149). Did any of the disputes as to the roles of the Republican challengers which you sought to mediate involve opposition to the type of challenging procedure being employed or the basis of the challenge, as distinct from the right of the Republican challenger to function at all in such a capacity in the precinct in question? If so, please explain the challenging procedures which came under attack.

13. Judge Charles L. Hardy in a letter to Senator Eastland describes the tactics of the Republican Party in Phoenix in 1962 as follows: "In 1962, for the first time, the Republicans had challengers in all of the precincts in this county which had overwhelming Democratic registrations. At that time among the statutory grounds for challenging a person offering to vote were that he had not resided within the precinct for thirty days next preceding the election and that he was unable to read the Constitution of the United States in the English language. In each precinct *every* black or Mexican person was being challenged on this latter ground and it was quite clear that this type of challenging was a deliberate effort to slow down the voting so as to cause people awaiting their turn to vote to grow tired of waiting and leave without voting. In addition, there was a well organized campaign of outright harassment and intimidation to discourage persons from attempting to vote. In the black and brown areas, handbills were distributed warning persons that if they were not properly qualified to vote they would be prosecuted. There were squads of people taking photographs of voters standing in line waiting to vote and asking for their names. There is no doubt in my mind that these tactics of harassment, intimidation and indiscriminate challenging were highly improper and violative of the spirit of free elections."

(a) Please describe the relationship between your role in planning and implementing Republican election day challenging efforts that year and the tactics described by Judge Hardy.

(b) Did any of the practices described by Judge Hardy come to your attention before or during election day in 1962? If so, did you seek to curb such procedures or were they in your view proper?

14. Were you present at the Bethune precinct at any time on election day, November 3, 1964? If so, while you were there, did you speak to any persons waiting to vote regarding their qualifications to vote under the state literacy laws or other laws, or regarding their ability to read the Constitution? Did you ask anyone waiting to vote at the Bethune precinct in 1964 to read from any printed material which you or anyone else presented to the potential voter? Were you engaged in any dispute at the Bethune precinct in 1964 with Democratic workers regarding efforts by yourself or other Republican representatives to challenge voters? If so, please describe the incident in detail.

15. The *St. Louis Post-Dispatch* of November 18 carries a story which states that "documents have been discovered suggesting" that you were "once a member of a rightwing organization" called "Arizonans For America," or "For America." You have previously denied that you are or at any time in the past have been a member of the John Birch Society. Have you been a member of the "Arizonans For America" as is alleged by the *St. Louis Post-Dispatch*? Do you have any additional response to the article.

DEPARTMENT OF JUSTICE,  
Washington, D.C., November 20, 1971.

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

DEAR SENATOR EASTLAND: Enclosed are my answers to the questions propounded to me by members of the Senate Judiciary Committee.

Yours very truly,

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

1. (a) When I used the phrase "the interests of the Government in the larger point of view," I meant that the Government is under a greater obligation than

the ordinary adversary in a lawsuit to make a reasoned, responsible presentation of its case.

(b) One implication of the "inherent power" position was that in this area the Executive was not subject to the requirements of the Fourth Amendment. The effect of the abandonment of the "inherent power" theory in favor of the argument of reasonableness under the Fourth Amendment was to recognize that the Executive is subject to the restraints of the Fourth Amendment in this area as elsewhere. The practical result was to recognize that the courts would decide whether or not this practice amounted to an unreasonable search which would violate the Fourth Amendment.

(c) During the course of the hearing I declined to answer the questions enumerated because I felt it inappropriate for one who has spoken as an advocate for the Attorney General or for the President to thereafter offer his personal opinion on the same subject. I see nothing inconsistent between that position and my willingness to explain my contribution to a Departmental position which was primarily developed by the Internal Security Division, and ultimately publicly expounded by the Solicitor General.

2. (a) In a speech delivered in Houston for Law Day, April 29, 1970, I referred to the fact that "dramatic progress has been made by minorities in all of the civil rights areas in the past generation." I would not have referred to a law of the type I had opposed in 1964 as representing "dramatic progress" if I still opposed that type of law.

(b) It is impossible for me to pick out any particular date on which I came to realize "more than I did" in 1964 "the strong concern that minorities have for the recognition of these rights." When I spoke in Phoenix in 1964 I placed a good deal of emphasis on the fact that very few restaurants in Phoenix actually did discriminate and therefore the denial of these rights in practice was infrequent. In the intervening years, at least in part as a result of having become acquainted with more members of minority groups, I have come to appreciate the importance of the legal recognition of rights such as this without regard to whether or not that recognition results in a substantial change in custom or practice.

(c) No. While the manner in which the ordinance was accepted was a factor in changing my opinion, my realization of the depth of feeling of the minorities about this sort of right would not be diminished, and would control, even though the ordinance had been less readily accepted.

3. (a), (b) This question refers to a letter to the Editor appearing in the *Arizona Republic* on Saturday, September 9, 1967, which is captioned "'De facto' Schools Seen Serving Well." The question characterizes the letter as stating my "opposition to proposals to alter the 'de facto segregation' of the Phoenix schools." The letter, of course, speaks for itself; the caption above the letter was not chosen by me. My position, as stated in the letter, was clearly not opposed to a number of the proposals advanced by Superintendent Seymour for reducing *de facto* segregation.

While I have not had an opportunity to review the series of articles by the newspaper reporter, Mr. Harold Cousland, to which my letter refers, I have reviewed a copy of an article in the *Arizona Republic* describing the Superintendent's "integration program" for Phoenix high schools. Referring to this letter, and to my own recollection of the situation in Phoenix at that time, I think that Professor Orfield's description of the Superintendent's proposal is materially inaccurate. Professor Orfield says that the "integration program" called for "freedom of choice desegregation with students paying their own bus fare to attend other high schools." This was not a part of the Superintendent's *proposal* at all; it was a program *already in effect* in Phoenix at that time. I was in full agreement with this program. Superintendent Seymour, according to the article, in fact commented that there was little evidence that minority groups had taken advantage of this existing "open enrollment" policy.

Thus, Professor Orfield confuses the program of open enrollment which was already in effect in Phoenix with a series of additional proposals made by Superintendent Seymour in September, 1967. Among these proposals was the appointment of a policy advisor who was skilled in interpersonal relations and problems, the organization of a city-wide citizens advisory committee representing minority groups, the formation of a human relations council at each high school, and the promotion of a voluntary exchange of students among racially imbalanced schools. He went on to suggest, in addition to this voluntary exchange of students, that he would not rule out busing of students as a partial solution.

As is clear from my letter, I was speaking out in favor of the neighborhood school system, which is entirely consistent with a number of Superintendent

Seymour's proposals. It was not, however, consistent with his statement that he would "not dismiss busing of students as a partial solution." In the context of a proposal which had already discussed voluntary exchange of students, and which was made in the context of an existing open enrollment program, the sort of busing envisioned by Superintendent Seymour was inconsistent with the neighborhood school concept. The reason for my opposition to this type of busing can best be expressed in the words which I used at that time: "The school's job is to educate children. They should not be saddled with the task of fostering social change which may well lessen their ability to perform their primary job."

3. (c) To the extent that the term "that effort" used in this question refers to the suggestion of busing outside of neighborhood schools solely for the purpose of establishing racial balance, I regarded it as undesirable for the reasons stated in my letter and therefore excessive. I certainly did not consider the open enrollment program already in effect in Phoenix in 1967, which is basically that described in the quoted language of Professor Orfield, as being in the least excessive.

4. I did not make the statement described in question 4, or any similar statement, to Senator Cloves Campbell.

5. (a) I have recalled since my testimony at the hearings that in 1963 I served as an Associate Member of the American Bar Association Special Committee on the Defense of Indigent Persons Accused of Crime. Since becoming Assistant Attorney General, I have publicly testified in support of the ratification of the Genocide Convention and in support of the Equal Rights Amendment. As Assistant Attorney General, I also supervised and personally participated in the preparation of the Attorney General's Opinion upholding the lawfulness of the so-called "Philadelphia Plan."

(b) (Note: With respect to this question, and subsequent questions which call for historical recollection of legal cases or political activities in which I participated, I have tried as best I can to recall the events requested. I have not had the benefit of my case files or of any other contemporaneous written material, which might have been of significant aid in sharpening my recollection.)

Throughout my practice in Phoenix, I took cases on a regular rotating basis from the Legal Aid Society, a practice followed by many but by no means all of the Bar. In addition, after the *Gault* decision was handed down, I responded to a request from the then Juvenile Court judge for lawyers with some experience to appear without compensation representing juvenile defendants. I would estimate that in addition to the three cases mentioned below, there would be several times that number of the same general description, the particulars of which I cannot now recall.

I recall the following fairly recent representation of indigents outside the criminal defendant area:

(i) I was requested by the Juvenile Court judge of Maricopa County to represent the interests of a woman who had been committed to the State mental hospital during a juvenile proceeding in which she had been deprived of custody of one of her children.

(ii) I represented an elderly woman who was threatened with the sale of her interest in a home as a result of a judgment taken against her by a collection agency in which, as I recall, she contended she had a defense which she had no opportunity to assert because of lack of proper notice of proceedings.

(iii) I spent a good number hours, partly on the Navajo Reservation and partly in my office in Phoenix, counselling with a group of Indians who constituted one faction in a tribal dispute revolving around whether certain actions taken by the tribal chairman could properly be taken by him, or whether instead they required the approval of the tribal council.

(c) My recollection is that either as Vice President of the Maricopa County Bar Association, or as its immediate past President, I was an *ex officio* member of the Legal Aid Society Board. It would be a mistake to assume from the word *ex officio* that the position was by any means a ceremonial one; it was the principal bar association duty of the officer filling that post. At the time I served, the County Bar Association contributed a substantial part of the total funds available to the Legal Aid Society Board for its operating budget, and I took an active part in the work of the Board.

6. I took one action in connection with proposed litigation by the Government against *The Washington Post* in connection with its publication of portions of the Pentagon Papers. At the request of the Attorney General on a date which I believe was Friday, June 18, I telephoned Mr. Ben Bradlee, Executive Editor

of *The Washington Post*, and requested on behalf of the Justice Department that the *Post* refrain from further publication of these papers. Mr. Bradlee told me that the *Post* would not accede to this request. I believe that my telephone conversation with Mr. Bradlee was described in a story in the *Post* on Saturday, June 19.

7. I know of no other Supreme Court nominee who, having acted as a representative or spokesman for the Executive Branch, was then asked by the Judiciary Committee to express his personal views on the matters with respect to which he had served as a spokesman or advocate. There is, therefore, so far as I know, precedent neither for the questions being asked, nor for the answers being declined.

8. (a) I was expressing the position that I felt any reasonable spokesman for the Department would have taken had he been aware of this aspect of the problem at the time of his original testimony.

(b) Not applicable.

9. (a) I was not.

(b) This question characterizes my views as being "that Executive self-restraint will provide sufficient protection of First and Fourth Amendment freedoms." I do not believe this is a fair characterization of the views which I expressed before the Ervin Subcommittee, and it is therefore all but impossible to answer the question as stated. I made quite plain in my testimony, I thought, that both the First Amendment and the Fourth Amendment imposed significant limitations on governmental information gathering. The context in which I made my statement about "Executive self-restraint" was one in which the protections of the First and Fourth Amendments to the Constitution, and such additional statutory limitations on the Executive as those pertaining to wiretapping in the Omnibus Crime Bill of 1968, were already in existence, and the question to which I was addressing myself was whether additional statutory restrictions were desirable.

To the extent that the actual activities of the FBI, as opposed to the characterizations of such activities by a particular agent or by the press, were in fact such as to have a chilling effect, there would be an added factor to be weighed in making a constitutional determination under the First Amendment. If such activities were at all prevalent, I indicated in my testimony before the Ervin Subcommittee that the Department would give careful consideration to remedial legislation.

Following is the text of my statement on these points:

"I think it quite likely that self-discipline on the part of the Executive Branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering. No widespread system of investigative activity, maintained by diverse and numerous personnel, is apt to be perfect either in its conception or in its performance. The fact that isolated imperfections are brought to light, while always a reason for attempting to correct them, should not be permitted to obscure the fundamental necessity and importance of federal information gathering, or the generally high level of performance in this area by the organizations involved."

"In saying this, I do not mean to suggest that the Department of Justice would adamantly oppose any and all legislation on this subject. Legislation which is carefully drawn to meet demonstrated evils in a reasonable way, without impairing the efficiency of vital federal investigative agencies, will receive the Department's careful consideration. But it will come as no surprise, I am sure, for me to state that the Department will vigorously oppose any legislation which, whether by opening the door to unnecessary and unmanageable judicial supervision of such activities or otherwise, would effectively impair this extraordinarily important function of the federal government."

10. During the course of the Committee's deliberations, I submitted the following affidavit to the Chairman of the Committee:

"I have read the affidavits of Jordan Harris and Robert Tate, both notarized in Maricopa County, Arizona. Insofar as these affidavits pertain to me, they are false. I have not, either in the general election of 1964 or in any other election, at Bethune precinct or in any other precinct, either myself harassed or intimidated voters, or encouraged or approved the harassment or intimidation of voters by other persons."

In order to fully respond to question 10, an understanding of the background of Republican challenging procedures in Maricopa County is necessary. I have therefore tried as best I can to recall and set forth that background.

A combination of the peculiarities of Arizona election law, the customary practices of the Board of Supervisors in appointing precinct election officials, and the numerical weakness of registered Republicans in part of the Country resulted in the fact that the only method by which a Republican observer or poll watcher could be stationed inside a particular polling place in many precincts in order to watch for voting irregularities was to be there as a "challenger." While he was authorized by law to challenge voters, the prospects of his being successful were not great, since the challenges he made were ruled upon by a three-man election board (two judges and an inspector) and in the precincts with extraordinarily heavy Democratic registration at least two and often three members of this board would be Democrats. The challenger's real usefulness to the Party, therefore, was not that he was going to be able to prevail upon the election board to disqualify any large number of voters, but that his mere presence as a party representative would have a tendency to discourage any large-scale irregularities in voting procedures at that precinct. My recollection is that the most frequent cause of dispute which arose on Election Day during the late 50s and early 60s was the nature of the credentials required for a challenger to be allowed to enter and remain in a polling place, since in many of these precincts there had never been a Republican representation on the scene during Election Day.

With respect to the specific questions posed, I have attempted to refresh my recollection by speaking with several persons in Arizona who acted in Republican Party affairs during the years covered in this question and to Judge Hardy, who was active for the Democratic Party at the same time. I have also had occasion to see two local newspaper articles which appeared in the Fall of 1964, describing my position during the elections of 1960, 1962, and 1964. I recall that at the time there were written schedules, instructions, and the like prepared at least for the elections of 1960, 1962, and 1964, but I have not found anyone who was able to locate any of this written material, and it may no longer be in existence.

In 1958, I became involved in the Election Day program on quite short notice, and spent all the day at Republican County Headquarters in Phoenix answering questions as to the election laws on the telephone. So far as I remember, I was the only person having this responsibility at County Headquarters. I don't believe I had a title, and I cannot remember by whom I was selected. As I recall, Don Reese, then of Phoenix but presently of Houston, Texas, was County Chairman in 1958.

My attention has been called to a clipping from the *Arizona Republic* in October 1964, which states that in 1960 I was co-chairman of the "Ballot Security Program." I do not have any independent recollection of this fact, but I have no reason to dispute the account in the newspaper. As I recall, however, the program in 1960 was not called the "Ballot Security Program," since I don't remember hearing that term used before 1964.

In 1960, I supervised and assisted in the preparation of envelopes to be mailed out in advance of the election for the purpose of challenging voters on the basis of their having moved from the residence address shown on the poll list; I also recruited about a half a dozen lawyers to work on a "Lawyers Committee" on Election Day. I did not myself recruit challengers, but I did speak to a "school" held for challengers shortly before election, in order to advise them on the law. I believe I also supervised and assisted in the assembling of returns of our mailings which were returned "addressee unknown", so that they could be made available to the particular challenger who was stationed in the precinct in which the address was located. On Election Day, I believe that I spent most of the day in County Headquarters. In that year, however, we had enough other lawyers available in County Headquarters so that I probably spent some of the day going to precincts where a dispute had arisen, and attempting to resolve it.

I cannot remember whether Don Reese or Ralph Staggs was County Chairman in 1960; I believe I was designated by whoever was County Chairman that year.

With respect to 1962, I have been shown an article in the October 1964, *Arizona Republic* which states that I was Chairman of a Lawyers Committee which operated on Election Day. This is consistent with my own recollection. I do not believe that in this year I participated in the mailing out of envelopes prior to election, though I may have. I did speak at a school for challengers, I believe, in much the same manner as in 1960. On Election Day, my recollection is that I spent most of the day in Republican County Headquarters; however, I think that on several occasions in 1962, just as in 1960, I went to precincts where disputes had arisen in an effort to resolve them.

With respect to 1964, I have seen an article in the *Arizona Republic* dated October 1964, stating that I was Chairman of the "Ballot Security Program." This is consistent with my recollection. I presume that I had overall responsibility for the mailing out of envelopes, the recruiting of challengers, and the recruiting of members of the Lawyers Committee to work in County Headquarters; however, I believe that there were individuals other than me who were directly responsible for each of these aspects of the program. At this time, Wayne Legg was Chairman of the Republican County Committee, and I presume it was he who designated me as chairman. My recollection is that on Election Day during this particular election I spent all of my time in County Headquarters.

I also think, though I am not certain, that I spoke at the school for challengers held just before the election; if I did not speak to the school, I believe I was present when someone else spoke on the law. Challengers were advised in this year, pursuant to an opinion issued by the State Attorney General, that challenging at the polls on the basis of literacy or interpretation of the Constitution was unlawful by virtue of the Federal Civil Rights Act of 1964.

In 1966, my best recollection is that I played no part at all in the election activities, though I am not absolutely certain. If I played any part, it was simply to serve as a lawyer on duty at County Headquarters for a period of several hours in order to handle questions that might come in over the phone.

In 1968, I played no part at all in the election activities.

(a) In none of these years did I personally engage in challenging the qualifications of any voters.

(b) The recruitment of challengers in each of these years was under the direct supervision of someone other than me. However, in at least two of these elections—1960 and 1962—and perhaps in 1964, I spoke at a challengers' school conducted shortly before the election. The purpose of my talk was to advise the various persons who were to act as challengers as to what authorization was required in order to enable them to be present in a polling place during the time the election was being conducted, and also as to the various legal grounds for challenging as provided by applicable Arizona law. My recollection is that I simply recited the grounds set forth in the Arizona Revised Statutes as to the basis for challenge, the method of making the challenge, and the manner in which the challenge was to be decided by the Election Board of the precinct in question.

(c) I did not. No such practice came to my attention until sometime on Election Day, 1962. The manner in which I saw this type of challenge being used, when I visited one precinct, struck me as amounting to harassment and intimidation, and I advised the Republican challenger to stop using these tactics. Since no question was raised at that time as to the propriety or lawfulness of the use of printed passages from the Constitution by challengers in conjunction with the election board in an otherwise courteous and lawful manner, I did not consider it. Shortly after the election, I discussed this type of challenge with Charles Hardy, now Judge of the Superior Court of Maricopa County, and expressed my vigorous disapproval of any shotgun use of literacy challenges. By the time of the next biennial election, in 1964, such challenges were no longer permitted under federal law.

11. I cannot speak at all for Pima County, and I cannot speak at all for 1956. I did not myself directly supervise the recruiting of challengers in Maricopa County in any of these years. If challengers were instructed in any formal way in 1958, I do not remember it. Substantially the same legal advice as to challenging, more fully described in the answer to 10(b) above, was given by me in both 1960 and 1962. I do not presently remember whether the same challengers operated in 1958, 1960, and 1962, but I believe there was some turnover each time, and a rather substantial turnover between 1960 and 1962.

12. As described in my answer to 10(c), I recall one instance in which a Republican challenger was himself going down the line and requiring prospective voters to read some passage of the Constitution, rather than presenting his challenge to the Election Board in an orderly way. I advised him to stop this practice, and to make any challenges in the manner provided by the law.

13. (a) My role in 1962 was, to the best of my recollection, that described above. I neither advised nor suggested that shotgun challenges be made on the basis of literacy. I neither advised nor suggested the handing out of handbills, nor the photographing of voters at the election places. My talk to the challenging "school" in 1962 as to the law governing elections was, I believe, substantially the same as that which I gave in 1960. In 1958 and in 1960 virtually the entire

thrust of the Republican challenging effort was devoted to preventing unregistered persons, or persons who had moved from the address from which they were registered, from voting, and as I recall the main disputes which arose in those years with respect to the right of the Republican challengers to enter the polling place to which he was assigned. I did not realize the change in emphasis of some of the Republican challengers in 1962 until sometime during Election Day of that year. I therefore feel that there was no connection between my role and the circumstances related by Judge Hardy.

(b) The practices described by Judge Hardy, to the extent that they did in fact obtain, did not come to my attention until quite late in the day of the election in 1962. At that time I believe that the County Chairman decided to remove the Republican challenger from Bethune Precinct because of the serious trouble his actions were causing. The challenging procedures relating to residence described by Judge Hardy were, in my opinion, generally proper; those relating to indiscriminate use of literacy challenges were entirely improper.

14. I was not present at Bethune Precinct at any time on Election Day in 1964.

15. I have never been a member of Arizonans for America or For America. I have seen a newspaper clipping from a local newspaper in 1958 which indicates that I was one of four panelists who appeared at a meeting of Arizonans for America in 1958 to discuss the federal income tax. While I have no independent recollection of speaking at such a meeting, I have no reason to dispute the newspaper account.

(Signed) WILLIAM H. REHNQUIST.

