

quist in return for a pledge that there will be no health related questions posed to Justice Rehnquist. This is false.

While I understand that Justice Rehnquist is perfectly willing to answer any questions put to him concerning his health, we have nonetheless reached an understanding that Justice Rehnquist's health records are confidential.

Senator Biden and I have agreed to have an independent physician review Justice Rehnquist's medical records and report to the committee on their contents.

Senator BIDEN. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Delaware.

Senator BIDEN. Mr. Chairman, that is correct and the independent physician who will review Justice Rehnquist's medical records will also speak with Justice Rehnquist's doctor and, in fact, report on a confidential basis to the committee.

One more thing if I may, Mr. Chairman, a procedural matter again.

You and I have been up here discussing with our colleagues the order of witnesses. And as I understand it, we will be able to tomorrow morning, by beginning at 8 o'clock instead of later, that we will begin with—who we begin with remains to be seen. But the two panels that are going to take issue with Justice Rehnquist, one a panel, the Civil Rights Panel, panel 4, and panel 6.

The CHAIRMAN. I do not care what panels they are. We have agreed that we will start at 8 o'clock tomorrow, and I fully intended to stop at 1, but we have agreed to go to 2 o'clock tomorrow. And in that 5 hours tomorrow, we will take only 2 hours and give them 4 hours. In other words, give them twice as much time as we have. And we will go tonight until we finish everything tonight except the 6 hours tomorrow.

They can use any witnesses they want to tomorrow during their 4 hours, but we are going to finish at 2 o'clock.

Is that agreed?

Senator BIDEN. That is agreed.

Now, one other thing. I have just been told by staff that Senator Simon should withhold asking those questions because Senator Byrd may physically be on his way over to ask the questions himself. And there is a vote.

We could recess for the vote, Mr. Chairman. We have five bells and we will be right back.

The CHAIRMAN. We will recess for a vote.

[Recess.]

The CHAIRMAN. The committee will come to order.

You can notify the Justice we are ready.

[Pause.]

The CHAIRMAN. The committee will come to order.

The distinguished Senator from West Virginia.

Senator BYRD. Thank you, Mr. Chairman.

Mr. Justice Rehnquist, I apologize for not having had the opportunity to attend the hearings prior to this moment. And I apologize to the chairman and the other members if I am delaying the actions of the committee, but I do not need to explain that I have been very busy elsewhere.

I would like to ask you, Mr. Justice Rehnquist, what would be the single goal which you would most like to accomplish if your nomination to the office of Chief Justice of the United States is confirmed?

Justice REHNQUIST. Senator Byrd, I think the goal would be in the field of judicial administration rather than just the work of the Supreme Court. And it would be to try to persuade Congress and the country that we do need what has been referred to as an inter-circuit tribunal, or a National Court of Appeals to operate as kind of a Junior Chamber of the Supreme Court because of the increased caseloads in all the other courts.

I know there have been proposals submitted to the Congress for that. But they have not really gotten the necessary number of votes to be enacted into law. And I would hope by working with the Judiciary Committee in the Senate and the Judiciary Committee in the House, and by doing whatever else I can to assist those committees and getting some support in the ranks of the profession, to get such a court created.

Senator BYRD. Mr. Chairman, has anyone asked this question of the Justice, or has he spoken of it prior to this moment?

The CHAIRMAN. They have asked questions somewhat similar, not exactly.

Senator BYRD. Well, I do not want to go over the same ground if these questions have been asked.

Would you contemplate a court, the members of which would be nominated by the President and confirmed by the Senate as is the case with district courts, appellate courts, and the Supreme Court?

Justice REHNQUIST. Senator, I would. As you know, the bills that are pending do not take that position. I think perhaps with an eye to appeal to the Congress on the ground of economy, they contemplate using existing circuit judges, and simply having a rotating panel that would sit part of the year in Washington to decide those cases.

But there have been very real difficulties raised, I think, with the manner in which judges to that sort of a court would be appointed. And so I think I would favor, if Congress would accept the idea, the idea of a really new court, called it what it is, with new judges to be appointed by the President and confirmed by the Senate.

Senator BYRD. Would you briefly then state what your objection would be to the proposals that would provide for judges being on that court who already serve on circuit courts, and what would be the downside to that, and what would be, as you see it, the advantage of having a new court, an intermediate court, that would be made up of persons nominated by the President and confirmed by the Senate?

Justice REHNQUIST. Let me say first, Senator, that if Congress should feel that the Court could only be created under one of the existing proposals, I would cheerfully abandon what seemed to me some objections to those. But the objections do not come from me; they come from other segments of the profession and other judges.

There are two existing proposals, as you know, for staffing or picking the judges of the new court of appeals under the existing bill. One would be that they be picked by the Chief Justice of the

United States. And I am loath to subscribe to that because I think it would give the Chief Justice too much power over the composition of the court.

Another proposal is that the judges be elected by each of the various circuit counsels and the regional courts of appeals that now sit in the country. I have some reservation about that because, as I answered one earlier question, I believe, I think it would tend to make the new court a little bit like the United Nations with the judges named to it having loyalty primarily to the court of appeals from whence they came rather than to the new court. And that is why I think it should be appointment by the President and confirmation by the Senate.

Senator BYRD. Would you see any constitutional question that would trouble you with respect to any approach other than the creation of a court, the members of which are nominated by the President of the United States and confirmed by the Senate of the United States?

These would be officers of the United States, right?

Justice REHNQUIST. Yes, I suppose they would be.

Senator BYRD. And as officers of the United States, why would they not come within the provisions of the Constitution which refer to the nomination by the President and the confirmation by the Senate of members of the Supreme Court, and officers, which term would include the district judges, the appellate judges, and also these judges on this intermediate court?

Justice REHNQUIST. I think I see your point, Senator. I think that some thought has been given to it, and it was thought, I believe, that there was a precedent for it in the Temporary Emergency Court of Appeals which sat during the Second World War, and which sits now, where the judges held judicial office in a regular court and were appointed to this rather temporary court.

But I realize, as you suggest, that if the court were not temporary, then you would really have a problem under the officers of the U.S. court.

Senator BYRD. And I take it that some of the judges who presently sit on the circuit courts throughout the country would be not exactly enthusiastic about the creation of this new court?

Justice REHNQUIST. They have manifested, the majority of them who have spoken out on it have manifested, I think, disagreement with the idea.

Senator BYRD. Well, I am interested in your having indicated that this would be "the goal," as I phrased it. I asked if you could respond to that, and you did. I am, I think, more interested than I have been heretofore in this proposal. And I am anxious to get interested, not only to get what you see as the goal you would most desire to achieve, but also with respect to your viewpoint as to the constitution of that court, and so on.

Well, I will be interested in working with you once you become Chief Justice, if you do become Chief Justice, and I am not passing on that one way or the other right now. But this is a matter which I think will become more intriguing as time goes on and as the necessities grow for some attention to be given thereto.

Let me go now to another line of questions.

Are you familiar with John Ehrlichman's book, "Witness to Power?"

Justice REHNQUIST. I am familiar with it in the sense—was that the first book he wrote?

Senator BYRD. I do not know how many books he wrote. I have in my hand here a book "Witness to Power."

Justice REHNQUIST. I think I am familiar with it. I have not read it from cover to cover. I think I have read parts of it.

Senator BYRD. I shall read from page 136 of that book, and first of all let me read a paragraph in which Mr. Ehrlichman was not too flattering of Senator Robert Byrd of West Virginia. [Laughter.]

Senator Robert Byrd of West Virginia would be flattered to be considered, Nixon reasoned. There should be some public speculation about Byrd for the Court. He had gone to law school at night and had never practiced law, but it should "get out" that Nixon thought so much of Byrd's ability that he would consider him for the Court. Byrd then would be much easier to work with.

And I do not know why he said that, "He is a very vain man of limited ability." [Laughter.]

Well, I agree with half that sentence. I will leave it to you to guess which half. [Laughter.]

Nixon mused. As I asked questions, it became clear that Nixon had no intention whatever of nominating Byrd. You know, that comes as a great disappointment to me because I always thought he really meant it. [Laughter.]

But he wanted Byrd to hear that his name had been on the President's list—a very short list.

Now, these are the paragraphs which I would call to your attention especially.

William Rehnquist had been the White House's lawyer from the first days of the Nixon Administration. Deputy Attorney General Richard Kleindienst had recruited him from their home State, Arizona, and designated him to head the Office of Legal Counsel at the Justice Department. When I became Counsel—

This is Ehrlichman speaking—

When I became Counsel to the President, I was told that William Rehnquist and his staff would be available to brief and answer any of the legal questions that arose in the White House. I was delighted. Bill Rehnquist and I had been law students at Stanford at the same time, and I knew him to have been a superb student. In 1969, when I was Counsel, I sent him more than a few tough questions, mixed issues of law and politics, and he handled them well, with a sensitivity to the President's objectives and to the practicalities of our situation. Bill Rehnquist and I talked often. After I moved to Domestic Affairs, we served on some policy committees together. Occasionally we met socially, at the public school that our children all attended or at some party.

Do you recall your acquaintanceship with Mr. Ehrlichman in a similar fashion to that which he has just recounted here?

Justice REHNQUIST. Yes; I think very much so.

Senator BYRD. Let me read this sentence again:

When I was Counsel, I sent him more than a few tough questions, mixed issues of law and politics, and he handled them well with a sensitivity to the President's objectives and to the practicalities of our situation.

Do you recall his sending you these "tough questions, mixed issues of law and politics?"

Justice REHNQUIST. I, certainly, recall him sending me some tough questions. This far back in time, it is hard to pick out any one thing.

But the most difficult thing about many of the questions we used to get from the White House in the Office of Legal Counsel was not the inherent difficulty of the question. They were questions that any good lawyer could have answered in 2 weeks or maybe 1 week. But the difficulty was the White House would call at 10 and want an answer at 2 in the afternoon. And that was what posed the difficulty, because the questions often had some substance to them. And it took a real determined effort plus a bit of the seat of the pants instinct to get the work out.

Senator BYRD. Can you recall some of those tough questions which were mixed issues of law and politics?

Justice REHNQUIST. Well, I think the side of the things sent to me was generally the legal side of the thing. The question would have political implications.

Just to take a hypothetical example: Can the President do such and such under such and such?

Now, the question if the President could legally do it, he would go ahead and do it, would be a political question. That was not the kind of thing that was submitted to me.

But a lot of the political decisions that the President was considering had legal implications.

Senator BYRD. These tough questions were mixed issues of law and politics, and you handled them well, with a sensitivity to the president's objectives and to the practicalities of our situation. So, he does say that they were mixed issues of law and politics.

Justice REHNQUIST. I think they were mixed issues of law and politics, but I would be surprised at the White House, with all of the political operatives over there, sending to the Office of Legal Counsel something that they wanted a political decision on.

Senator BYRD. I can understand also, that some of those questions, although they would be mixed questions of law—I can understand that there would be a mix, but with a political, certainly, question implicit, if not explicit.

Justice REHNQUIST. I am sure that was possible.

Senator BYRD. Do you recall some of those questions of that nature?

Justice REHNQUIST. I recall something involving a question where—I think it was a Governor, I cannot think of his name—a Republican Governor who was pressing to have some sort of a—I cannot even remember what it was now, but it was sent over to us with the idea, is what the Governor asking lawful? Could we do it if we wanted to?

But there was never any suggestion that the Office of Legal Counsel simply ought to give a legal opinion because the president wanted to do the thing politically, or because somebody in the White House wanted to do something politically.

Senator BYRD. Mr. Chairman, I should have asked at the beginning: what is the committee's rule with regard to time?

The CHAIRMAN. Well, we have been giving today 10 minutes a round, but I was giving you extra time because you could not be here for—

Senator BYRD. I thank the Chairman.

Now, Mr. Justice, did you render your answers orally, or in writing?

Justice REHNQUIST. Many of them were just over the phone; some of them were formal opinions; some of them may have been letters.

Senator BYRD. Some were in writing?

Justice REHNQUIST. Yes; I think we rendered written opinions over my signature, to departments, and things like that.

Senator BYRD. No; now I am talking about the questions, the kind of mixed questions, the mixed issues of law and political questions that Mr. Ehrlichman is addressing his words to here.

And I believe you indicated you remember receiving some questions from him. Were those responses normally in writing, or were they oral, or—

Justice REHNQUIST. I am sure some of them were in writing and some oral.

Senator BYRD. Let me ask this question: Were there any questions of this nature that you ever refused to answer? Did you ever refuse to answer any of these questions that Mr. Ehrlichman is talking about?

I take it it could have been from Mr. Ehrlichman; it could have been from someone else, Mr. John Dean, or whomever may have been there at the time.

Justice REHNQUIST. I cannot think of any instance, Senator, in which I ever refused to answer a question. I may have said that I could not render a satisfactory opinion in the time given, or, perhaps the opinion I rendered was not the one that the people over there wanted.

I cannot imagine myself flatly refusing to answer a question.

Senator BYRD. Do you recall at any time—

The CHAIRMAN. Senator Byrd, excuse me just a minute. That is the 5 minute bell. If you want to continue, we will just let you continue, or if you want to stop and vote, and come back. What do you prefer to do? I will accommodate you every way I can.

Senator BYRD. Do you suppose you could get them to let this vote run till I get there. Tell them that I have a 100-percent record this year, and a 100 percent last year.

The CHAIRMAN. Ask them to hold it?

Senator BYRD. Yes; if you would, for just a few minutes. I will not be long. If you would.

The CHAIRMAN. Then would you just announce a recess as soon as you finish.

Senator BYRD. That is right, and I think it would accommodate Mr. Justice Rehnquist as well.

[The Chairman leaves to vote.]

Senator BYRD [presiding]. Do you recall, at any time, any question from Mr. Ehrlichman, that you considered to be legally improper for you to answer?

Justice REHNQUIST. No, I do not; Senator.

Senator BYRD. You do not. Do you recall whether any of these so-called tough questions, mixed issues of law and politics, which were handled well, quote, "with a sensitivity to the president's objectives and to the practicalities of our situation," close quote—do you recall any questions that dealt with wiretapping, that came to you from Mr. Ehrlichman, or anyone there?

Justice REHNQUIST. I do not recall any but it has been a while. I would not say there were not any.

Senator BYRD. But you cannot say, flatly, that there were none?
Justice REHNQUIST. No; I cannot.

Senator BYRD. Do you recall any questions, "tough questions, mixed issues of law and politics," which you handled well—according to Mr. Ehrlichman—I am just trying to lay it into the context of his statement—"with a sensitivity to the President's objectives and to the practicalities of our situation," close quote, dealing with leaks, investigations?

Justice REHNQUIST. Not with leaks or investigations. I was chairman of a committee to look into the classification of materials as secret, and that sort of thing. And whether some part of that work might have dealt with leaks, I am just not sure. It was the same general area, certainly.

Senator BYRD. Do you recall any questions from Mr. Ehrlichman of the nature which he has described, which dealt with surveillance? Or which dealt with CIA activities?

Justice REHNQUIST. I cannot recall any, Senator, but I cannot say that there were not any.

Senator BYRD. Would questions of that nature, dealing with wiretapping, leaks, investigations, surveillance—would they have come to you in writing, as you recall, or would they have come to you orally? Or do you recall their having come to you one way or the other?

Justice REHNQUIST. I do not recall their having come to me one way or the other, Senator, but certainly, if they had come, it could have been either oral or written.

Senator BYRD. Would questions of that nature have been answered in writing? Questions coming from Mr. Ehrlichman at the White House dealing with any of those sensitive—he spoke of a "sensitivity to the President's objectives and to the practicalities of our situation."

Would questions of the nature of wiretapping, leaks, investigations, surveillance, CIA activities, or any other such sensitive questions—would they have been responded to by you in writing? Or would these have been questions that you would have just picked up the telephone and talked with Mr. Ehrlichman about, or, would he and you have met and discussed them?

Justice REHNQUIST. It could have happened in any one of those three ways, Senator.

Senator BYRD. Do you recall, at any time, any such happening?

Justice REHNQUIST. I certainly remember meetings to discuss legal questions with Mr. Ehrlichman, and I recall talking to him on the phone, and I am sure I probably sent him letters.

Senator BYRD. Where would those letters be, in your judgment, now?

Justice REHNQUIST. Well, I—excuse me. The original would have been sent to him, and I do not know where that would be, and I presume a copy of the letter would be kept somewhere in the Justice Department files.

Senator BYRD. Do you recall anything else—I will not pursue this any further except for this final question. Let me read this one sentence once more.

"In 1969, when I was Counsel, I sent him"—Mr. Ehrlichman is talking and referring to Mr. Rehnquist at this point—"I sent him

more than a few tough questions, mixed issues of law and politics, and he handled them well, with a sensitivity to the President's objectives and to the practicalities of our situation."

What does he mean by that, by his reference to "a sensitivity to the President's objectives and to the practicalities of our situation"? I know your answer to that would be, "well, I do not know what he may have meant;" but in the context of this statement—that is, a public statement by Mr. Ehrlichman—what, based on your experience with him, and your working with him, and others at the White House at that time—what was he talking about, in your judgment, Mr. Justice?

Justice REHNQUIST. Obviously, I do not know what he was talking about. I could perhaps give some idea about what I think those words might have meant on this part.

I think it was what any good lawyer does for a client. The client does not want to hear no, no, no. If the client's proposal is, has some legal problem with it, the good lawyer tries to figure out what the client's objective is, and find a lawful way to accomplish the objective. And I think perhaps that is what he is referring to. It was not simply a situation of sending back a letter saying, no, your plan is not authorized under the statute. It would be sending back a hypothetical letter, saying:

You cannot proceed under the statute as you thought you could, but perhaps if you take a look at another section of the statute and change your plan a little, it might comply with that section of the statute.

Senator BYRD. Well, perhaps I do have one more question.

Is your recollection of the "tough questions" that he writes about here—is your recollection the same as his, that they were mixed issues of law and politics, with a "sensitivity to the President's objectives, and to the practicalities of our situation"?

Surely, if Mr. Ehrlichman is telling the truth there, you would have some recollection, it would seem to me, of what he is talking about, when he refers to the "sensitivity to the President's objectives, and to the practicalities of our situation."

Justice REHNQUIST. Well, those are very general words, Senator. I have offered one explanation of what I thought he might mean by them. I do not know that I can offer much else.

Senator BYRD. Very well. Is there anything else that you would like to say in connection with this language which I have read here this afternoon?

Justice REHNQUIST. Only the qualification, Senator, that I think I mentioned earlier, that I would not have used the term, in describing the things that the White House, in Mr. Ehrlichman's testimony, as mixed questions of law and politics.

I would describe the questions in the White House as that, but it seems to me that it was the legal implications of those questions, and those only, that were sent to us.

Senator BYRD. All right. Mr. Justice, I was told by the chairman to announce that the committee would be in recess pending the call of the Chair, and I take it that this will be later this evening.

Mr. SHORT. Yes, sir. He should return shortly after the vote.