STATEMENT OF WILLIAM M. KUNSTLER
Vice President, Center for Constitutional Rights,
Submitted to the Committee on the Judiciary, United States Senate,
in Opposition to the Confirmation of William H. Rehnquist
as Chief Justice of the United States

I am a founder and vice-president of the Center for Constitutional Rights, a privately-funded and non-profit legal center, dedicated to the creative use of law as a positive force for social change, and to the training of young lawyers to participate in this process. For almost twenty years, the Center has applied the letter and spirit of the American Constitution to the unfolding struggle for human rights, both here and abroad. It is a relentless foe of those who ignore the Constitution's mandate and twist its meanings to deny freedom and equality to those less privileged and powerful than themselves.

It is in the light of these principles and objectives that we oppose the confirmation of William H. Rehnquist as Chief Justice of the United States. While we hardly share the nominee's archconservative views, our opposition is based squarely on what we consider to be his mindset that the President has the inherent power to suspend or override the written Constitution and the laws of the land whenever he feels it necessary to do so. In this vein, the Supreme Court forcefully reminded us, a century ago, that "the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort [the recently concluded Civil War] to throw off its just authority." Ex Parte Milligan, 4 Wall. 2-142, 18 L. Ed. 281, 295 (1866). (material in brackets added).

It is our understanding, based upon our intimate connection with the case in which then Attorney General John N. Mitchell advanced what has become known as the Mitchell Doctrine, namely that the Executive Branch had the inherent power to conduct warrantless wiretapping, in open disregard of th Fourth Amendment, upon domestic groups and individuals whenever it decided that it would be in the national interest to do so, that Justice Rehnquist was the chief architect and spokesperson of this incredible thesis. Fortunately for all of us, the tribunals which were first confronted with this contention -- the District Court, the Court of Appeals and the Supreme Court (with Justice Rehnquist recusing himself) --, decided against such an outrageously unconstitutional assertion of tyrannical executive power.

In writing for the Court of Appeals majority, Circuit Judge Edwards pointed out that "It is strange, indeed, that in this case, the traditional powers of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign." United States v. United States District Court, 444 F. 2d 651, 665 (6th Cir. 1971). In his concurring opinion in the Supreme Court's 8-0 repudiation of the doctrine, Justice Douglas referred to it as the "terrifying ... claim of inherent power ..." 407 U.S. 297, 332 (1972). Five years earlier, when the phrase "national defense" was urged as the rubric for suspending the Constitution, then Chief Justice Warren noted that "[I]mplicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart ... It would indeed be ironic if, in the name of national defense, we would sanction the subversion of ... those liberties ... which [make] the defense of the Nation worthwhile." United States v. Robel, 389 U.S. 258, 264 (1967).

At the time when the Mitchell Doctrine was developed, Justice Rehnquist was the Assistant Attorney General in the Office of Legal Counsel. As such, he served essentially as outside counsel to the President in contrast to the in-house role then played by John Dean. His formulation of and support for the

Mitchell Doctrine, a fact that was not fully considered because of the nominee's reluctance during his original confirmation hearings before this Committee in 1971, Hearings before the Committee of the Judiciary, United States Senate, 92nd Congress, 1st Session, November 3, 4, 8, 9 and 10, 1971, makes him unfit to sit on a body which, in fulfilling its official functions, must never permit any suspension whatsoever of our written Constitution and, in particular, its Bill of Rights, no matter how exigent the pressures of the moment may be considered to be.

If the Mitchell Doctrine had been validated by the Supreme Court, it would have served as the keystone of the Nixon Administration's horrendous 1970 intelligence-gathering Huston Plan, The White House Transcripts, New York: Bantam Books, Inc., 1974, at 808, 813 and 857.[1] Not only would the concept of the supremacy of the written Constitution as the law of the land, and the power of the federal judiciary to interpret it, have been dealt a severe, and possibly mortal blow, but King George's infamous Writs of Assistance, one of the direct causes of the American Revolution, would have undergone a tragic latter-day revival. Can it be safely assumed that a nominee for the highest and most influential judicial post in the country who countenances such a denigration of the Fourth Amendment and, by necessary inference, the entire Constitution, would not, if confirmed, apply his thoroughly anti-American concepts to the assignment and decisions of cases argued before the High Court? His unfortunate track record as an Associate Justice, demonstrating his predilection to side in almost every instance, with the Executive Branch against individual rights, amply proves that the Rehnquist of 1986 is indistinguishable from the Renhquist of 1969.

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[1] On July 23, 1970, the President approved a 43-page report (Huston Plan) of an interagency committee, recommending surreptitious entry, covert mail coverage and other activities conceded by the Committee to be "clearly illegal", The White House Transcript, at 813.

We must concede that we cannot document the full nature of Justice Rehnquist's participation in the formulation and vending of the Mitchell Doctrine. What we do know is his position in the Office of the Attorney General at the time it was urged upon the District Court, the fact that Robert C. Mardian, his fellow Arizonan, argued its acceptance before both the Court of Appeals and the Supreme Court, and his majority and dissenting opinions as an Associate Court. However, we do understand that there are some 330 or so of his memoranda as an Assistant Attorney General included in the Nixon papers presently lodged in the National Archives. Surely, this Committee has the power to obtain access to these documents which, like the memos of Justice Rehnquist contained in the late Justice Robert H. Jackson's papers at the Library of Congress, may furnish a clearer indication of such an unrestrained and pervasive bias in favor of governmental authority over individual freedoms as cannot be tolerated in the Nation's chief judicial officer without jeopardizing the rule of law and the written Constitution itself.

In addition, a searching inquiry into Justice Rehnquist's activities as an Assistant Attorney General may well shed some light on one of the deepest mysteries of the Watergate scandals. As this Committee knows, the so-called White House burglars -- McCord, Barker, Martinez, Gonzales and Sturgis -- had, after two prior unsuccessful attempts, broken into the Democratic National Committee's Watergate headquarters on May 28, 1972, and installed a number of bugging devices. The White House Transcripts, supra, at 819. On June 16, 1972, this same quintet was again ordered to travel to Washington, D.C. from Miami, Florida, and directed to re-enter the same premises, but were arrested while inside during the early morning hours of June 17, 1972, a Saturday. Ibid., at 820. The following Monday, June 19th, the Supreme Court announced its repudiation of the Mitchell Doctrine. Ibid., at 821.

There has never been a satisfactory public explanation of why exactly the same personnel who had installed the bugging equipment at the Democratic National Committee's Watergate

offices on May 28th were ordered to undertake another foray there three weeks later. A highly plausible rationale is that the White House had been leaked information as to the nature of the impending Supreme Court decision and opted to remove the wire-tapping devices before they lost any arguable legitimacy. In this connection, it may be highly significant that the missing eighteen minutes in the White House tapes involve a conversation between the President and H.R. Haldeman, his chief of staff, on June 20, 1972. Ibid., at 867.[2]

This chronology raises a reasonable suspicion that the Supreme Court's decision had been leaked to the White House. Advance notice of Supreme Court rulings, while presumably rare in our history, are not unknown. The most dramatic, of course, were the letters written by at least two Associate Justices to President-Elect James Buchanan in 1857 furnishing him with intelligence as to the pending Dred Scott decision. While we certainly cannot prove that such a leak occurred in this particular case, the facts and circumstances set forth above certainly raise the distinct possibility that the Administration was tipped off as to the nature of the impending ruling and acted on that information to direct the removal of the Watergate taps. At the very least, it appears to us that it is highly appropriate for this Committee, at this propitious moment, to conduct an inquiry into this matter by calling before it those who, like Mr. Haldeman, might well have direct knowledge of the matter. Whether or not the results of such an investigation would have any bearing on the Committee's present considerations, it seems to us that both the public and the dictates of history call for an independent review of the available witnesses and documentation.

This completes the written statement on behalf of the Center for Constitutional Rights. I gratefully acknowledge the assistance in its preparation of my fellow founders at the Center, Rutgers University Law School Prof. Arthur Kinoy, a vice-president, and Morton Stavis, its president, as well as that of the entire staff.

[2]On November 27, 1973, Rose Mary Woods, the President's personal secretary, testified before District Judge John J. Sirica that she accidentally erased only five minutes of this tape. Ibid., at 868.

The CHAIRMAN. I let you go over several minutes. The 5-minute bell just rang for a vote.

Senator BIDEN. I have one question. Mr. Kunstler, how would you respond to the following assertion: That notwithstanding the fact that Justice Rehnquist authored those memos, he was just being a good lawyer for his client, the President, who wanted that position taken. He wanted justification for the position, and he went out to find justification, attempt to find it; and that once he was in a different position as a Justice, his decision relative to similar matters—wiretapping in particular—did not reflect what in fact his assertions had been as an attorney for his client, the President, several years earlier?

Mr. KUNSTLER. I have two answers, Senator Biden, on two different levels. No. 1, any lawyer who advises his client to violate the Constitution should not be a lawyer.

No. 2, leopards do not change spots. And the consistent history of siding with the executive branch authority over individual rights by Justice Rehnquist, I think proves that. Many people here have said he has been the most consistent conservative—if that is the term—on the Court. He does not change, and he will not change. And I think any thoughts that he will change is an illusion.

Senator BIDEN. Mr. Chairman, just as I was prepared to get together with Mr. Fein, I suggest you get together with Mr. Kunstler.

I do not have any more questions. I just want to know if you will make the same offer to him as I made to his predecessor here.

Mr. KUNSTLER. Senator Thurmond and I have one thing in common only: We both have very young children, at an advanced age. [Laughter.]

The CHAIRMAN. Thank you very much. We will be in recess.

Mr. KUNSTLER. Thank you.

[Brief recess.]

The CHAIRMAN. Senator Simon, should we go ahead with some of these witnesses?

Senator SIMON. Yes. Let us go ahead.

The CHAIRMAN. Panel No. Eight, I will ask the following witnesses to come around: Dr. Robert L. Maddox, executive director, Americans United for Separation of Church and State; Ms. Joan Messing Graff, executive director of Legal Aid Society of San Francisco; Mr. Robert McGlotten, American Federation of Labor and Congress of Industrial Organizations; Mr. Jeffrey Levi, National Gay and Lesbian Task Force—is he here? Come around and have a seat—Ms. Karen Shields, executive director of National Abortion Rights Action League. Is she here? All stand and be sworn.

Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Dr. MADDOX. I do.

Mr. LEVI. I do.

Ms. SHIELDS. I do.

Senator SIMON. Mr. Chairman, I am advised I have to duck out for a few minutes. One of these witnesses is from Illinois, and I hope you treat her especially well.

The CHAIRMAN. Thank you.