But I said then and I say now and I will always believe that anybody who publicly at any time in his adult career takes a position that the black citizens of the United States are not entitled to equal treatment under the law is unfit to sit on the U.S. Supreme Court and that ought to be the rule.

Senator BAYH. Unfortunately, there are not as many people who share that specific judgment as you would want, and thus it seems to me the responsibility we have for a true test of the quality of the nominee or nominees is to see what their judgment is now and the fact that you are here and I think are making such a credible record indicates that one man with a black face would be received with open arms and with great consideration by this committee.

I am concerned about what white people or black people have said about the nominee, and I am also concerned about what the nominee himself has said.

Mr. MITCHELL. That is what I tried to develop.

Senator BAYH. We developed this on the accommodations and the school matters, we tried to get at it, and I hope we will get testimony from those who have first-hand information on the voting matter. But let me deal just one other question as far as what the nominee himself believes.

I did send a letter referred to by our distinguished colleague from Nebraska to the Attorney General. I have received a reply and since there are no objections, I do not think there is any lawyer-client relationship between the two of us, I would like to put it in the record at this time so everybody would have the opportunity to examine it.

Senator HART. Without objection, it will be received.

(The letters referred to follow.)

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., November 4, 1971.

Hon. JOHN MITCHELL,
Attorney General of the United States,
Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: When President Nixon announced the nomination of William Rehnquist to be a Justice of the Supreme Court, he stated that one of the criteria he used was "the judicial philosophy of those who serve on the Court." The President has said that these nominees share his judicial philosophy, "which is basically a conservative philosophy."

The Members of the Senate Judiciary Committee have been attempting for the last two days to explore for themselves the judicial philosophy of William Rehnquist. Many Members of the Committee appear convinced that this is a fit subject for inquiry by the Senate. Indeed, Mr. Rehnquist has stated at the hearings that he believes that the Senate should fully inform itself on the judicial philosophy of a Supreme Court nominee before voting on whether to confirm him. *See also* William H. Rehnquist, "The Making of a Supreme Court Justice," Harvard Law Record, Oct. 8, 1959 p. 7; C. Black, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 Yale L. J. 657 (1970).

Unfortunately, the Committee has been unable to inform itself fully regarding Mr. Rehnquist's judicial philosophy because he has felt it necessary to refrain from answering a number of questions. Some of the questions at issue involve Mr. Rehnquist's refusal to respond based upon his claim of the lawyer-client privilege arising out of the work as Assistant Attorney General since 1969. In my view, the lawyer-client privilege does not require Mr. Rehnquist to remain silent concerning his *own* views on questions of public policy and judicial philosophy merely because he has advised the Department of Justice on these matters or because he has publicly defended the Department's position. As one scholarly observer has noted:

"The protection of this particular privilege is for the benefit of the client and not for the attorney, the court, or a third party. The client alone can claim the

privilege, and in fact the client must assert such privilege, since it exists for his benefit." E. Conrad, *Modern Trial Evidence* § 1097 (1956).

And as Professor McCormick has noted (*Handbook of the Law of Evidence* § 96 (1954)), "it is now generally agreed that the privilege is the client's and his alone."

Despite my view that the privilege is inapplicable here, I am writing to urge you—in the interest of the nominee and of the nation—to waive the lawyer-client privilege in this situation. I have made a similar request of the President. This would release Mr. Rehnquist from any obligations he might have under Canon 4 of the American Bar Association Code of Professional Responsibility, see Code of Professional Responsibility, DR 4-101 (c)(1), or any other obligations he may have to refuse to answer questions involving his own views on questions of public policy or judicial philosophy. It is essential that the Senate, which must advise and consent to this nomination, have the fullest opportunity to determine for itself the nominee's personal views of the great legal issues of our time. I hope you will be able to cooperate to this end.

Sincerely,

BIRCH BAYH, *United States Senator.*

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., November 5, 1971.

HON. BIRCH BAYH,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BAYH: As I understand your letter of November 4, 1971, you are requesting that I, as Attorney General of the United States, waive what you refer to as the "lawyer-client privilege" with respect to matters on which William H. Rehnquist, as an Assistant Attorney General in the Department of Justice, has advised me and with respect to which he has taken a public position on my behalf. I further understand that this request is made by you individually rather than by the full Senate Judiciary Committee before whom Mr. Rehnquist has appeared as a nominee as an Associate Justice of the Supreme Court of the United States.

The issue raised by Mr. Rehnquist or any Supreme Court nominee's refusal to respond to certain questions during confirmation hearings is far broader than the scope of the lawyer-client privilege. There are other considerations which prompt a refusal to comment. For example, a nominee may feel that it would be improper for him to respond to the kind of question that might come before him as a Justice of the Supreme Court. Past nominees have confined themselves to fairly general expressions, declining to provide their view of the Constitution as it applies to specific facts.

Even in those few instances wherein Mr. Rehnquist, relying on the lawyer-client privilege, declined to answer questions concerning what advice he may have rendered me, I feel constrained to say that a waiver would be entirely inappropriate. As Attorney General of the United States, I am acting on behalf of the President. In such a capacity as a public official, I do not consider the same factors the private client considers in deciding whether to waiver the lawyer-client privilege.

I can well appreciate your personal, intense interest in probing into all aspects of Mr. Rehnquist's work while at the Department of Justice. I am sure you appreciate, however, that it is essential to the fulfillment of my duties and obligations that I have the candid advice and opinions of all members of the Department. Further, I am sure you realize that if I should consent to your request or other requests to inquire into the basis and background of advice and opinions that I receive from the members of my staff, it would be difficult to obtain the necessary free exchange of ideas and thoughts so essential to the proper and judicious discharge of my duties. It would be particularly inappropriate and inadvisable for me to give a blanket waiver of the lawyer-client privilege in this situation. Ordinarily, a waiver should only be considered as it may apply to a specific set of facts. The range of questions which may be put to a nominee is so broad that it would be difficult, if not impossible, to anticipate what a general waiver would entail. Because Mr. Rehnquist, as Assistant Attorney General in charge of the Office of Legal Counsel, renders legal advice to others, including the President and members of the Cabinet, obviously I cannot waive the privilege that may exist by reason of those lawyer-client relationships. And determining the limits of each relationship cannot be done with precision.