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

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

Mr. RHODES. Thank you.

The CHAIRMAN. Any questions?

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

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

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

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

The CHAIRMAN. When did you get it?

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

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

Mr. REHNQUIST. Yes, I believe it is.

The CHAIRMAN. And you got it in 12 years.

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

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

Mr. REHNQUIST. That is my understanding.

The CHAIRMAN. Senator McClellan.

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

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

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

Do these nominees have personal integrity?
Do they possess professional competency?
Do they have an abiding fidelity to the Constitution?

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

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

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

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

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

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

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

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

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

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

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

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

The CHAIRMAN. Proceed.

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

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

Mr. REHNQUIST. I would not, Senator McClellan.

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

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

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

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

Mr. REHNQUIST. No; I would not.

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

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

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

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

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

Mr. REHNQUIST. None.

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

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

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

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

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

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

Mr. REHNQUIST. Yes.

Senator MCCLELLAN. Would you hestitate to do that if you had been wrong?

Mr. REHNQUIST. I certainly would not.

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

Mr. REHNQUIST. No; I would not.

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

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

Senator MCCLELLAN. Very well.

Let me read another quotation:

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

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

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

Mr. REHNQUIST. No.

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

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

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

Mr. REHNQUIST. I subscribe unequivocally to the statement read.

Senator MCCLELLAN. All right. The Justice further said:

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

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

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

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

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

I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions. I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for constitutional rights. But, in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitation which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.

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

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

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

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

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

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Ervin.

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

(Laughter.)

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

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

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

The CHAIRMAN. Senator Hart.

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

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

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

Mr. REHNQUIST. Yes, Senator.

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

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

Senator HART. Right.

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

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

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

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

Mr. REHNQUIST. I see no difference.

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

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

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

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

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

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

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

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

Mr. REHNQUIST. Very true.

Senator ERVIN. All of us are.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Laughter.]

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

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

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

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

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

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

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

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

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

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

Help us on that one.

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

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

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

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

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

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

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

Mr. REHNQUIST. Unequivocally.

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

Mr. REHNQUIST. Without hesitation.

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

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

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

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

Nobody quarrels with that. And you conclude:

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

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

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

How, do you react?

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

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

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

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

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

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

Mr. REHNQUIST. I think I meant the latter.

Senator HART. And you disagree——

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

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

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

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

Mr. REHNQUIST. Yes.

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

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

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

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

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

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

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

Mr. REHNQUIST. New Mexico.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

The CHAIRMAN. Let us have order.

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

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

The CHAIRMAN. Sure.

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

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

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

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

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

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

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

Senator HART. I reserve my time.

The CHAIRMAN. Senator Kennedy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. REHNQUIST. Certainly.

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

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

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

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

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

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

Mr. REHNQUIST. Well, I——

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

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

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

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

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

That is a quote.

Mr. REHNQUIST. I believe, Senator——

Senator KENNEDY. Representing your views.

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

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

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

Senator KENNEDY. Yes.

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

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

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

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

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

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

AFTERNOON SESSION

The CHAIRMAN. Let us have order.

Senator Kennedy.

Senator KENNEDY. Thank you very much.

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

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

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

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

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

Senator KENNEDY. Yes.

Mr. REHNQUIST. No; I did not.

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

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

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

Senator KENNEDY. Well, of course——

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

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

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

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

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

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

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

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

Mr. REHNQUIST. No; I did not.

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator KENNEDY. What would that be?

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

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

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

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

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

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

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

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

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

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

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

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

Mr. REHNQUIST. I did not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. REHNQUIST. I believe it is very important.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator KENNEDY. What would be some of the others?

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

Senator KENNEDY. I am not——

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

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

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

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

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

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

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

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

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

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

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

Senator KENNEDY. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. REHNQUIST. Yes.

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

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

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

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

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

Mr. REHNQUIST. I certainly am suggesting that.

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

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

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

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

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

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

Senator KENNEDY. What about the arresting without probable cause?

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

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

Mr. REHNQUIST. That is my understanding.

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

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

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

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

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

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

The CHAIRMAN. That is a rollcall.

Senator KENNEDY. Can he just answer this?

The CHAIRMAN. That is a rollcall vote.

Mr. REHNQUIST. Could I have the question repeated?

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

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

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

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

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

(Short recess.)

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

Senator Kennedy.

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

Am I correct in that?

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

Senator KENNEDY. Would you restate it, then?

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

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

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

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

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

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

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

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

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

Mr. REHNQUIST. No; I did not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. REHNQUIST. Yes.

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

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

Mr. REHNQUIST. I face the same decision here.

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

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

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

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

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

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

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

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

Senator KENNEDY. Could you?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. REHNQUIST. I am sure I have.

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

Mr. REHNQUIST. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator KENNEDY. Yes; without a court order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Chairman. Let us have order.

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

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

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

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

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

Mr. REHNQUIST. I did.

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

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

Senator KENNEDY. Well, could you?

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

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

The CHAIRMAN. It will be admitted.

(The letter referred to follows.)

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

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

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

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

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

In the same paragraph of the editorial the following appears:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And you say the—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. REHNQUIST. Could you be any more specific?

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

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

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

Mr. REHNQUIST. Let me try.

Senator KENNEDY. All right.

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

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

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

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

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

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

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

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

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

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

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

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

Senator KENNEDY. No; that is all right.

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

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

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

The CHAIRMAN. Senator Bayh.

Senator KENNEDY. I would like to reserve some time.

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

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

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

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

Mr. REHNQUIST. Yes, it is, Senator.

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

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

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

Mr. REHNQUIST. Yes.

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

Mr. REHNQUIST. Yes; I graduate in 1948.

Senator BAYH. 1948. I am sorry.

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

Mr. REHNQUIST. Yes.

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

Mr. REHNQUIST. That is correct.

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

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

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

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

Mr. REHNQUIST. Yes; it is.

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

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

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

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

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

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

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

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

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

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

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

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

Mr. REHNQUIST. Phoenix Title & Trust.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator BAYH. Thank you.

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

Mr. REHNQUIST. I believe I am, yes.

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

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

Senator BAYH. Let us gather together in misery.

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

Mr. REHNQUIST. Yes.

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

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

Mr. REHNQUIST. Those are 1969 letters?

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

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

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

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

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

Mr. REHNQUIST. Do you want my present opinion?

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

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

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

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

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

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

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

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

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

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

Senator COOK. It is not within the framework.

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

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

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

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

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

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

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

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

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

Senator BAYH. Oh, you would not have?

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

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

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

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

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

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

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

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

Mr. REHNQUIST. Yes, I do.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator BAYH. The FBI and local police as well?

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

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

Mr. REHNQUIST. Yes; I believe it is. Do you want me to answer?

Senator BAYH. Well, if you care to. The question is: How do you reconcile—where does the fourth amendment fit where you happen to have the local police chief or the FBI or the President on one hand feel that wires should be tapped and a room should be bugged and, on the other hand, the rights of an individual citizen protected under the fourth amendment?

Mr. REHNQUIST. Well, I think a good example of a line that has been drawn by Congress is the act of 1968, which outlawed all private

wiretapping and which required, except in national security situations, prior authorization from a court before wires could be tapped.

Now, it strikes me that both of those are protection of the citizen in his home.

Senator BAYH. And you feel that the imposition of a neutral judge between these two competing rights sometimes is a good buffer, is a good way to guarantee this fourth amendment right?

Mr. REHNQUIST. Yes.

Senator BAYH. Let me ask you, if I may, to get your specific relationship into this inasmuch as you asked me to be more specific.

Senator Kennedy asked some of these questions, and Senator Hart asked at least one, and you felt, as I recall, that you were unable to answer, because of various relationships, or not being willing, not feeling that you should prejudge any case.

Let me use a little different approach, if I may, and see if we can get a specific answer.

On March 11 of this year, the Providence Journal reported that you were questioned at Brown University about the Justice Department's—and I quote:

> Practice of not obtaining judicial permission before installing wiretaps in cases of national security.

The newspaper went on to say that you replied—and here, again, I quote the newspaper:

> In these cases, the Department must protect against foreign intelligence or subversive domestic elements. It often does not have the evidence of imminent criminal activity necessary for wiretapping authorization.

Is that a correct quotation of your response at Brown? Is that still your opinion? Was it then?

Mr. REHNQUIST. I have no idea whether it was a correct quotation. I can certainly remember in substance defending the administration's position on national security wiretapping, which has since been embodied in a brief in the Supreme Court of the United States.

I cannot, at this time, recall the words I used.

Senator BAYH. Well, does this reflect your views?

Mr. REHNQUIST. As I said to Senator Kennedy, Senator Bayh, I think it inappropriate in a case in which I have appeared as an advocate to now give personal views.

Senator BAYH. With all due respect, do you have—is there any legal precedent for saying that you have an obligation to the Justice Department when you are queried on your opinion at Brown University?

It is hardly the client-lawyer relationship, is it, Mr. Rehnquist?

Mr. REHNQUIST. The format of the college visits which I participated in, 10 or 12 last year, was very simple:

"Come and defend the Justice Department to the college students." They certainly would regard it as a lawyer-client relationship.

Senator BAYH. I find this a rather difficult position for me to be in, and in which I frankly would like to give you the benefit of the doubt. From your mouth have come a number of statements that concern me very much, about whether the Government is going to be given carte blanche authority to bug and to wiretap, and yet there is no way I can find William Rehnquist's opinion about that.

Mr. REHNQUIST. Well, I doubt that you can find any statement, Senator, in which I have suggested that the Government should be given carte blanche authority to bug or wiretap. I recently made a statement at a forum in the New School for Social Research up in New York, attended by Mr. Mear of the Civil Liberties Union and Mr. Katzenbach, that I thought the Government had every reason to be satisfied with the limitations in the Omnibus Crime Act of 1968.

Senator BAYH. Of course there were certain areas that were not dealt with in the Omnibus Crime Act of 1968, the whole thorny thicket of national security was not dealt with?

Mr. REHNQUIST. Well, it was dealt with to the extent that Congress made it clear that the limitations being imposed by that act were not to be carried over into that type of case.

Senator BAYH. But you do feel this gave the President rights that he did not have before?

Mr. REHNQUIST. I think that is a fairly debatable legal question.

Senator BAYH. What do you feel about it?

Mr. REHNQUIST. I think, again, having participated in the preparation of the Government's brief—the Government's brief which is on file in the Supreme Court of the United States—I think it would be inappropriate for me to give a personal opinion.

Senator BAYH. Can we find something a little more basic that may not involve a specific case?

Do you feel that there is some standard that should be present before the Government gets involved in bugging activities? For example, the standard of probable cause?

Can the Government go out here on a fishing expedition and promiscuously bug telephones because the President, himself, seems to feel it meets a certain criteria; or should it meet the probable cause test that is not foreign to our system of jursprudence?

Mr. REHNQUIST. I think the answer to the first part of your question is so clear that I should have no hesitancy in giving it, that, certainly, the Government cannot simply go out on a fishing expedition, promiscuously bugging people's phones. As to whether a standard of probable cause, in the sense of probable cause to arrest, in the sense of probable cause laid down by the Omnibus Crime Act of 1968, or probable cause to obtain a search warrant for tangible evidence, it seems to me those are the sort of questions that may well be before the Court, and I ought not to respond.

Senator BAYH. A moment or so ago, we, I think, reached some agreement that the fourth amendment rights can be protected by interposing between the Government and the individual a neutral party, a neutral magistrate. Can you tell us why this should not be the case, in your judgment, as far as the national security is concerned?

Would you care to make a distinction between the foreign intelli-insurgent? Do you make a distinction in your own mind on these two?

Mr. REHNQUIST. I can tell you the position which the Government has taken and which I believe is a reasonably well done job of advocacy. and that is that given the facts, five preceding administrations have all taken the position that national security type of surveillance is permissible, that one Justice of the Supreme Court has expressed the view that the power does exist, two have expressed

the view that it does not exist, one has expressed the view that it does not exist, one has expressed the view that it is an open question, that Government is entirely justified in presenting the matter to the Court for its determination.

Senator BAYH. Do you not care to offer a personal opinion on it, then?

Mr. REHNQUIST. I think it would be inappropriate.

Senator BAYH. All right. I do not know whether you are aware or not—I suppose you are—of the ABA standards relating to electronic surveillance, in the tentative draft of June 1968, which says that they feel a distinction should be made in the President's right to tap wires when international agents are involved on the one hand and domestic insurgents are involved on the other. Do you care to commnet on that?

Mr. REHNQUIST. I think the Department has taken the position that this is a distinction that is virtually impossible to make. Their position is taken on the basis of operational divisions with the knowledge of which I am not familiar, but I do not think it would be appropriate for me to make a personal observation.

Senator BAYH. Let me broaden the question a bit to include not only bugging, which is the more traditional fourth amendment area, but also the right to privacy, which, as the *Griswold* v. *Connecticut* case held, is the product of several sources, the fourth, the first, the fifth, and ninth, and maybe the 14th amendments.

Let me here again go to some of your testimony before the subcommittee of this committee where you said, in response to a question by Senator Ervin at the hearing on the investigative authority of the executive, that you saw no constitutional problem in Government surveillance of persons exercising their first amendment rights to assemble peacefully to petition the Government for redress of a grievance. Is this an accurate statement of your views?

Mr. REHNQUIST. With the qualification that the surveillance ought to be in the interest of either apprehending criminals or preventing the commission of crime, and with the additional qualification that the surveillance talked about there is not wiretapping and it is not forcibly extracting information. It is simply the viewing in a public place.

Senator BAYH. Taking pictures and compiling dossiers and this type of thing, you feel is warranted?

Mr. REHNQUIST. I feel is—what?

Senator BAYH. Is warranted.

Mr. REHNQUIST. My statement was, I believe, that I did not feel it was a violation of the first amendment. The question of whether it is warranted or not is a good deal different one it seems to me.

The question of proper use of executive manpower, you know, with the idea of compiling dossiers on political figures, such as was being done by the Army at one time, strikes me as nonsense.

Senator BAYH. But you do not feel that is a violation of anybody's constitutional rights?

Mr. REHNQUIST. I expressed that view at the time of the hearing before the Ervin committee. I was speaking for the Department, and I will stand by that statement.

Senator BAYH. Can you just tell me one more time why you feel that this kind of thing which you disagree with and you feel is

improper, some of the ridiculous examples we had of a peace march in Colorado where I think there were about 119 people and about half of them were agents, and the fact that a church's young adults class had been infiltrated by Army agents in Colorado Springs, this type of thing which would seem to me to have no useful purpose, why would that not be unconstitutional? Why is that not abrogation to the right of privacy of the individuals involved?

Mr. REHNQUIST. Well, I do not disagree with you at all, but it would seem to have no meaningful purpose to me.

Even in my examination of the cases as a Justice Department lawyer, I was unwilling, and I did not feel that the precedents suggested that everything that was undesirable or meaningless was unconstitutional.

Senator BAYH. Well, how do we protect these rights if they are not unconstitutional? Let me ask you this——

Mr. REHNQUIST. Can I answer that?

I mean, Congress has it within its power any time it chooses to regulate the use of investigatory personnel on the part of the executive branch. It has the power as it did in the Omnibus Crime Act of 1968 of saying that Federal personnelsh all wiretap only under certain rather strictly defined standards. That is certainly one very available way of protecting.

Senator BAYH. You are right, but when you testified before our subcommittee, again you suggested that the Justice Department, and I quote, "vigorously opposed is any legislation that would open the door to unnecessary and unmanageable judicial separation of the executive branch for information-gathering activities."

Now, I do not think we ought to impose unmanageable or unreasonable criteria. But we have got the very strong feeling that the measure that a couple of us introduced, which appeared reasonable to us, was going to be opposed by the Justice Department. What criteria would you oppose or permit to be interposed that would not be unreasonable, unnecessary, or unmanageable?

Mr. REHNQUIST. Speaking as a Justice Department advocate, as I was at the time, I think that a couple of earlier sentences immediately preceding the one you read, Senator, summarized the view that legislation tailored to meet specific evils would not receive the categorical opposition of the Department. I think, from the law enforcement point of view, we were skeptical of the notion that some sort of judicial hearing should be required before an investigation be even undertaken which, I think, would have the most deleterious effect on effective law enforcement, in effect, preventing the commencement of an investigation which might ultimately end up in a showing of probable cause before the investigation could even start.

Senator BAYH. Have you, or has the Justice Department suggested any possible alternative to the measures that have been introduced by the Members of Congress to deal with this problem?

Mr. REHNQUIST. I think the LEAA bill sent up, in response to Senator Mathias' amendment to the LEAA Act of 1970, presents what struck me at the time I had a chance to look at it as a reasonable accommodation of the interests.

Senator BAYH. In what way?

Mr. REHNQUIST. In that it prevents the wholesale dissemination of criminal history information; it prevents almost completely the

dissemination of criminal investigative information. It confers, in some cases, a right of private action for someone who is wronged by that. I do not pretend to carry in my mind even all of the significant provisions of the act, but it seems to me those were some of them.

Senator BAYH. In commenting on this before Senator Ervin's hearing, you seemed to stress, as I recall—and this is, I suppose, an even broader question—that the only real way, or the best way, to deal with this would be self-discipline, self-discipline on the part of the executive branch.

Self-discipline, on the part of the executive branch, will provide an answer to virtually all of the legitimate complaints against excess information gathering.

Do you really believe that is sufficient?

Mr. REHNQUIST. I think it can go a long way, yes.

Senator BAYH. Let me read one paragraph of a memo prepared by a very distinguished member of my staff back on March 17, right after you made that statement, and I would like to have you comment on the thoughts here which I must say are my own.

Fundamentally, and of interest both philosophically and politically, the history of civilization and freedom suggests that no society which depends simply on the self-discipline of its government can expect to withstand the pressure and temptation to weaken and destroy individual freedom. This is, of course, a tremendously conservative thesis. The need is to protect the individual from big government. If we should rely on self-discipline we would not need the Bill of Rights, the First Amendment protection, of free religion, free speech, free press; the Fourth Amendment protections of security against searches and seizures; the Second Amendment protection against the double jeopardy and violation of due process; the Sixth Amendment requirements of speedy trial, right to confrontation, and defense; the Seventh Amendment right to jury trial; the Eighth Amendment right to fair bail and restrictions against cruel and unusual punishment. All of these guarantees are express constitutional limitations on the power of government when enacted, because we were not prepared to trust our future to the self-discipline of those who happen to be in power.

Mr. REHNQUIST. I agree with that statement. My remarks before Senator Ervin's committee were in a context of the existence of the Bill of Rights, the existence of the statutory restrictions such as were contained in the 1968 act. And the question, as I understand it, was what additional statutory prescriptions should be placed on investigative processes.

Senator BAYH. You have expressed the opinion that judicial hearings would be deleterious. I can see how sensitive matters would cause this to be the case. But is there no limit beyond which this spying can go, this eavesdropping can go?

Why do we not just have a simple recognition of the fact that if we seek the advice and counsel, seek the permission of the unbiased member of the Federal judiciary, that we have provided the buffer we need between big government on one hand that might want to spy and pry and listen and the individual citizen who has the right to privacy? How would that be deleterious?

In other words, let us get a court warrant. You would not have to have a hearing. Why could that not work?

Mr. REHNQUIST. Well, you are talking about a court warrant before you commence an investigation?

Senator BAYH. Yes; before you tap a telephone.

Mr. REHNQUIST. Well, you are required to get one now.

Senator BAYH. No; not if it is in national security. At least you suggest it is arguable as to whether it is a domestic or international security problem, and there is a very nebulous area there, as I am sure you agree. But why not let a Federal judge say "Yes," that there is probable cause there and go ahead and do it?

Mr. REHNQUIST. Well, as to whether Congress ought to enact legislation like this, I would not express any opinion. Our position in the brief in the Supreme Court has been that with the existing provisions in the act of 1968, the Constitution does not require that it be done.

Senator BAYH. What would be wrong with you, as a judge requiring that it be done? Is not this something that a member of the judiciary can take into consideration, whether there has been adequate self-restraint on the part of the executive?

Mr. REHNQUIST. You mean what would be wrong with passing such a statute?

Senator BAYH. No; a judicial interpretation without a statute in the area where I say it is now nebulous, where the administration feels they have the right, and some of us in Congress feel they do not. Is this a matter that is subject to consideration by the judiciary?

Mr. REHNQUIST. I honestly do not understand your question, Senator.

Senator BAYH. Is adequate self-restraint a subject which can be considered in judicial interpretations as to whether fourth amendment rights have been violated or the right to privacy has been violated?

Mr. REHNQUIST. I still do not understand.

Senator BAYH. Well, then, we are equal. You see, what concerns me is that we have had, in the past decade, a commingling of executive authority and political activity. In the last 10 years we have had Attorneys General, charged with the dispensation of law, maintenance of order, provision of justice, who have also been the campaign managers of the President they serve. They have run the political operation, and it just seems to me that we would be in a lot better position, before we started taking pictures, before we started listening in on peaceful demonstrations, before we started tapping telephones, if we required that a court order be given.

And I will not proceed further on that.

Will you give us your thoughts in another area, the civil rights area?

Let me just ask you, if I may, to explore the text of the two letters you wrote to the Arizona Republican in the transcript of your testimony concerning the Phoenix Public Accommodations Act enacted in 1964, your statement opposing the public accommodations ordinances, which suggested that it was "impossible to justify the sacrifice of even a portion of our historic individual freedom for such an end."

There you were referring to the freedom of businessmen to select their customer for the purpose of giving to the public access to facilities that were offered for public use. That was your opinion before you served in the Justice Department. Is that still an accurate reflection of your opinion now?

Mr. REHNQUIST. I think probably not.

Senator BAYH. How would you look to that differently now?

Would you care to explain a little but in more detail for us, please?

Mr. REHNQUIST. Yes.

I think the ordinance really worked very well in Phoenix. It was readily accepted, and I think I have come to realize since it, more than I did at the time, the strong concern that minorities have for the recognition of these rights. I would not feel the same way today about it as I did then.

Senator BAYH. Have you had the same change of feeling relative to the 1967 letter to the editor in which you quoted a statement of the Phoenix school superintendent relative to the integration of the school system?

Mr. REHNQUIST. I think probably not. And if I may explain: My children here go to school out in Fairfax County, in schools that are integrated and attended by a minority of blacks. My son plays on a football team, on which both blacks and whites play. He plays on a basketball team on which blacks and whites play, and I feel he is better off for that experience than if he were playing on a team entirely composed of whites. This, however, is done in the context of the neighborhood school. All of these people are in the general geographical area and attend the school because of that. I would still have the same reservations I expressed in 1967 to the accomplishment of this same result by transporting people long distances, from the places where they live, in order to achieve this sort of racial balance, and what I would regard as rather an artificial way.

Senator BAYH. What is your feeling about transporting people either long or short distances to maintain an all-white or an all-black school?

Mr. REHNQUIST. Well, I think that transporting long distances is undersirable for whatever purpose.

Senator BAYH. You do not make a distinction between the two types of transportation?

Mr. REHNQUIST. Well, in the context of the situation where there has not been de jure segregation, obviously we get into a situation where there are questions pending before the Court, and which it would be inappropriate for me to comment on. I do feel obligated to comment, because I did write the letter to the editor. I think you are entitled to inquire into my personal views on that particular point.

Senator BAYH. May I ask you just to explain in a little further detail a specific quotation from a letter that might be more pertinent to the general question?

The superintendent of schools apparently had said that we are and must be concerned with achieving an integrated society. And you responded and said:

> I think many would take issue with his statement on the merits and would feel that we are no more dedicated to an integrated society than we are to a segregated society, that we are, instead, dedicated to a free society in which each man is equal before the law, but that each man is accorded a maximum amount of freedom of choice in his individual activities.

Is that still your view now?

Mr. REHNQUIST. In the context of busing to achieve integration in a situation where it is not a dual school system; I think it is.

Senator BAYH. All right, now, we are not talking about an isolated situation where this is taking place. In fact, I think this is extremely

important, because I think generally one would adopt that hypothesis if it were not for history, and I want to ask you: Do you believe that we can achieve the free society in which each man is equal before the law, as you suggested in your letter, if we ignore the social and economic and sociological consequences of 300 years of segregation? How can we look at this in a vacuum?

Mr. REHNQUIST. Well——

Senator BAYH. We usually have gone through calculated efforts on the part of Government to segregate. Now, you suggest that we do not have to do something to redress the balance here?

It seems to me it is rather——

Mr. REHNQUIST. The courts have held where a situation has pertained in segregation we are required and obligated to redress that balance. That was not the situation to which I was addressing myself in that letter.

Senator BAYH. Let me ask you one other question about the civil rights area. As you know, there has been some opposition from the NAACP in your part of the country to you because of one quotation that I have here from a resolution which, if you are not familiar with it, I would be glad to show you.

The southwest area conference of the NAACP says:

> Mr. Rehnquist does not fully accept the right of all citizens to exercise the franchise of voters' rights, and our fears are based upon his harassment and intimidation of voters in 1968 during the Presidential election in precincts heavily populated by the poor.

I have here a number of newspaper clippings citing certain types of election-day activities, and apparently you had some position of responsibility within the party to challenge in this type of thing. Would you care to explain how the NAACP would be so concerned about the voter activities?

I think Senator Hayden, on one occasion, asked the FBI to investigate.

Mr. REHNQUIST. I would not undertake to explain the grounds of the NAACP opposition. I will try to give a fair answer to the specific charges so far as 1968 is concerned. My recollection is I had absolutely nothing to do with any sort of poll watching. That is not a completely fair answer or a completely responsive answer, because in earlier years I did, and they may well have confused 1968 with earlier years.

My responsibilities, as I recall them, were never those of a challenger, but as one of a group of lawyers working for the Republican Party in Maricoba County who attempted to supply legal advice to persons who were challengers, and I was chairman of what was called the Lawyers Committee in a couple of elections, biennial elections, which I believe were in the early 1960's. And we had situations where our challengers were excluded from precincts where we felt, by law, they were entitled to get into, and I might say that our challenging efforts were directed not to black precincts as such but to any precinct where there was a heavy preponderance of Democratic voting, just as our counterparts in the Democratic Party devoted their efforts to precincts in which there was a heavy preponderance of Republican voting.

And, as matters worked out, what we finally developed was kind of a system of arbitration whereby my counterpart, who was for a couple

of elections chairman of the Democratic lawyers, and I, the chairman of the Republican lawyers, tried to arbitrate disputes that arose, and frequently the both of us would go together to a polling place and try to decide on the basis of a very hurried view of the facts who was in the right and who was in the wrong. And I can remember an occasion in which I felt that a couple of our challengers were being vehement and overbearing in a manner that was neither proper nor permitted by law and of telling them so. I can also remember situations in which the Democratic poll judges were refusing to allow our challengers to enter the polling place, and I can remember my counterpart insisting that they let them in.

So, I do not feel I can fairly be accused in the manner that the NAACP has accused me on the basis of what those activities were.

Senator BAYH. Of course, a part of this activity was the sending out of letters to those who lived in the minority group areas and then challenging those who had letters returned to you?

Mr. REHNQUIST. It was not devoted to minority group areas as such; it was devoted again to areas in which heavy Democratic pluralities were voting together, with some reason to believe that tombstones were being voted at the same time. And this was one of the principal means used to try to find letters returned with the addressee unknown and then to challenge the person on the basis of residence if he appeared to vote.

I might say that the Democrats made equal use of the same device.

Senator BAYH. As I read these newspaper clippings, it does not mention anything about the Democrats doing that. I suppose that does not mean they did it or did not do it, but at least the newspaper reporters did not catch it. If I were a Republican, I would want to keep as many Democrats from voting as I could, I suppose, and vice versa. But this is done in some areas, and I am familiar with this, in those areas that are not just Democratic, but minority groups primarily, whether it is chicano or black or whatever it might be, where there is more movement back and forth across the street and from one part of the community to another. Can you give me any reason why the NAACP would make this assessment, or did they just have something in for you?

Mr. REHNQUIST. I simply cannot speak for them. I know of my own conduct in these matters, and that the letters were mailed out on the basis of mathematical calculations of Democratic votes in precincts together with areas in which there was some reason to believe that there actually were tombstone or absentee voting, and I know from my trips to polling places, as a member of the Lawyers Committee, that some of the precincts certainly had a number of blacks, a number of chicanos, and many of them were totally white.

Senator BAYH. Let me ask two other specific questions, Mr. Chairman, and then I feel I would like to move on and reserve whatever time I might need for further questioning and let Senator Tunney have a chance.

There was a question asked by Senator Hart, in which he quoted a U.S. News & World Report article relative to your observations about the liberals on the Court. Are you familiar with the question he asked? I did not get the answer. What he said was: "Is your opinion the former or the latter?" And you said, "The latter," which really did not have meaning.

Mr. REHNQUIST. I do not remember the question, Senator.

Senator BAYH. When you wrote that article——

Mr. REHNQUIST. Oh, I do, too; I remember the question.

Senator BAYH. When you refer to the extreme solicitude for claims of a Communist or other criminal defendant, does that mean you thought the Warren court was very sensitive to the constitutional rights of all citizens, including these groups, or do you mean that the Court was more sensitive to their rights because of some ideological opinion?

Now, I think you answered the latter, but then we moved on to something else, and I just wanted to redefine very quickly what you meant when you said that.

Mr. REHNQUIST. Well, I certainly did not mean to suggest then or now that the Court at that time was sympathetic to the claims of Communists, because they, themselves, sympathized with communism. I think what I meant to suggest was that was an ideological sympathy with unpopular groups which was not developed from the Constitution itself which may have partaken of the decision.

Senator BAYH. One last question, and that deals with disqualification.

I understand the problem you have in not wanting to prejudge a case which you might have to decide, or even to determine whether you are going to remove yourself, but we have a problem, too, Mr. Rehnquist. We have a problem deciding whether your judgment is going to keep you from getting involved in a conflict of interest where you have, indeed, provided significant legal counsel to the Attorney General, and you have, on a number of instances, refused to say to what degree you have been involved in a number of cases. On one case, you suggested that you had helped to prepare a brief. Now, just let me ask you again, and I will not repeat all of the assessment here, what Mr. Kleindienst said your job description was, and what you, yourself, said, how you described it before Senator Ervin's subcommittee, but do you not feel that if you had helped the Justice Department prepare a brief, that this ought to disqualify you from sitting on a case? Is that not a direct conflict there?

Mr. REHNQUIST. Well, I think my answer to that would be "Yes."

Senator BAYH. Well, I may be wrong, but I thought that in the answer to the wiretap question that was raised, you came very close to saying that; but you said, well, you did not want to make a final judgment on that.

Mr. REHNQUIST. And in a sense I probably should not have answered the last question "Yes," because I think one has got to reserve his complete independence of decision if he is confirmed. I think you are entitled to know my present impressions, and my present impressions are that the memo submitted to Byron White is a good summary of disqualification law, and that it requires disqualification where there has been personal participation, even in an advisory capacity on the preparation of a brief, and that I have participated in the wiretapping brief in an advisory capacity.

Senator BAYH. I might suggest that we have a precedent that is even a bit stronger than the distinguished Justice that you referred to. Now, 28 U.S.C. 455 says that if you have previously been a counsel, that you should disqualify yourself, and it seems to me if

you have helped prepare a brief, you have been as close as you can be, in Government service, of counsel.

Mr. REHNQUIST. I would not want to venture an interpretation of the term of counsel, except to suggest I think it could fairly be said to mean "of counsel," as the term is traditionally used in the legal profession, representing a part in court.

Senator BAYH. It is not possible to be of counsel and represent one part of the question and participate in one part of a case, if you happen to be in the Government's employ?

Mr. REHNQUIST. Well, I would want to examine——

Senator BAYH. Who do you have representing the Government on a case?

The CHAIRMAN. Let him answer.

Mr. REHNQUIST. Would you repeat the question?

Senator BAYH. I did not mean to interrupt. I just wanted to rephrase the question.

Who represents the Government in a court case, who prepares the case, if it was not someone of counsel?

Mr. REHNQUIST. Well, I think the legal definition of someone of counsel is someone whose name is signed to the brief or whose name appears with a specific designation of counsel on the brief. Now, whether that provision should be construed that narrowly or not is something I would not want to prejudge.

Senator BAYH. May I quote from the White memorandum?

From the foregoing, it seems clear that a Government attorney is of counsel within the meaning of 28 U.S.C. 455 with respect to any case in which he signed a pleading or a brief, even if it is merely a formal act, and probably should be regarded as of counsel if he actively participated in any case, even though he did not sign any pleading or brief.

Do you concur in that general assessment?

Mr. REHNQUIST. Well, I concur in that general evaluation.

Senator BAYH. Are you familiar with the new canons of judicial ethics of the American Bar Association, the ones in the process of being prepared now?

Mr. REHNQUIST. No.

Senator BAYH. I might point out that in canon 2, under "Disqualification," the following is cited—and then I will ask your opinion—a judge has to disqualify himself "in any proceeding in which his partiality might reasonably be questioned, including, but not limited to instances where (1) he has a fixed belief concerning the merits of the matter before him or personal knowledge of evidentiary facts concerning it; (2) he has previously served as a lawyer in the matter in controversy or has been a material witness concerning it."

May I ask you whether you think generally those views are consistent with your view of disqualification?

Mr. REHNQUIST. I have never had an opportunity to review those canons alongside of 28 U.S.C. 455. I would presume that in any decision I made on disqualification, should I be confirmed, I would then have an opportunity to do that and would do it.

Senator BAYH. Mr. Chairman, I yield and would like to reserve the opportunity to ask further questions if it seems important afterwards.

You have been very patient, Mr. Rehnquist, and I appreciate it.

The CHAIRMAN. Mr. Tunney.

Senator TUNNEY. Thank you, Mr. Chairman.

Mr. Rehnquist, you and I are relatively young men, and, as such, I feel a very important responsibility in passing judgment on your qualifications, because it is entirely possible that in the year 2000 you will still be sitting on the Supreme Court if you are confirmed. Between now and then there is going to be a profound political, social, and economic change taking place in this country. You are going to be required to pass judgment on the constitutionality of many of these changes as they relate to maintaining an equilibrium between freedom and order, equality and efficiency, justice and security.

I look at your professional qualifications, and I have studied them, your competence, your judicial temperament, your integrity, and I see a highly qualified man for the Supreme Court. I believe, however, as I read your writings, that you share my viewpoint that a nominee's philosophy is a legitimate area for senatorial confirmation inquiry.

In other words, it is my view that where the President deems it appropriate to change entirely the character of the Supreme Court, changing it to his own image, the Senate has the right to reject the nominee on the grounds that his views on the large issues of the day will make it harmful to the country were he to sit and vote on the Court.

Now, I want to be frank with you and state that in reading what you have written and reports of what you have said in speeches, there are aspects of your philosophy of government and the right of the individual which I consider to be very disturbing, just as I am sure you would consider my views to be very disturbing if our positions were reversed.

I would like to quote from a few of your letters, articles, and speeches, and ask you to say precisely what you meant in those statements, and the context in which the statements were made.

I note that in an article that you wrote for the Harvard Law Record, you express very clearly the fact that you feel that philosophy is a legitimate area for senatorial inquiry and you state:

> Specifically, until the Senate restores the practice of thoroughly examining inside of the judicial philosophy of the Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process. As of this writing, the most recent Supreme Court Justice to be confirmed was Senator Charles Evans Whittaker. Examination of the Congressional Record for debate relating to his confirmation would reveal a startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation.

Now, one of the things that I would like to say prefatory to my specific questions is that the only way that we can get an idea of your philosophy is if you answer questions. If it is impossible to probe your thinking because you feel that somehow the issue might come before the Supreme Court at some time, there is no way that we can go after the process of thinking that you engage in and which you, in this early article, felt was very important as a part of the senatorial inquiry.

Therefore, I am going to try to avoid asking you specific fact situations which will come before the Supreme Court, but it would certainly help me if you could in general explore your thinking, both at time you made the statement and your thinking on the statement now. I will try to make this inquiry brief, because I recognize that there are

Republican members of this committee who have a very keen desire to be heard before the day is over.

Last year, you wrote a letter to the editor of the Washington Post in which you defended the civil rights record of Judge Harrold Carswell. In that letter you made the assertion that any seeming anti-civil-rights bias on his part was, in fact, not that at all but rather simply a reflection of constitutional conservatism—using your words. The letter stated specifically, and I quote:

> Thus, the extent to which his judicial decisions in the civil rights cases fails to measure up to the standards of the Post is traceable to an overall constitutional conservatism rather than to any animus directed at civil rights cases or civil rights litigants.

If that is true and if we are to believe that you are a constitutional conservative, and, using the President's term, a strict constructionist, what can we expect from you in the area of civil rights in the future?

Mr. REHNQUIST. Well, just as I understand your problem, you understand mine, Senator. I believe I have tried to give to Senator Kennedy some basic outlines, and however much it may displease you I do not feel I can do more.

As I said, a decision that was handed down unanimously and has been unanimously reconsidered by a succeeding group of judges, of which *Brown* v. *Board of Education* would be an example, is to my mind the established constitutional law of the land.

To the extent that one takes other decisions which were by a closely divided Court more recently, I would regard these precedents as not being as strong, though nonetheless entitled to weight.

So far as the power of the Congress to enact civil rights legislation, such as the Public Accommodations Act of 1964, under the commerce clause, on matters like that, I think they have been sufficiently set at rest by a constitutional decision that one need not hesitate to say that that is so.

Senator TUNNEY. And so what I take from your remarks when you testified in 1964 before the Arizona State Legislature against the civil rights bill that was pending before that legislature, you were expressing your viewpoint as a private citizen and that you may or may not hold the same views today?

Mr. REHNQUIST. That is correct, Senator.

If you were present when I answered Senator Bayh, I would answer you much the same way, and I——

Senator TUNNEY. On a different question, I believe he asked you about the ordinance, the Phoenix City Council ordinance.

Mr. REHNQUIST. Well, that was the only one. I never testified against any State legislation.

Senator TUNNEY. That was the only one?

Mr. REHNQUIST. Right.

Senator TUNNEY. There was no State legislation?

Mr. REHNQUIST. Right.

Senator TUNNEY. I am sorry. I was misinformed about that.

When the ordinance passed by unanimous vote in Arizona, you wrote a letter to the editor of the Arizona Republican in which you stated, and I quote:

> Unable to correct the source of the indignity to the Negro, it redresses the situation and places a separate indignity on the proprietor. It is as barren of

accomplishment in what it gives to the Negro as from what it takes from the proprietor, the unwanted customer and the disliked proprietor are left glaring at one another across the lunch counter.

Now, I understand your testimony to say that you have a different view of that today, but I am more concerned now about another issue, and that is the relative rank that you give to individual freedoms as opposed to personal property rights.

I would assume from reading and interpreting fairly that quotation that at that point you felt that personal property rights were more important than individual freedoms, the individual freedom of the black to go up to a lunch counter?

Mr. REHNQUIST. In that context, I think that is a fair interpretation.

Senator TUNNEY. Do you still ascribe a greater degree of value to individual property rights in a civil rights area than to freedoms of individuals, individual freedoms?

Mr. REHNQUIST. I have indicated that I am no longer of the same opinion on the public accommodations point.

Senator TUNNEY. Yes; but I am trying to get at philosophy now.

Mr. REHNQUIST. OK. If we broaden it out, I certainly am not prepared to say, as a matter of personal philosophy, that property rights are necessarily at the bottom of the scale. Justice Jackson, for whom I worked, commented shortly before his death that the framers had chosen to join together life, liberty, and property, and he did not feel they should be separated. I think property rights are actually a very important form of individual rights. On the other hand, I am by no means prepared to say that a property right must not on some occasion—and I am again speaking personally and not in any sense of the Constitution or statutory construction—but certainly when a legislative decision is made that a property right must give way to what may be called a human right or an individual right, that may frequently be the correct choice.

Senator TUNNEY. How about if it is not a question of the interpretation of a statute? What happens if the case comes to you on a constitutional question and there is no precedent?

Mr. REHNQUIST. I feel that it is improper for me to answer in that context, Senator.

Senator TUNNEY. Was Justice Jackson on the Supreme Court when he made his evaluation of the relative values of life, liberty, and property?

Mr. REHNQUIST. Yes. I am not.

Senator TUNNEY. That is what I was trying to find out about. I mean, I do not think that there is anyone on this committee that would not want to support your candidacy based on your professional qualifications. You are an outstanding candidate as far as your competence. We have seen an indication of your judicial temperament and I think it is excellent. But I, like you back in 1958, when you were writing about the subject, am worried about the philosophy, the personal philosophy, of the candidate for the Supreme Court, and I would like to think that individual freedom is more important to you than personal property rights when you have a direct conflict between the two.

Mr. REHNQUIST. Senator, my fundamental commitment, if I am confirmed, will be to the greatest extent possible to totally disregard my own personal belief as to whether property is invariably sub-

ordinate to individual freedom or whether they must be balanced in some way. I realize that you certainly are not required to take at face value my statement to this effect and that anyone is perfectly free to attach such significance as they will to Senator Ervin's very perceptive comments that what I am today is part of what I was yesterday, and yet, framed in the constitutional context in which you frame it, I think it is improper for me to answer it.

Senator TUNNEY. In a speech to the Arizona Judicial Conference, you were reported as saying:

> First, however, I should point out that the principle of a person is not an absolutely unchanging right. Constitutional language is sufficiently broad to permit a latitude of judicial interpretations to meet the circumstances of needs of our society at any given time.

Were you speaking there as an attorney for the Justice Department or were you speaking there from your personal philosophy?

Mr. REHNQUIST. I was speaking, I think, as a spokesman for the Department in the area of the pretrial detention bill. And I think that the contest of my remarks was that based on a historical analysis of the cases that personal freedom can be limited by arrest, by detention of a subject, following a trial, or even to a momentary search under the doctrine of *Terry* v. *Ohio*, that these are decisions that have been made by the Supreme Court, and are parameters under which the Justice Department and the Government now operate.

Senator TUNNEY. You were not expressing a personal viewpoint on the constitutionality of preventive detention?

Mr. REHNQUIST. I was giving my best lawyer's view, I would say, as the Assistant Attorney General, of the constitutionality.

Senator TUNNEY. Would you feel, if you were on the Court that you would have to necessarily apply the same standards——

Mr. REHNQUIST. No.

Senator TUNNEY. As a justice which you applied as a member of the Department of Justice?

Mr. REHNQUIST. No; I would not.

Senator TUNNEY. In a speech to the Newark Kiwanis Club in 1969, your prepared statement says this, and I quote:

> We are thus brought to the question of what obligation is owed to the minority to obey a duly-enacted law which it has opposed. From the point of view of the majority, if it functions as a whole, the answer is a simple one. The minority, no matter how disaffected, or disenchanted owes an unqualified obligation to obey a duly-enacted law.

How do those principles apply to a black person in the South who was at a segregated lunch counter?

Mr. REHNQUIST. Well, I think it is clear from my speech up there that I would not apply that principle to the situation where a person seeks to test the constitutionality of the law. He runs the risk of it being held constitutional, and then he must pay the price exacted by the law. But if the law is held unconstitutional, obviously he is vindicated.

Senator TUNNEY. Mr. Chairman, I would like to reserve the rest of my questions.

Senator BAYH (presiding). The Senator from Nebraska.

Senator HRUSKA. Thank you, Mr. Chairman.

Mr. Rehnquist, I want to congratulate you on the events which, happily, have made it possible to have your presence here in the

committee room today under these circumstances. The confidence and the judgment of the President when he transmitted to the Senate your nomination for the position of Associate Justice of the Supreme Court confirms my own favorable estimate which has been built up over the course of the last two and a half years.

During that time it has been my privilege to have worked with you quite closely on a number of matters of mutual concern, and to have observed you in your role as an advocate for the administration before various committees of the Congress. I have observed you also as a counselor, as a consultant with reference to matters of policy, and as an adviser on legal problems in the field of jurisprudence.

My conviction and my estimates have been reinforced since your nomination by a reading of some of the material that you have written and some of your public statements, which had not come to my attention sooner. I was most favorably impressed with these documents.

So, I say again, I congratulate you for the preferment that has come your way.

Mr. Chairman, I should like to defer now to my colleague, the Senator from South Carolina, who states that he has a few brief questions to pose, and then I should like to resume my statement and ask a few questions.

Senator THURMOND. Mr. Chairman, I wish to thank the distinguished, able Senator from Nebraska for his courtesy.

Mr. Rehnquist, I wish to take this opportunity to congratulate you and the President upon your appointment. In looking over the record of the Standing Committee on the Federal Judiciary of the American Bar Association, I was interested in reading its content and was impressed with the findings of this committee.

The last page of the report reads as follows: "The committee is unanimous in its view that he is qualified for appointment to the Supreme Court. A majority of nine is of the opinion that he is one of the best qualified available, and thus meets high standards of professional competence, judicial temperament, and integrity. The minority," which would be three, there are 12 on the committee, "would not oppose the nomination."

I feel that with your impeccable character, Mr. Rehnquist, your superior legal mind, and your quick intellect, that you are uniquely qualified for the Supreme Court, which Mr. Nixon has termed the fastest track in the Nation. Your experience as a law clerk to Justice Jackson, your experience in the Justice Department, and your experience as a practicing attorney are very valuable to you in this work.

I am very much interested in seeing lawyers appointed to the Court who believe in the Constitution of the United States, and who will uphold that document and will not attempt to rewrite it.

Senator Ervin and Senator McClellan have already brought out some points I intended to bring out, so I shall not duplicate. I think if I were commissioning a lawyer to go to the Supreme Court today, I would give him two books, and tell him to put one in each hand, the Bible in one hand, and the Constitution in the other, and I think he would have good guidance.

And, therefore, because of your unquestioned integrity, your very excellent ability, your successful experience in the practice of law, your service to our country, and by that elusive quality known as

judicial temperament, which few of us can define but which all of us can recognize when we see it it will be a pleasure for me to support your nomination.

Thank you, Mr. Chairman. That is all.

Senator HRUSKA. Mr. Rehnquist, your nomination by the President renews a problem that always comes to people who move from one capacity to another, whether it is in public life or in private life. You have led a varied life with many facets, first of all as a clerk to one of the Justices of the Supreme Court. Then as an advocate for your clients, when you were in private practice, and now you are occupying an office in the Department of Justice where you have served as advisor, advocate, and spokesman for the Attorney General. You are about to change your advocacy now. In fact, it will be a termination of advocacy.

But, it will be necessary for you to transfer your loyalties, and the application of your resources, and your talents to another role, that of a judge You will no longer be an advocate; you will be looking at two or more advocates before you in the presentation of one cause or another before the Supreme Court and making a determination between them.

My question is this: Do you know of any reason why you could not be successful in shedding and thrusting to one side any loyalties that you may have had in the past, in the interest of extending to the advocates before you, as a member of the Supreme Court, that fairness of decision, and that consideration of the facts and the law which will enable you to make a fair decision, regardless of the color of the skin, regardless of the economic position, regardless of any other attribute which may be involved?

Will you be able to make a fair decision, based upon the facts and law, and the Constitution, regardless of any official position or personal feeling that you have taken in the past?

Mr. REHNQUIST. I will bend every effort to do so, Senator, and I would regard myself as a failure as a Justice if I were unable to do so.

The CHAIRMAN. To my leftwing friends, when they conclude, we will go over to 10:30 in the morning with Mr. Rehnquist. [Laughter.]

(The Republican members of the committee were seated to the chairman's left.)

Senator SCOTT. The chairman will allow the leftwing friends to continue tonight?

The CHAIRMAN. Yes, sir.

Senator SCOTT. Thank you, sir.

Senator HRUSKA. Some interrogation today has been directed toward you, which has canvassed some of the past statements you have made, some of the positions that you have taken, and some of the briefs that you have filed, and speeches made. I ask these questions for the purpose of ascertaining in my mind that you are willing to undertake the very difficult task of discontinuing your interest in past actions and positions when you assume your new position. Your responses have indicated the answer to be affirmative.

Now, with reference to positions on various current national issues held by persons in public life, whether they are officials or not, they are sometimes said to be in step with the needs of the time or "out of step with the needs of the time."

Now, with regard to the interpretation of principles of the Constitution, what are your ideas as to the part to be played by the desire or the necessity to be "in step with the needs of the times"?

Mr. REHNQUIST. Well, I think the framers drafted a document, Senator Hruska, which was capable of forming a framework of government, not just in 1789, but in our own day. And there is no question in my mind that the principles they laid down then, as subsequently interpreted, must be applied to very changed conditions which occur now rather than then.

But, I think even now it is to the Constitution and to its authentic interpretation that we must turn in solving constitutional problems, rather than to simply an outside desire to be "in step with the times."

Senator HRUSKA. Well, there is a philosophy held by many people that when one seeks to be in step with the times it is necessary to determine what is the public wave of approval or disapproval of something, at a given time, and then there should follow the interpretation of the Constitution or an application of its principles which will conform to the popular whim or fancy of the day. Do you subscribe to that sort of inperpretation?

Mr. REHNQUIST. No, I do not; and I think specifically the Bill of Rights was designed to prevent exactly that sort of thing, to prevent a majority, perhaps an ephemeral majority, from restricting or unduly impinging on the rights of unpopular minorities.

Senator HRUSKA. One of the enduring values of the Constitution is its protection of the rights of minorities, is it not?

Mr. REHNQUIST. Certainly.

Senator HRUSKA. Earlier there was discussion during this hearing about some recent Supreme Court decisions that may have handcuffed the police, and I believe you answered in that connection that the Bill of Rights protects the rights of individuals against oppression by government. As a matter of fact, that is the reason for the existence of the Bill of Rights?

Mr. REHNQUIST. Yes; it is.

Senator HRUSKA. But, in addition to persons accused of crime who need certain protections, there are others who possess rights granted by the Constitution. These persons also deserve certain protections. I am speaking of many people who are not accused of crime, who are law-abiding citizens, the great bulk of society, whose rights are encroached upon when protections given individuals go beyond reasonable bounds.

In other words, all people are protected by the Constitution. We have on one side the protection of individuals by the Bill of Rights and we have safeguards and goals for the vast proportion of the population which are set forth in among other places the Preamble of the Constitution:

> We, the people of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Now, then, if in the process of trying to afford individuals the rights granted by the Bill of Rights there comes about a situation where there is an impairment of the rights of the general public, then there arises a situation which the Supreme Court finds difficult to resolve.

Judge Lumbard in 1963 put it this way:

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

Now, there are many of us who feel that for a long time there has been an undue emphasis, and to some extent almost exclusive emphasis, upon individuals rights to the detriment of the rights of society as a whole. We believe with Judge Lumbard that this imbalance should be replaced with simultaneous attention to both aspects.

Do your agree?

Mr. REHNQUIST. Well, I would certainly not want to comment on any particular matter that would come before the Supreme Court were I confirmed in that context. Taking Judge Lumbard's statement as a desirable philosophical approach to the problem of law enforcement, the concomitant development of the rights of individuals, and the efficacy of law enforcement, I certainly have no quarrel with it at all. Ultimately, of course, any such philosophical judgment or legislative judgment is subject to the requirements of the Constitution, and were I confirmed as a Justice of the Supreme Court, it would be the commands of the Constitution, as I understand them, that I would employ in passing judgment on any such measures.

Senator HRUSKA. If in the process of implementing the Bill of Rights there is an impairment, or an erosion, or a potential destruction of the rights of society, then we have a real problem, do we not?

Mr. REHNQUIST. Well, if in fact the Bill of Rights does produce such an imbalance, we have a problem. But, it is obviously not one that the Justices of the Supreme Court should solve by rewriting the Bill of Rights so that it permits more balance on the side of law enforcement. It seems to me that the type of situation which you are referring to, and perhaps I am poorly paraphrasing your language, is that the preamble and other sections of the Constitution contemplate that the legislative process, shall ultimately govern, subject to the provisions of the Constitution. And that where the Constitution itself, were it to be distorted in meaning, so as to unreasonably restrict what was the intent of the Framers as to the extent of the legislative power, then it would be something that ought to be corrected.

Senator HRUSKA. It was not my thought that to reconcile these two positions, that the Supreme Court should step in and legislate.

Mr. REHNQUIST. No, I was sure it was not.

Senator HRUSKA. Or to construe the Constitution differently from the intent of the framers.

Now, honestly, and with due regard for precedent, and due regard for the principles that are supposed to be more or less stationary and stable, my thought was, however, that exclusive attention should not be paid to one part of the Constitution at the expense of another.

Mr. REHNQUIST. Certainly all sections of the Constitution that have any applicability to a case should be considered.

Senator HRUSKA. It seems to me that Senator McClellan spoke wisely and truly when he referred to the three tests that we should apply to any nominee for the Supreme Court which we have come before us. The idea of personal integrity, professional competency, and, or course, finally, fidelity to the Constitution, because it is those nine men on that court to whom we must look for that latter quality. I believe you meet these three tests to a high degree.

I thank you for your answers and for your appearance, and I defer now to my colleague, the Senator from Pennsylvania.

Senator SCOTT. Thank you.

Senator HRUSKA. Reserving additional time at a later time if an occasion should arise.

Senator SCOTT. Thank you, Senator Hruska.

Mr. Rehnquist, I have the greatest sympathy for the fact that you have been here a long time, and I will be very, very brief.

Initiation into the Supreme Court is one of the roughest of American tribal rites, and you have my sympathy for it.

You will hear a lot from the Members, and a considerable amount that might otherwise be designated as opinions from some of us, but we are all engaged in the search for the same thing, the qualifications of the candidate.

A major breakthrough in the fight for equality in employment opportunity occurred on the 27th of June 1969, when the Department of Labor announced the Philadelphia plan. You played a part in that. What is the plan, and what was your part leading to its enactment?

Mr. REHNQUIST. The Philadelphia plan, Senator, was a proposal implemented under the leadership of the Department of Labor to require in the construction trades in Philadelphia, and in other localities where the situation was similar to that which had prevailed in Philadelphia, where in effect statistics and history indicated that minority members were simply not getting into unions, and the construction contractors were depending on union hiring halls to furnish their employees, to require, as a condition of receiving a Government contract, a commitment to achieve, if possible, certain goals of minority hiring.

My role was that almost immediately after the plan was announced by the then Labor Secretary Shultz, the Comptroller General of the United States rendered an opinion that in his view the plan was unconstitutional and unauthorized by law.

This obviously put the Secretary of Labor in a serious bind and he consulted the Attorney General and requested an Attorney General's opinion on the legality of the plan. With the help of the Solicitor's Office in the Labor Department, and our own Civil Rights Division in the Justice Department, we prepared a draft opinion, which was ultimately signed by the Attorney General, upholding the legality and constitutionality of that plan.

Senator SCOTT. And you played a considerable part in that, in that you prepared the memorandum for the Attorney General?

Mr. REHNQUIST. Yes; I would say it was carried out under my supervision, and I personally, as I do on all draft Attorney General's opinions that have been prepared since I have been there, devoted a substantial amount of effort to it.

Senator SCOTT. Where did the opposition to the plan come from?

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

Senator SCOTT. I do not mean by name, but generally who was opposing the plan and criticizing it?

Mr. REHNQUIST. My recollection is that it was the construction trade unions and some of the contractors.

Senator SCOTT. I will not go into further detail on that since the plan, itself, is pretty well known.

Mr. REHNQUIST, on the 22d of May 1962, during the administration of the late President Kennedy, the distinguished Attorney General, Robert F. Kennedy, appeared before this committee in open hearings, and I was in attendance at the time, and he made a statement which was followed by a considerable amount of questioning, and other witnesses later appeared, all of which is available if anyone wishes to note the extent of the Attorney General's opinion and the reactions of the committee, but I think it is interesting to read and ask you if you will find any reason to differ from a part of this statement. I would like, Mr. Chairman, to reserve the right to put the statement in the record tomorrow after I have made some further study of it.

The Attorney General made the point that it is necessary, and he offered H.R. 10185, in such a bill to provide adequate authority of law enforcement officers to enable them effectively to detect and prosecute certain major crimes; prohibit all wiretapping by private persons and all unauthorized wiretapping by law enforcement officers; provide procedural safeguards against abuse of the limited wiretapping which it would authorize; establish uniform standards for the Federal Government and the States.

He makes the point that:

> Wiretapping is an important tool in protecting the national security. In 1940 President Roosevelt authorized Attorney General Jackson to approve wiretapping in national security cases.
>
> Attorney General Clark, with President Truman's concurrence, extended this authorization to kidnapping cases.

Now, the questioning of you today, some of it has turned on the issue of whether or not in matters involving national security the President, or the Attorney General acting for him, has under the Constitution certain powers in addition to the powers subsequently granted to him under the Omnibus Crime Act.

Here is a part of Attorney General Kennedy's statement, on page 7, in which he seeks the alternative methods contemplated in addition to the bill:

> In cases involving national security, we have provided alternative procedures. Application may be made to a court under the procedures outlined above, but in addition the bill provides that the Attorney General, in person, may authorize interception of wire communications if he finds that the commission of the offense is a serious threat to the security of the United States and that the use of the court order procedure would be prejudicial to the national interest.
>
> In a narrowly limited class of cases, both because of the sensitivity of the information involved and in the interest of speed, the Attorney General needs this executive authority to permit wiretapping.
>
> National security requires that certain investigations be conducted under the strictest security safeguards. All Attorney Generals since 1940 have been authorized by the President to approve wiretapping in national security cases. Attorney General Clark, with President Truman's concurrence, extended this operation to kidnapping cases.

He goes on to say:

This legislation would authorize the Attorney General to order wiretapping after the determination that there was a reasonable ground for belief that the national security was being threatened. In order to proceed, the Attorney General would have to find and certify that the offense under investigation presented a serious threat to the security of the United States; that facts concerning that offense may be obtained through wiretapping; that obtaining a court order would be prejudicial to the national interest and that no other means are readily available for obtaining such information.

And the concluding part of this section of his statement reads:

Thus, the bill would limit the authority now held by the Attorney General to authorize wiretapping but it would permit evidence obtained thereby to be presented in court. I believe these are most important points.

Would you be in a position to comment on that, outside of the same work of your own brief to the Court, Supreme Court?

Mr. REHNQUIST. Well, naturally it would be improper for me to comment in any sense in a situation like that that might come before the Court for review, whether or not I might feel bound to disqualify myself. But certainly it sounds as if Attorney General Kennedy's testimony was very similar to the practice presently followed by the Department of Justice in which it is substantially defended in the brief just filed by the Government in the Supreme Court of the United States, the limitation to national security cases, and the importance of the same to the protection of the Government, itself, that is.

Senator SCOTT. And you noted in the quotation that the Attorney General makes the point that this power has existed in the President, acting through their Attorneys General, since 1940, which is now 31 years?

Mr. REHNQUIST. Yes, and we now have 9 additional years of precedent which we have cited in the Department's brief, since Attorney General Kennedy spoke in 1962.

Senator SCOTT. Well, I thank you very much, Mr. Rehnquist, I reserve the right to continue in case there is a second round of questioning.

I would also like, Mr. Chairman, to reserve the right, as I noted, to offer this brief with some additional documentation in the hearing tomorrow. Thank you, sir.

Senator BAYH (presiding). The chairman will welcome all material the gentleman from Pennsylvania wants to put in the record.

Senator Cook.

Senator COOK. Mr. Chairman, I would like to reserve the right until tomorrow.

I think Senator Mathias and I have agreed.

There is, however, one thing that I want to say for the benefit of the few press that are left. In the letter from the American Bar Association that was distributed this morning, I would like to read the second to the last paragraph on page 2 which says:

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

I wish to say to the few spectators that are left that this may be why people can no longer believe what they read in the newspaper, because the night final of the Evening Star says:

Court Choices Given ABA Okay. Panel Supports Rehnquist 9–3, Powell Fully.

Now, that is completely inaccurate and everybody can see it in print.

Senator MATHIAS. Mr. Chairman——

Senatory BAYH. May I just ask the Senator from Kentucky if he believes anyone who disagrees with him on an issue is on the wrong side?

Senator COOK. No, sir; I do not, and I think the acting chairman knows different than that, and the acting chairman and I have been at this for quite some time.

But, one of these days I may be fortunate enough to get enough seniority on here that I will be able to ask some of those question before they all get asked.

Senator MATHIAS. Mr. Chairman?

Senator BAYH. I would suggest that you will have to have a little patience, and we have all had a little today.

Senator SCOTT. If you would yield, I would like to comment that if this committee would some day revise its procedures in line with those of most other committees, and alternate right to left, maybe some of us would get an opportunity to be heard before the noon and the evening deadlines have passed, and all of those who have made the deadlines have happily gone hence.

Senator MATHIAS. Mr. Chairman, following up——

Senator COOK. I apologize that the able acting chairman is the one that got caught in that.

Senator MATHIAS. Mr. Chairman, the Senator from Kentucky and I made sort of a nonjudicial interpretation that this is getting close to the eighth amendment prohibition against cruel and unusual punishment to prolong this very much longer.

Mr. Chairman, can we have an understanding that we begin tomorrow with the Senator from Kentucky, and proceed with the normal rotation of questions?

Senator BAYH. With the understanding from the Senator from Indiana that our chairman decides for us and we come in at 10:30 tomorrow morning. I certainly feel we should resume——

Senator MATHIAS. With the Senator from Kentucky.

Senator BAYH (continuing). Where we had terminated.

Senator MATHIAS. Right. Thank you, Mr. Chairman.

Senator BAYH. Could I address one last question which I thought had been laid to rest, and I feel somewhat with deference to the witness and nominee, I just wondered, you have just been given a copy of the transcript that I thought answered the question obviously, but let me have just one more question:

When we were talking about various clients and I asked questions relative to Transamerica Title Insurance Corp., or Phoenix Title & Trust Co., now, did you negotiate—you talk about escrow and this type of thing, and I think you laid this to rest, but I want to ask one specific question, and I think it is important to you that it be in—did you negotiate or carry out a very large transfer of land in 1964, involving land in Arizona exchanged for land in Point Reyes National Park, Calif.?

Mr. REHNQUIST. Point Reyes Park in California? No.

Senator BAYH. Thank you.

(Thereupon, at 6:20 p.m. the hearing was recessed to reconvene tomorrow, Thursday, November 4, 1971, at 10:30 a.m.)