# NOMINATION OF JOHN PAUL STEVENS TO BE A JUSTICE OF THE SUPREME COURT

TUESDAY, DECEMBER 9, 1975

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

The Committee met, pursuant to notice, at 10:05 a.m., in room 2228, Dirksen Senate Office Building, Senator James O. Eastland, chairman, presiding.

Present: Senators Eastland, Hart, Kennedy, Burdick, Byrd, Tunney, Hruska, Scott of Pennsylvania, Mathias, and Scott of Virginia.

Also present: Peter M. Stockett, Francis C. Rosenberg, Thomas D. Hart, J. C. Argetsinger, and Hite McLean, of the committee staff.

Chairman EASTLAND. The committee will come to order.

Senator Byrd.

Senator BYRD. Judge Stevens, you have served as a Federal judge for 5 years on the Seventh Circuit Court of Appeals. You indicated that your work as a Supreme Court Justice would differ from the kind of work that was yours as a member of the circuit court of appeals. You indicated that there would be a more restrictive framework within which you would have to work.

Would you approach cases any differently constitutionally than you did as a circuit judge?

Judge STEVENS. No, Senator, I would not.

I just think I have to recognize the fact that, by virtue of the flow of cases through the court of appeals, as compared with the flow in the U.S. Supreme Court, that there is a much larger precentage of the caseload in the court of appeals where the result, really, is quite clear because there is a body of precedent, or statutory directives, that we must follow, whereas in the selection process in the granting of certiorari as a discretionary matter, he Supreme Court takes an unusually difficult group of cases, very often presenting open questions as to which the answer is not often as clear as it is in the court of appeals. It is just that the case makeup is somewhat different, and the responsibility I have to recognize is such.

Senator BYRD. How did you as a circuit judge view the doctrine of *stare decisis?*

Judge STEVENS. I think it is an important part of our jurisprudence because it is an aspect of the development of law which tends to give certainty and predictability to the law.

There have been occasions, I should frankly concede, however, Senator, where we have felt that there had been an earlier decision in our circuit which had misconstrued the statute, and we have felt obliged to overrule it. I think that happened a few times in my recollection.

Our practice, when that was done, was, in advance of the publication of the opinion, to circulate the proposed opinion to the entire Court so that the entire Court would have an opportunity to decide whether or not the desirability of reaching the result different from one in the past outweighed the factor of stare decisis and the consideration of certainty and predictability that we all recognize as having importance.

Senator BYRD. How would you view the rule of stare decisis as a member of the Supreme Court of the United States?

Judge STEVENS. I think in much the same way.

I think there would be times when the Court might be called upon to reexamine earlier decisions which might have been incorrectly decided. But I think it is still an important value and perhaps particularly so at the national level because there is so much more reliance on past decisions in the Federal system when it is a decision of the U.S. Supreme Court.

So I would think your basic considerations are much the same, that there is important value in a system of law which is largely developed on a case-by-case basis to give appropriate respect to that which has been decided before, but yet there are occasions when the desirability of certainty and predictability is outweighed by other factors.

Senator BYRD. Would you say that precedent is entitled to a great deal of respect on constitutional questions before the Supreme Court?

Judge STEVENS. Yes.

Senator BYRD. How much would you feel bound by the precedents that the Supreme Court has established on constitutional questions?

Judge STEVENS. Well, Senator, the word bound is a little difficult for me to apply accurately. I would say that I certainly would weigh very carefully any decision that had already been reached by a prior Court and I would be most reluctant to depart from prior precedent without a clear showing that departure was warranted.

I would feel bound, but not absolutely 100-percent bound; I think I could not, in good conscience, say that. I think there are occasions, particularly in constitutional adjudication, where it is necessary to recognize that a prior decision may have been erroneous and should be reexamined.

Senator BYRD. To which would you give greater weight, prior recent precedent or prior earlier precedent, where the two might conflict?

Judge STEVENS. Well, I suppose if you assume a direct conflict between the two, the more authoritative precedent would be the more recent one because, presumably, it would have overruled the earlier one. But if you have two different situations where they are not directly in conflict, I really don't know. I don't think one can judge entirely on the basis of time. I think, if it was an opinion by a Justice such as Justice Holmes or Justice Brandeis, one would think very carefully before tending to disagree with him. If it were some Justice that had commanded less respect from the profession, one might be more willing to do so. I think it is not simply a question of age, Senator.

Senator BYRD. Would the division of votes have any weight?

For example, if a recent precedent was by a 5-to-4 decision, and the earlier one was by a 9-to-0 decision, and the two were in conflict; would this have any weight?

Judge STEVENS. I think it would. But again, there is a caveat—and I want to be as straightforward as I can about it—it is my understanding

that decisions that appeared to be unanimous in prior years were not, in fact, always so. There are private papers of some of the Justices that indicate that it was more customary then than it has been in recent years for Justices to go along with the majority opinion rather than to voice dissent. So sometimes the unanimous opinion is somewhat deceptive and I think one has to be a little bit careful about overstating reliance on the factor of unanimity.

But I would agree that to the extent that the decision was unanimous rather than closely divided you would tend to give more respect to it and feel more comfortable in figuring that it really did command a unanimous view. And also I think in the 5-to-4 decisions usually the countervailing argument is spelled out in some detail so you have, right on the face of the decision, reasons to consider the opposite conclusion as well.

Senator BYRD. How do you feel about the idea that there should be unanimity on any constitutional question when some of the Justices may be prone to dissent or disagree?

Judge STEVENS. Well, it has been my practice—and this is not a universal practice among appellate judges but it has been the topic of discussion in appellate seminars and the like—it has been my practice to dissent whenever I disagreed with the majority. That is one reason why you may find a larger number of dissents among my opinions than you do for some other judges.

I know there is one school of thought that the appearance of unanimity tends to add stability and respect to the law. My own view is that it actually facilitates the fair adjudication process if everyone states his own conclusion as frankly as he can. I think it also serves the purpose to let the litigants know that they have persuaded one or two judges, and I think they are entitled to know that. They are entitled to know that their arguments were understood and they were persuasive to some even though not to all. And I found in my court, although I did dissent a great deal, that if it is done in a forthright way it does not stimulate dissension within the court.

We had a very harmonious working court, notwithstanding the fact that we all felt free to dissent whenever we simply did not come to the same conclusions as the majority did. My practice is to dissent when I disagree.

Senator BYRD. A dissenting view often becomes the majority opinion in time, does it not? It often becomes the majority view at some future time?

Judge STEVENS. It does in those cases in which the later generation of judges is persuaded that the merits of dissent, as opposed to the merits of the majority, outweigh the desirability of stability and uniformity in the law, which is the value of the stare decisis theory. So there is always that balance.

Senator BYRD. It seems to me the desire to have unanimity, if it is too overriding, can breed disrespect for the court's opinions.

Judge STEVENS. I think there is that danger. I would agree, Senator.

Senator BYRD. What is your view of the idea that the Constitution had a fixed and definite meaning when it was adopted and that the same fixed and definite meaning prevails today but that it must be applied to changing circumstances and interpreted and construed in the light of those circumstances?

Judge STEVENS. Well Senator, any attempt to write rules, whether they be a Constitution or in a statute or in any process of formulating rules by which we must govern ourselves, inevitably leaves areas of open questions that require study and analysis before the basic document can be applied to a specific factual situation.

The more fundamental the charter is, the more it must, necessarily, contain open areas that require construction and interpretation. And to the extent that open areas remain in our Constitution, and inevitably a large number do—I must say, I don't mean to digress too much, but I have been constantly surprised in my work how many questions have not yet been decided, statutes, Constitution, all the rest—where there are open areas, the judge, I think, has the duty, really, to do two things. One, to do his best to understand what was intended in this kind of situation, and yet to realize that our society does change and to try to decide the case in a context that was not completely understood and envisioned by those who drafted the particular set of rules. So there is an open area within which the judge must work.

I think he has to be guided by history, by tradition, by his best understanding of what was intended by the framers, and yet he also must understand that he is living in a different age in which some of the considerations that happen today must inevitably affect what he does.

So you just do the best you can with all the factors that you put together in a particular case.

Senator BYRD. Do you feel that a Supreme Court Justice should allow his personal views of the law to override longstanding precedents because he feels they have been ineffective in dealing with social problems that might happen to be a matter of controversy at the time?

Judge STEVENS. No, Senator, I do not.

In the area of policy judgments, I think the legislative branch is the branch which should make the policy judgments. Now again I think we have to be realistic and recognize the fact that when you get into these open areas, that I have mentioned, no matter how hard one tries to subordinate his own philosophy sometimes it may not be completely possible.

I can say, though, in all sincerity and without the slightest hestitation, that there have been many cases on which I have sat as a court of appeals judge in which I have voted for a result which I did not personally consider to be the wisest way to handle a particular problem but which was, in my judgment, clearly the result which was required by legislation or prior decision or the Constitution. Certainly you do not have a charter of freedom to substitute your own views for the law.

Senator BYRD. You do not view the Supreme Court, then, as a continuing constitutional convention, or as a legislative body?

Judge STEVENS. No; I do not.

But again I have to say there are decisions which inevitably have a lawmaking character to them. I think some of that is inevitable.

Senator BYRD. But where those are areas in which the legislature should act, and has the clear responsibility to act, you do not feel it would be the responsibility of the Court to act in such a way as to legislate?

Judge STEVENS. Definitely not.

Senator BYRD. If you were confronted as a Supreme Court Justice with a case that dealt with the same legal principles as a case that came before you as a judge on the Seventh Circuit Court of Appeals, how hesitant would you be to decide the case in a different manner than while serving as a circuit judge?

Judge STEVENS. Well, I must answer that in two parts, Senator, because I have some concern about the extent to which I should sit on cases which present precisely the same issue I might have ruled on as a court of appeals judge.

Clearly I should not do so if I sat on a particular case, and one of the canons refers to avoiding cases where one has a fixed idea about the merits or something like that. So I am kind of uncertain about how that applies to cases raising issues similar to those on which I have sat.

I am in the process of thinking that through, to be quite frank about that.

But would I feel free as a Supreme Court Justice—I think it is most unlikely that I would as a Supreme Court Justice come to a different conclusion, because I would think that the reasons that persuaded me that the law required result A in the earlier case would be equally persuasive to me when I sat on the other tribunal.

Senator BYRD. Although there might be conflicting decisions by other circuits that you would consider as a Supreme Court Justice which might have come along subsequent to the case on which you sat as a circuit judge?

Judge STEVENS. If they raised arguments that I had not considered then I certainly would reappraise the issue in the light of the arguments I had failed to appreciate. But the mere fact it was another court of appeals making arguments I had already considered, I doubt if that would be particularly persuasive to me.

Senator BYRD. Would your prior decisions as a circuit judge have a strong influence on cases that you might hear before the Supreme Court?

Judge STEVENS. Well, Senator, not simply because they were prior decisions but it is usually true that after I have taken the time one takes in the court of appeals to come to a conclusion, I am pretty well convinced that is the result the law requires. I think it would be highly probable that the same process of reasoning would bring me to the same result again.

But there have been occasions on which, upon further study in depth of a case, I have changed my view from what I originally thought the correct result was and I would not hesitate to do so if I was persuaded I was wrong the first time.

Senator BYRD. What is your view of the role that the Supreme Court should play in adjusting the rights of society and the individual in the administration of justice?

Judge STEVENS. Senator, I think I may have said this before, and I don't mean to be repetitive, but I really think that the business of the Supreme Court—as it is the business of other courts—is to decide cases, to decide specific controversies that the Court has jurisdiction to decide pursuan t to article III of the Constitution. In the process of adjudication certain law is made and changes develop but the changes really, I think, are initiated by the litigants putting forth new claims some-

times found to have merit and sometimes rejected. I do not think it is the function of the Court to search for issues or to regard itself as sort of commission to reform the law or something like that. There is plenty to do in simply deciding the cases that the litigants bring before the Court and that process the law does develop.

Senator BYRD. Do you feel that a Supreme Court Justice should interpret the Constitution in accordance with his own personal views on economic and political and sociological questions?

Judge STEVENS. Well, Senator, again I think I would make much the same answer that I did before: that one must study the document, the language used, and the intent of the framers, and the way in which one thinks the framers would have sized up the problem now presented. One should always subordinate his own personal views, whether they be economic, social, political, or whatever they may be, because when you are talking about your own views you are only one of millions of individuals in the country. When you are interpreting the law, perhaps you have a special skill and special training that does give you the right to pass on these questions. I have to confess that in this open area, sometimes inevitably, a man is the product of his own background and he may be somewhat influenced. But I will do my very best to subordinate those considerations because I think that is the duty of any judge.

Senator BYRD. Would you have any hesitancy in getting into political questions?

Judge STEVENS. The term "political question" is used in many different ways, Senator, and I want to be sure I answer them fairly.

If the term political question is used in the judicial sense of a question which is appropriately to be resolved by another branch of the Government, such as the legislative or executive, then I would not merely hesitate, I simply would say the Court has no jurisdiction because there is a jurisdictional doctrine that the Court has no business deciding political questions in that sense.

There are, however, cases that come before the Court which involve political ramifications, such as a contest for election between two candidates for the office of U.S. Senator, or something like that, which the layman would characterize as political issues. In those cases, the fact that it is political, as far as I am concerned, makes it no different from any other case. We have to face up to the question and decide the legal question, then we must do so. We decide it on the basis of law, not, of course, on political affiliation of the litigant or anything of that character which would be irrelevant.

Senator BYRD. Where statutes are sometimes vague and unclear, do you think that the Supreme Court would have a duty to expand the stautes so as to apply to a circumstance that is clearly beyond the original intent of Congress if the Court felt that the statute did not go far enough?

Judge STEVENS. No.

Senator BYRD. In your opinion, do the difficulty and the great time that are involved in amending the Constitution justify the Supreme Court in changing established interpretations of the Constitution?

Judge STEVENS. Well, Senator, I do not think that is a factor which affects the decisions on particular issues. As I indicated, there are times when the course of decision necessarily changes somewhat, but I do not think one could say that because of the difficulty in amending the

Constitution, that it would be a proper function of the Court to assume that it had the authority to amend the document itself. I would think clearly it does not.

Senator BYRD. The Constitution says that each House shall determine the elections, returns and qualifications of its own members. Do you view the Supreme Court as having any role? Would you say that there was any appeal from a decision by the Senate, let us say, in determining the returns in the election of one of its own Members?

Judge STEVENS. This happens to be an area in which I have written an opinion, and I think the law is quite clear that that would be a political question with respect to which the Court would have no jurisdiction.

Senator BYRD. In the event of an impeachment of a President of the United States and the conviction upon trial by the Senate of the United States of that President, do you feel that there is any appeal from the decision of the Senate?

Judge STEVENS. I will answer that question but I should preface my answer by saying that I have not studied the issue with care. I, of course, was conscious of the issue during the last period of time. I would say my first reaction to the issue was that there would be no appeal but I really would not want that to be interpreted as a considered judgment of the issue because I have not studied it. I think it is not inappropriate for me to respond to it because I consider it so unlikely that the issue will arise during my term on the Court that I do not hesitate to respond to you as best I can.

Senator BYRD. Well, I am pleased at your response on both of the last two questions. As you know, we have had occasion to look into both of these matters in recent times, and I have expended a considerable amount of time on both questions. I feel as you do as expressed by your responses to my questions.

The Constitution, in article III, after enumerating many categories of cases over which the Supreme Court has jurisdiction, goes on to say: "In all of the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact with such exceptions and under such regulations as the Congress shall make."

Have you ever pondered that particular subject with reference to the possibility of Congress, perhaps, taking some action to create exceptions and to make such regulations as are contemplated?

Judge STEVENS. I recall pondering that section during law school, and I recall pondering that section when I was considering a case involving the right of the defendant to demand a jury trial in a housing discrimination case. But I have not thought about all of the ramifications of the section, and I am not quite sure how much in-depth thinking I would have to do to answer your last question.

Senator BYRD. Do you feel that there may come a time and circumstance in which the Congress would be wise to use that power?

Judge STEVENS. Well, certainly Congress has such power, and, of course, whether it is wise for Congress to exercise that power is really for Congress to decide, not for me to decide. But if the power exists, I must assume there may be the occasion when it would be wise for it to be exercised. I think that is about the best I can do.

Senator BYRD. Judge Stevens, you may have gone into this area yesterday in response to questions that were asked—I was unable to be present throughout the afternoon—and if you have, please say so.

What are your feelings on the Federal Government's use of various surveillance methods, including wiretapping; first, as to their use in protecting national security interests; second, as to their use in the preventing of Federal crime; and third, as to their use for general surveillance where there is neither a demonstrable danger to national security nor a danger of an imminent crime being committed?

Judge STEVENS. There was some discussion yesterday, Senator, about this, but I have no hesitation in restating as briefly as I can the substance of what I understand to be——

Senator BYRD. If you have already laid the answer on the record, you do not need to repeat it now. If the question is different to a degree——

Judge STEVENS. They do differ to a degree, Senator, and I would not want you to think I had answered that completely.

I think in the third area that you describe, general surveillance and the use of wiretapping, I do not think there is now statutory authority for that type of thing. I think that, of course, there is an extremely important interest in privacy that must always be evaluated before any such law enforcement technique is applied.

In the second—and I am going backwards through your three areas—in the second area, crime detection and enforcement generally, I indicated yesterday my very firm belief that Congress was wise in having the checks on the use of that technique, that it has, specifically, the requirement of an approval by the Attorney General and then approval by the judges.

In that connection, I made a point which I would really like to emphasize. I think that throughout the system, it is just as important to be sure that we get people we can trust in high office as it is to write laws because laws have to be administered. The confidence in the people administering the laws is something we must always value and keep in mind. We have that kind of confidence today and I think it is a very important factor in society.

In the national security area, I really am not prepared to comment, Senator. I understand that somewhat different considerations are involved. I understand the Court has had one case in that area but I am not sure I can go beyond what I have said.

Senator BYRD. What are your general thoughts in the area dealing with prior restraint on the media of the United States. You may have been asked this question yesterday.

Judge STEVENS. No; I was not, Senator. There was one question in which the tension between the fair trial interests of the trial procedure as opposed to the free press interests were involved. I place a very high value on the first amendment and I place a great respect for the informing function that the newspapers perform and the press generally performs and I think you would find that I would be quite sensitive to claims predicated on the first amendment. I think perhaps a general statement of my views is enough but if you want more I would be glad to enlarge on it.

Senator BYRD. Would you say that the first amendment is the highest and best protection that the media can have? In other words, that no law that Congress could enact would ever improve on that first amendment phraseology?

Judge STEVENS. I think that is correct. I think that this is a fundamental aspect of the Bill of Rights. It is one of the fundamental things that makes democracy work the way it does. I think it is of great importance. I think the fact that I have been reluctant as a Judge to communicate generally with the press should not be taken as any lack of interest or sympathy for the very important work they perform. It is just that in my particular office it is inappropriate for me to make statements about policy.

Senator BYRD. Serious violations of law by the media have been dealt with by punishment after publication of material. What are your thoughts in this regard?

Judge STEVENS. I may not have quite understood your question, Senator. I am sorry.

Senator BYRD. I said that there have been violations of law by the media that have been dealt with by punishment after the publication of certain material. What are your general thoughts?

Judge STEVENS. Well, if the law is a constitutional law and does not go beyond the limitations imposed by the first amendment, I would think the violation of the law by the press could be dealt with just as the violation of law by any other segment of society should be dealt with. I would not say they have any immunity from compliance with statutory law to the extent that statutory law is constitutional.

Senator BYRD. Yesterday, you indicated that the Congress should act to increase the number of judges in order to meet the problem of overcrowded dockets and so on. Can you think of any other improvements that would aid in improving the situation?

Judge STEVENS. Yes, I can, Senator. I did not expect to address this subject in this forum, but I would like to identify what I regard as a problem which approaches crisis proportions. It is the salary situation for Federal judges. I am personally aware of many qualified people who have been asked to assume the bench, and who would have performed magnificently on the bench, who have been unwilling to do so, when they feel they have an obligation to their families, because of the dramatic disparity between what they can earn in their private practice and the relatively modest salaries that are paid to Federal judges. I really think that the quality of justice in the country is at stake when Congress does not face up to its responsibilities to pay these men what they are entitled to receive.

Senator BYRD. Judge Stevens, do you know what the retirement pay is for a Federal judge?

Judge STEVENS. If he qualifies he draws his full salary.

Senator BYRD. Do you know how much he pays into a retirement fund?

Judge STEVENS. No. I know what my paycheck is each month.

Senator BYRD. I understand that he pays nothing into a retirement fund.

Judge STEVENS. I also know he is paid less than State judges in most States in the Union now.

Senator BYRD. I also know that I could form a line from one end to the other of this building of very capable individuals in both political parties who would just be delighted to be appointed to a Federal district judgeship.

Judge STEVENS. And that line, Senator, would include men who have accumulated great wealth. It would include young men who are not now making the salary a Federal judge makes. It would not include very many qualified individuals who have families to raise and who can make double that money in private practice.

Senator BYRD. I could fill the line with qualified people.

Judge STEVENS. I could give you a line of men who have rejected the appointment in large metropolitan areas. I could cite to you the names of judges who were performing magnificent service who have resigned. I think it is tragic.

Senator BYRD. I think there is some merit to what you say. If we would couple an increased salary with the requirement that they pay into a retirement fund and that the retirement they would receive would be commensurate with the retirement that Members of Congress receive then there might be a balancing of the equities here.

Judge STEVENS. Well, most of us——

Senator BYRD. And may I say that I have to hold Congress to blame for these inequities that prevail.

Judge STEVENS. I think that most of the men that you want on the bench would prefer not to be thinking primarily of retirement but rather of how they are going to perform when they are on the bench and when they are in the most productive years of their lives.

Senator BYRD. That is very true. But there comes a time when we all have to retire, if we live long enough. We have to plan for it.

There is also a view—and I think there is some validity to it—that many judges do not spend enough time on the bench.

Judge STEVENS. That is not true in the seventh circuit, Senator. We have a very hardworking court. Let me just give you one statistic. I read the transcript of Justice Blackmun's hearing. I have the greatest respect, as I said yesterday, for Justice Blackmun. In the 10½ years that he served on the eighth circuit, and that was a busy court during those years, he did less work in terms of output of opinions and sitting on cases than each of our judges in the seventh circuit has done in the 5 years that I sat on that court.

And he was paid in terms of the real value of dollars a salary that was about twice as much—well, that is an inaccurate statement, but our salary has been declining each year in terms of the real value of dollars as our workload has been going up. In each of the last 3 years we have disposed of more cases than the number of new cases filed and the number that are filed is more than double what it was a few years ago.

They are a hard-working group of judges. There are some judges, perhaps, who do not work hard, but that has not been my experience with the Federal judges with whom I have had contact. And I have had contact with those in other circuits as well.

Senator BURDICK. We have provided another judge for the seventh circuit.

Judge STEVENS. I wish they would provide another judge for the northern district of Indiana. The judges there are so loaded with criminal work that the civil litigants just cannot get to trial.

Senator BYRD. What is your view as to the workload of the Supreme Court? I realize that you are not yet a sitting member, but you certainly have a long-distance view of that work and the time that is taken

by the Justices as most of us are able to view it. Do you feel that they are overworked?

Judge STEVENS. It was my view as a law clerk back in 1947—and I should correct the record in one detail, I was a law clerk for only 1 year and not 2—it was my view then that the Justices worked very hard, all of the Justices on the Court. I think it is still true. I do not think it is a part-time job. I think it is a full-time job. I think that no matter what the caseload is, the men who sit there recognize the responsibility to give the best they have. I am not really sure the workload there is any harder than it is on our court.

I think that the attention that has been given to the serious workload problem in the U.S. Supreme Court has tended to divert attention from other problems of equal importance to the entire judiciary, specifically the terrible strain at the court of appeals level and in many districts at the district court level. I mentioned the northern district of Indiana. In the western district of Wisconsin, Judge Doyle, one of the very fine judges, is just swamped with work. He can hardly keep up. This is true in many places in the country.

Senator BYRD. Undoubtedly, also, the situation is that the work would not be behind and the dockets would not be so overcrowded if all judges spent more time at their work. Would you agree with that?

Judge STEVENS. That may be true, but as I say, the judges that I have seen working do not fit that description. I do not really think there are very many in the Federal system. There may be some. No doubt there must be. In any system, there are bound to be some shortcomings from what we would desire. I think if you took people at random out of the line who are waiting for this job that you are talking about that might be true.

Senator BYRD. Judge Stevens, I have been a Senator for 17 years and I know something about that line I am talking about.

Judge STEVENS. Senator, I must say that for the last 5 years the job that they are doing is quite different from what it was during the first 10 or 12 years of that 17-year period.

Senator BYRD. I agree with that and the same can be said about the problems and issues that we are dealing with in Congress.

Judge STEVENS. I agree completely, Senator. I would not depart a bit from that. I think we are all swamped with work and that is one of the tragedies of the situation today of having inadequate time to do the work the way we want to do it.

Senator BYRD. You have written several articles on antitrust matters. You have written two published nontechnical works. One is a book review and the other is a chapter on Justice Rutledge in the book entitled "Mr. Justice." In your book review of Richard F. Wolfson and Philip Kurland's second edition of Robertson and Kirkham's "Jurisdiction of the Supreme Court of the United States" you discuss a change in the attitude of the Supreme Court on appeals from State courts—cases that were dismissed for want of a substantial Federal question with the dissent of one or more Justices. You point out that despite four votes being necessary to grant certiorari, often the court had granted the writ if two or more Justices felt the case should be heard. At the present time do you feel that it would be advantageous for the Court to grant certiorari in such cases when less than four Justices feel the case should be heard?

Judge STEVENS. Senator, I must confess I do not recall the book review from which you are quoting but I will not fail to answer the question for that reason. I simply have no recollection of it.

Senator BYRD. I think it was in the New York University Law Review, volume 27, in 1952.

Judge STEVENS. I am sure I must have written it if it is there but I simply have no recollection of it whatsoever. But in any event to answer your question, I really have a feeling this is a subject on which it might be somewhat unseemly for me to speak. I would say this much, that I think generally an institution such as the Court should have a rule that normally governs its procedures but those things can sometimes be taken care of by the respect which one Justice has for another. In other words, if there were three votes to grant certiorari and one of them felt especially strongly that the case should be heard, often, as a matter of courtesy, I think another Justice might say, Well, I will cast my vote with the three in order to grant certiorari. I think there has to be a certain flexibility and informality in the administration of that kind of rule. I don't know if I could go much beyond that.

Senator BYRD. In 1956 you contributed a chapter on Justice Rutledge to the book "Mr. Justice."

Judge STEVENS. Yes I recall that.

Senator BYRD. Edited by Dunham and Kurland. On page 340 of that book, you state:

> Neither the purpose to curb inflation during war, nor to settle a coal strike that was threatening a national economic crisis, would justify the use of a court as an instrument of policy.

Was this a statement of Mr. Justice Rutledge's view, or was it a view that you held personally?

Judge STEVENS. It would be my own view. I think it would also be Mr. Justice Rutledges' view. I have a recollection that I refer in that article to his statement that no man or group is above the law, or words to that effect, which I think I was surprised to find him use twice in the same opinion. He was known for writing long opinions. That was sort of a small example of his, perhaps, writing more than he needed to, but it was an important point worth making twice.

Senator BYRD. Do you now personally feel that a serious national crisis would justify the use of any court and especially the Supreme Court as an instrument of policy?

Judge STEVENS. No; I do not.

Senator BYRD. In "Mr. Justice" you also stated:

> Read in the context of the entire United Mine Workers dissent, the implication is strong that the Supreme Court itself was in the Justice's mind when he twice said—and this is the quote by Justice Rutledge—"no man or group is above the law."

Do you presently share the view that no man or group, including the Supreme Court of the United States, is above the law?

Judge STEVENS. Very definitely.

Senator BYRD. Were you Justice Rutledge's law clerk in the *Yamashita* case in 1946?

Judge STEVENS. No; I was not.

Senator BYRD. You end your chapter on Rutledge with a quote from the Justice's ringing dissent in the *Yamashita* case:

> More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this

stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens; alien enemies or enemy belligerents. It can become too late.

This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered. If we need not or cannot be magnanimous, we can keep our own law on the plane from which the defeated foes' never rose.

Twenty-nine years have passed since those words were written. I am curious as to how you would respond philosophically to the opinion in this case. Is this a concept of law you would take with you to the Supreme Court if you are confirmed?

Judge STEVENS. Senator, when I wrote that chapter on Mr. Justice Rutledge, I felt I could not improve upon his language at the time it was written and I could not do so now.

Senator BYRD. It would be difficult to improve upon that language.

You were concerned with a lack of procedural safeguards in getting a conviction in the *Yamashita* case. Do you feel now that strong public opinion can cause a due process problem in cases before the courts, especially before the Supreme Court?

Judge STEVENS. I think that the danger that press comment on the criminal trial would cause a due process problem primarily exists at the trial court, that is where there is the greatest danger that an unsequestered jury may be influenced by a matter outside the record. I would not think that the same danger exists in the appellate courts because judges should be able to separate out what is properly before them in the court record and what they read in the press.

Senator BYRD. Do you see any way to lessen the problem of lack of proper time for preparation on the part of the Supreme Court Justices when they are faced with a case on which the Court feels it must reach a quick decision due to various pressures?

Judge STEVENS. No, I think when you are given the predicate that they feel there must be a decision within a given period of time, by hypothesis it must be done within that period of time, but I certainly think that the decision that it should be decided at a particular time, should be very carefully made.

Part of Mr. Justice Rutledge's dissent in the *Yamashita* case was really an objection to the accelerated schedule which he did not think, and I think quite properly, justified any deviation from what otherwise would be proper procedure.

Senator BYRD. Have you been an officer, director, proprietor, or partner in any business firm or enterprise other than your old law firms?

Judge STEVENS. Not since I have been on the bench, Senator. I had been a director of some companies before I assumed the judgeship. In private practice, yes, but not since I have been a judge. I provided a list of those to, I believe, the Department of Justice when I first went on the bench and I have resigned from all of them.

Senator BYRD. And I take it you have not received any benefits from any business firm or enterprise since becoming a Federal judge?

Judge STEVENS. With this qualification, Senator. There were some payments made to me pursuant to my separation agreement with my firm on account of services performed before I went on the bench. I have received no compensation, no extrajudicial income on account of any activities since being a judge.

Senator BYRD. And was that information also provided to the Justice Department?

Judge STEVENS. It was in connection with this nomination, not in connection with the prior nomination because the negotiation of our separation took place after my nomination. But all those details were provided and they had been disclosed to everyone with an interest in the matter.

Senator BYRD. Would you state again the response to my question as to whether or not you have received any benefits from any business firm or enterprise? You indicated that you had, but that they had not been for services performed after you became a Federal judge?

Judge STEVENS. That is correct. Apart from the payments made by my former law partners to me on account of services performed before I went on the bench, I have received no extrajudicial income except in the form of either dividends, for a brief period of time when I still held some stock—I have no stock now—and interest payments on some bonds that I hold and interest on a savings account. I have no business income of any kind.

Senator BYRD. And you have no ties with any business firm or enterprise?

Judge STEVENS. No.

Senator BYRD. None?

Judge STEVENS. None.

Senator BYRD. Thank you, Judge Stevens.

I congratulate you on your nomination and I commend you on your responses to my questions.

Judge STEVENS. Thank you, Senator.

Chairman EASTLAND. Senator Burdick.

Senator BURDICK. Judge Stevens, I want to add my voice to those of the other members of the committee who have congratulated you on your nomination.

Before I get into my questions, I would like to advise you that this committee has recommended an additional circuit court judge for the seventh circuit. We have also recommended an additional judge for western Wisconsin and for northern Indiana. The circuit court judge bill has been passed by the Senate and is in the House. I think you will be pleased to hear that.

Judge STEVENS. I am indeed pleased, and I will, of course, also be pleased when the existing vacancy is promptly filled.

Senator BURDICK. Well, that's not in our department.

Judge STEVENS. I understand that.

Senator BURDICK. Like Senator Hart, I have had assistance from my staff in reviewing a hundred or more of the opinions which you have written or participated in while in the Seventh Circuit Court of Appeals. Generally speaking, these efforts have not prompted me to ask any questions about your views in any particular opinion you have written. However, I would like to ask you about your general impressions about a subject which affects the overall problems of judicial administration.

As you know, we have 400 district court judges and 97 circuit court judges. The committee has recommended legislation which would create 45 new district judges and 15 more circuit judges. Some studies have been made by the Federal Judicial Center which forecast a need for 1,129 district judges and 250 circuit judges by the year 1990, if the rate of increase in new case filings continues at the same pace. Do you have any conclusion about what problems there would be in the Federal judicial system if our only solution to increased caseloads is to increase the number of judges in proportion to the increased caseload?

Judge STEVENS. If this becomes necessary—and hopefully the explosion in the volume of cases will not continue at the same pace, it may or may not, we really can't be sure yet—but if an increase in the number of judges of the magnitude that is projected becomes necessary, and, of course, it may, I would think it would necessarily follow that we would have to start dividing the circuits and have a larger number of circuits and divide the larger circuits, such as the ninth and the fifth now, at least in half and gradually reduce the geographical area that they have jurisdiction over. I think a court as large as the fifth or the ninth probably does not function as effectively as one of about eight or nine judges. I have the feeling—and maybe that is just because I worked in such a court and it seems to have been an efficient judicial unit—I think you need several judges to take care of the conflict problem I discussed yesterday when someone can lean over on the side of recusing himself. But when you get too many judges you have a problem if you have en banc hearings, administrative problems, and I think it is also unfortunate in other circuits that the judges do not live in the place of holding court. I think we have an advantage by being in Chicago. I think there is an advantage derived from efficiency that way. I think that perhaps the first thing that would have to be done with a larger number of judges is to increase the number of circuits.

Senator BURDICK. There has been much testimony before the Subcommittee on Improvements in Judicial Machinery that to have an efficient court you need to keep it to about 15 judges. This would seem to be a general conclusion of the judges who appeared before us, that a court should not have more than 15.

Judge STEVENS. I would think even that is a little large, but perhaps I should defer to the judges on the fifth circuit on that. I do not think you should get larger than that certainly.

Senator BURDICK. In the case of *T.P.O. v. McMillan*, 460 Fed. 2d. 348, the seventh circuit held that a magistrate, the office we created 3 years ago, did not have the power to decide a motion to dismiss or a motion for summary judgment. While you did not participate in that decision and while I am not questioning the decision, I would be interested in your views about the advisability of clothing a judicial officer with certain powers to make proposed findings which would be referred to a judge of the court for ultimate decision. What are your general views on this question and what do you think about the jurisdiction of the magistrate?

Judge STEVENS. Of course, I am familiar with Judge Sprecher's opinion in that case. It did involve his interpretation and the panel's interpretation of the statute primarily. I think the power of the magistrate can be enlarged somewhat. I doubt if it can be enlarged to the extent of ruling on matters such as motions to dismiss. It seems to me

when you are talking about the legal sufficiency of the claim, that should be a matter for the judge, but I think there are areas in the supervision of discovery and in a preliminary investigation of facts, and the presentation of tentative findings of fact, in which the magistrate could appropriately be given additional authority which would be helpful to the judge and help solve the overload problem.

Senator BURDICK. Testimony indicates that the magistrates have been very helpful to the district judges.

Judge STEVENS. I think that is right.

Senator BURDICK. You are aware of the problem, and you are also aware, I presume, of the attempt of this committee, at least, to give a little more authority to the magistrates?

Judge STEVENS. Yes. I think I would generally support that.

Senator BURDICK. Judge, I understand why you declined Senator Kennedy's invitation to attach any label as to your judicial philosophy. At the same time, you can appreciate that members of this committee, and in fact all Senators, like to know something of the nominee's judicial philosophy before voting on confirmation.

You furnished me a copy of the speech made at Northwestern Law School about a year ago on Law Day, and I will now read a portion of that speech:

> Every decisionmaker, whether he be an umpire at the World Series, a legislator, a corporate manager, a member of a school board, or a federal judge, is fallible. But if he has earned the right to make decisions through an acceptable selection process, it is safe to predict that most of his decisions will be acceptable. Sometimes he will violate a rule that commands universal obedience, and such error must be corrected. But we should not attach undue importance to the occasional mistake. For the potential error—indeed the inevitable prevalence of a domest amount of error—is an essential attribute of any decisional process administered by human beings.
>
> The prevalence of widespread potential for error among other decisionmakers is one of the factors that repeatedly prompts invitations to federal judges to substitute their views for the erroneous conclusions of others. Sometimes I think federal judges have succeeded in creating an illusion that they are wiser than they really are because their self-imposed limitations on their jurisdiction must have left many losing litigants convinced that if only the federal judge had reached the merits, surely he would have ruled correctly and, of course, the winning litigant knows how wise the judge is. Be that as it may, the temptation to accept an invitation of this kind is always alluring, but whenever the federal judiciary does accept, three things inevitably happen. First, our workload increases and our ability to process it effectively diminishes. The risk that we won't have time to finish the exam becomes more and more real. Second, the potential for diverse decisions by other decisionmakers in dminished and another step in the direction of nationwide uniformity is taken; for after all, we are federal judges. And third, we substitute our mistakes for the mistakes theretofore made by others. Sometimes that price is well worth paying; it is, however, a cost of which we should always be conscious.

My question is this. Does the statement I read fairly reflect part of your judicial or legal philosophy, or do you want to expand or add to that statement?

Judge STEVENS. Yes; it does, Senator. I should, perhaps, explain that in the first paragraph, if I remember the speech, I recited the fact that I had obtained a commitment from Dean Rahl at Northwestern that what I said would never be published because I was speaking in a very informal way and taking little time to prepare, but I have reread the speech because I was told you might ask me about it, and I stand by what I said in the talk. I think it does fairly reflect my view.

I think that there are costs to having judges reach out for issues that need not be decided to dispose of litigation before them, and the cost is greatest when it is the Federal court that does that because of the implication of the Federal decision having a nationwide impact. So, that speech does, in sort of a rough, informal way, indicate the reasons why I think judges should impose on themselves the discipline of deciding no more than is really required to adjudicate controversies.

Senator BURDICK. Finally, Judge Stevens, Chief Justice Taft, at one time when he was testifying before this committee for proposed legislation to give the judicial councils of the circuits certain supervisory powers over district judges, made the following statement about the indifferent judge, and I quote: "He thinks that the people are made for the court, not the courts for the people." Judge Stevens, does that phrase of Chief Justice Taft suggest anything to you, that the indifferent judge thinks that people are made for the court instead of the courts for the people?

Judge STEVENS. I would have thought it was the other way around. Maybe I did not hear it correctly, that the people are made for the courts? I would say the courts, the business of the courts is to serve the people, and, of course, our society as a whole.

Senator BURDICK. That is what I was asking. Thank you very much.

Chairman EASTLAND. Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman.

Judge, prior to the time that President Ford nominated you for the Supreme Court, a number of members of the press were very curious as to the kind of standards that the Senate raised for judicial nominations. They called me and said, what do you think the test ought to be? I finally came up with a very simple one, that the candidate should be honest and that he should understand the spirit of the Constitution, the essence of the Constitution. I believe that is the test, and from all I know about you I think you meet that test and I am confident that our hearings will ratify my own judgment and you can be confirmed.

Chairman EASTLAND. There is a rollcall vote in the Senate. When Senator Mathias finishes his question, we will recess for the vote and then be right back.

Senator MATHIAS. That does not mean that every member of this committee and of the Senate has to agree with every decision that you have handed down, or that we would necessarily decide the same cases in the same way. What I think it does recognize is your integrity, your intellectual capacity, and your understanding of the spirit and substance of the organic document which has guided this republic for so many years.

When we return from the rollcall vote, I do have a few questions in some specific areas of the law as they approach the Constitution that I would like to examine with you. I hope you will excuse us for a few minutes.

[A brief recess was taken.]

Chairman EASTLAND. Let us have order.

Senator MATHIAS. Judge, I would like to raise with you what might be called the question of the firstness of the First Amendment and what sort of priority you would give to the First Amendment when it collides with other rights. We hear a lot these days about the right of

privacy and the right to a fair trial, and I wonder how you balance these colliding or conflicting concepts of law?

Judge STEVENS. I place the highest possible value on the interests protected by the First Amendment. I also place an extremely high value on the interests protected by the due process clause insofar as it guarantees fair procedure to every defendant. It is awfully hard to say in the abstract, Senator, which priority would govern in a particular case because the facts do vary from case to case. I certainly would not suggest at all that there was any constitutional provision of greater importance than the First Amendment, but I don't think that I could say that whenever there is a conflict between the First Amendment and the Fourteenth that you can count on me to rule for the First because the facts might not quite fit that formula.

Senator MATHIAS. I am not asking you to try to prejudge cases in which the fact situations have not been presented, but I think your answer is what I was groping for, which is that in a situation where everything else was equal, you would put the First Amendment first.

Judge STEVENS. I would think that is right, and I think I have recognized the values protected by the First Amendment in some First Amendment cases where my colleagues have not. I think those cases can be found and could be identified. I do not think you will have any trouble with my high regard for the values protected by that portion of the Constitution.

Senator MATHIAS. In a somewhat related vein, I would be interested in how you feel about State actions under the Fourteenth Amendment and where you draw the line? Whether it is a narrow line or a broad line, and perhaps the kind of classifications that might be adopted in order to develop some line of State action?

It has been held over the years that if there is some rational basis for a classification, that might rebut a presumption that discrimination was involved in State action. More recently classifications have been suspect. For instance, a classification which involves a racial question is now a suspect classification even though some rationale might be advanced to support it. The case of sex classification is, I think, not yet fully determined in the law. I wondered how you would feel when these questions impact on the Fourteenth Amendment?

Judge STEVENS. I think there are three parts to your question, if I may be as precise as I can.

Senator MATHIAS. You are very astute. There were precisely three as I had it written down.

Judge STEVENS. First, there is the question of whether there is sufficient State action to warrant Federal intervention at all, the kind of Federal intervention where you would reach the merits of a particular controversy. It is in that area that I, perhaps, have written some opinions which are somewhat more restrictive than other Federal judges have written.

I have required, and there are a number of these cases, it perhaps would not be best to talk about them specifically but I think that, to the extent that you can generalize, I have felt that consistent with my philosophy of trying to keep the work of the Federal courts within manageable bounds, so that it continues to perform with a degree of excellence that I think has characterized their work in the past, there is a strong interest in placing reasonable or recognizing the existing limitations on the scope of Federal jurisdiction.

So I have written a few opinions in which I have come to the conclusion that in the particular facts the State participation in the matter of which the plaintiff complained was not sufficiently direct to warrant Federal intervention, and some of those opinions are the subject of criticism by those who have suggested that I shoud not be confirmed. But once you get over the hurdle and into the area of where the Federal court does have jurisdiction, you must address the merits.

Then you have pointed out where there is a classification problem in the racial discrimination cases, and I understand you to be asking me if I would find a rational basis, a sufficient basis, for a classification on racial grounds. Clearly I would not. I think the law is well settled, and properly so, that a much heavier burden, perhaps almost an insurmountable burden, exists in order to justify any classification on any such factor.

And now you turn to the question of sex discrimination. I think you were asking me whether the heavy burden test or the lesser burden test should apply in sex discrimination cases.

Senator MATHIAS. Whether you have a similar approach to the racial?

Judge STEVENS. I am not sure, Senator. I am not sure whether the same test would apply or not. I don't think the court—the court has dodged and fenced a little bit on that question. They have made it clear, as I think I indicated yesterday in response to one question, that the classification is one that is subject to the equal protection clause, but that the standard of review may or may not be the same as it is in racial discrimination areas. And I suppose on reflection I have thought a little bit about Senator Kennedy's question. That may be something that the Equal Rights Amendment might accomplish. It might define the standard of review, but I am not sure when one reads the amendment that it does. So I am not sure you would have a different standard after the amendment is adopted.

I should say another factor that goes into the equation of whether the amendment is something that should be adopted is the extent to which the goals of the amendment can be ahcieved by statutory enactment. To the extent that they can be achieved by statute, is it really wise to go through the cumbersome process of amendment, which is not really necessary? That is part of my uncertainty about the problem.

Senator MATHIAS. I think it is an honest doubt which is not exclusive to you. I think that there are many people who have that question, but at least you face it as a doubt.

Judge STEVENS. Yes; I do.

Senator MATHIAS. In the *Cousins* case you wrote very eloquently of the necessity for prohibiting all invidious discrimination, and I don't think anyone can quarrel with that, but what about the remedies that you would apply if you have a case of discrimination which is clearly based on color, let's say, an injustice created by racial discrimination. Is there any kind of a colorblind remedy that is appropriate for the courts to apply? I suppose really what I come down to is what is the role of the court in helping to erradicate a racial discrimination?

Judge STEVENS. Senator, I think I may have made some comment on this problem already, but the role of the court is different from the role of the Congress in addressing that area of concern because presumably, on the hypothesis we are talking about, there has been a

finding of violation and there has been proof that discrimination existed and was supported by State action that made the matter appropriate for Federal review. That having been established by the record, what should the judge do about it? Well, there the trial judge may appropriately go beyond merely a colorblind remedy and require in certain circumstances affirmative action to redress the past injustice, but the extent of such affirmative action would always be a function of, and be related to, the kind of factual situation disclosed by the particular case.

So I could not fairly say that in every case affirmative action would be an appropriate remedy, nor could I fairly say that it would never be appropriate. It really has to be done on a case by case basis because there is a wide range of variation in cases of this kind.

Senator MATHIAS. I would like to ask a question which I am not entirely sure is a fair question because it really deals more with our function than with the function of the judicial branch, but I think maybe it is within the realm of fair examination here, and that is the question of amendments to the Constitution. This committee has had to entertain a number of suggestions for amending the Constitution in recent years. Some of them were directed at longstanding goals such as the Equal Rights Amendment. Others have been directed at more current controversies.

Archibald Cox wrote recently that one fundamental objection to the proposal in the case on which he was writing, which was the proposal for an amendment to ban busing, is a very great danger inherent in adopting specific constitutional amendments on specific questions of immediate public and political interest. One of the prime values of our constitutional system is the fact that the Constitution speaks in fundamental principles and has an enduring generality, and this characteristic, coupled with the power of the Supreme Court to project great fundamental issues upon particular occasions, gives our political ideals a permanence not subject to alteration by violent, short-run surges of public feeling or the desire of officeholders for political advantage.

Now in the light of that statement by Archibald Cox, I wondered what your general philosophy is about amending the Constitution and what you feel is the danger of really tampering with the organic law?

Judge STEVENS. Well, I think it is a power which should be exercised rarely. I think the difficulty in the amending process indicates that the authors of our Constitution did not expect it to be used frequently, on casual or relatively unimportant matters, and I would think generally that to the extent that goals can be achieved by other means without the costs that are associated with the laborious amending process that is desirable, and I would wonder if something as specific, say, as the 18th amendment, was wise when it could have, perhaps, been handled by legislation, at least as it is now construed I wonder if it was appropriate for amendment.

But I certainly would not say that there should be no tampering with the Constitution. It has to be changed from time to time, otherwise there would be no need for an amending power, so I would say that I would regard it as an important power to be sparingly used.

Senator MATHIAS. In propounding the question, I am not oblivious to the fact that the Constitution is amended not only in this body, but that the Court itself has played a role in some alterations of view in the way that the Constitution would be enforced.

Judge STEVENS. That is true, Senator, but I am not sure it is fair to characterize changes in the developing body of law as amendments to the Constitution. They, perhaps, have somewhat of that effect.

Senator MATHIAS. It is a change of view or a change of perspective which comes about other than amending the terms of the Constitution itself.

Judge STEVENS. Yes.

Senator MATHIAS. I am wondering to what extent and under what circumstances you feel that national security becomes an overriding question which affects the power of the Government to engage in certain activities, search and seizure, surveillance, which would otherwise not be permissible under the Bill of Rights?

Judge STEVENS. Well, Senator, I would think that one who relies on national security as a justification for action that otherwise would be impermissible bears a very heavy burden, but I think that we must face the fact that even in the area to which we attach the highest priority, namely, the first amendment area, there are occasions when restrictions are justified by reasons of national security, and I have in mind specifically the question of the prohibition of publications about troop movements and ships and the like, which even in *Near* v. *Minnesota* was recognized as exceptions to the absolute right of the press to publish what it would.

So, not trying to be evasive, you do have to consider the particular case; but I would certainly agree that the burden is on the Government when it seeks to justify for such a reason to show that this is a valid reason and to be prepared to make such a demonstration.

Senator MATHIAS. Let me give you a very simple example. I believe it is no longer in very active litigation, or maybe it is, and if it could have some bearing on some active litigation in a peripheral way, perhaps I should not ask you that question. I would have no problem with the examples that you give of troop movements and that kind of thing. But the problems of surveillance, personal surveillance, breaking and entering to obtain information without a warrant, and this kind of activity which we have been viewing in the Senate with great concern, for which the only justification was a rather vague statement about national security, is I think a far more difficult question than the ones which are really the Government in the exercise of its war powers.

Judge STEVENS. Well, there is no question that there are privacy interests we must always keep in mind in any of these problems, whether they be national security or even less extreme matters such as simple detection of crime.

Senator MATHIAS. But you rest on your statement that you feel that the Government bears a very heavy burden. I believe I quote you correctly.

Judge STEVENS. I would think so, and I would think, again, perhaps when a particular case comes up I might find that I have spoken somewhat loosely, without sufficient reflection, but my general reaction would be that A, it bears a heavy burden, and B, it bears some burden of factual presentation to enable a factfinder to know that this is not merely a formula of words that is being used to justify something other than a real national security interest.

Senator MATHIAS. Judge, we again have a rollcall vote, and we must go to the Senate floor. We will return in a few minutes.

I will put to you the affidavit of Anthony Robert Martin-Trigona, which makes certain allegations about previous conduct on your part, and I will ask for your comment on that when I return.

[The affidavit referred to follows:]

AFFIDAVIT OF ANTHONY ROBERT MARTIN-TRIGONA

Anthony Robert Martin-Trigona, being first duly sworn, states and deposes as follows:

1. He maintains a business office address at One IBM Plaza Suite 2910A, Chicago, Illinois and is a resident of the City of Chicago, Illinois.

2. For the reasons which he sets out in greater detail in this affidavit he believes there are certain prior activities of John Stevens, Esq. which raise possible doubts as to his fitness to serve as a Justice of the United States Supreme Court.

3. He believes there is a basis to conclude an extensive investigation is warranted to examine Mr. Stevens' prior activities with particular regard to his actions while serving as Chief Counsel to a special commission of the Illinois Supreme Court.

4. That in 1969, in Chicago, certain allegations appeared in various news media concerning unlawful and improper activities of some Illinois Supreme Court judges, charging in substance that sitting judges had accepted bank stock to influence their decisions on the Illinois Supreme Court.

5. In response to the public accusations and discussions, the Illinois Supreme Court appointed what it called the Special Commission in Relation to Docket Number 39797 (hereafter in this affidavit referred to as "Special Commission").

6. The Special Commission was charged with investigating the public charges and accusations which were being made and had been made concerning sitting justices of the Illinois Supreme Court.

7. John Stevens, Esq. acted as Counsel to the Special Commission and personally conducted and supervised substantially all of the investigatory activities of the Special Commission.

8. Jerome Torshen, Esq. served as Assistant Counsel to Mr. Stevens and participated in substantially all of the same investigatory activities of the Special Commission with Mr. Stevens.

9. On numerous occasions I discussed Mr. Torshen's work and role within the Special Commission with him and his working relationship with Mr. Stevens.

10. My discussions with Mr. Torshen as per paragraph (9) above took place in Mr. Torshen's office at 11 S. La Salle Street, Chicago, where we were meeting in connection with his service as my attorney.

11. Mr. Torshen was representing me in connection with my efforts to secure admission to the Illinois bar. I had received a Juris Doctor degree from the University of Illinois in 1969 and passed the Illinois Bar Examination in 1970.

12. Because Mr. Torshen viewed me as a future lawyer, we developed a close working relationship, more in the nature of lawyer to lawyer than attorney/client: for example, on at least one occasion he entertained me in his home for dinner with his family. Our discussions frequently ranged over a variety of topics completely unrelated to my bar admission case.

13. Mr. Torshen had hanging on one wall of his office a reproduction of the front page of one of the Chicago Newspapers (I believe it was the Chicago Daily News) announcing the report of the Special Commission and the resignation of the justices. My prior knowledge of the case and its novel aspects prompted me to question Mr. Torshen about the front page on the wall and this led to a series of discussions which Mr. Torshen and I had over a period of time relating to his service on the Special Commission.

14. Mr. Torshen and I discussed his work as Assistant Counsel to the Special Commission on numerous occasions. One of the reasons I repeatedly broached the topic was that I was frustrated that my bar admission had been inexplicably delayed, while Justice Solfisburg who had resigned in disgrace had not been disciplined and was again practicing law. We also discussed Mr. Torshen's work on the Special Commission because of the impact which it would or could have on the ultimate decision by the Illinois Supreme Court in my case.

15. Mr. Torshen assured me I would be admitted to the Illinois Bar because of his special influence with certain members of the Illinois Supreme Court. On one occasion I kidded Mr. Torshen that his claim of special influence was

no more than lawyer's bragging of a type that is characteristic of Washington lawyers claiming special influence.

16. Mr. Torshen assured me that his claims were in no way bragging and revolved around his knowledge of damaging evidence concerning some of the Illinois Supreme Court justices who were still on the Court, which knowledge and information he had gained as a result of his service as Assistant Counsel on the Special Commission.

17. Mr. Torshen assured me on numerous occasions that if the full and complete record of investigatory materials which had been assembled by himself and Mr. Stevens had been released, at least two additional judges (in addition to the two who did in fact resign) would have been forced to resign from the Illinois Supreme Court.

18. Mr. Torshen mentioned the specific name of one judge and stated in words to the substance of "He would be off the Court today if it were not for the fact that we restricted the scope of our report and limited the findings to the specific area of our mandate, and kept our mouths shut about other information which we developed as a result of our investigatory activities." Mr. Torshen also referred me to the actual report of the Special Commission to note the careful manner in which key passages of the report had been drafted to limit the scope of the disclosure being made. Mr. Torshen did not direct me to any specific sections of the Report of the Special Commission, but I did read the Report and formed at that time my own views as to areas of the Report which were in conformity with his claims.

19. Mr. Torshen also gave strong indications as to the identity of the second sitting Judge who would have been removed if the full record of the investigation had become public.

20. During the scope of our conversations Mr. Torshen repeatedly referred to Mr. Stevens and discussed the investigations the two men had jointly conducted.

21. I was particularly interested in Mr. Stevens role and informally probed his role because a member of Mr. Stevens' law firm, Mr. Donald Egan, was serving on a committee or sub-committee of the Bar which was investigating my own application for admission to the bar.

22. During the spring of 1972 Mr. Torshen and I disagreed concerning a number of issues relating to his representation of my interests. In particular, he made certain demands concerning payment of fees which I was not in a position to meet, since I had already paid him several thousand dollars in legal fees as per a modification of our earlier and initial agreement that no fees were to be due until the end of the case.

23. As a result, Mr. Torshen and I terminated our attorney/client relationship and our contacts generally ceased. Mr. Torshen refused to return to me my files. During subsequent hearings relating to my admission to the bar, Mr. Torshen testified in a manner which I would characterize as adverse-to-ambiguous concerning my interests. Mr. Torshen also sent a letter to the Chief Judge of the Illinois Supreme Court and did not advise me of the fact that he had sent such a letter although the letter arose out of our attorney/client relationship.

24. In the spring and summer of 1972 I began my own investigatory efforts into the work of the Special Commission.

25. As a result of my investigations I became convinced that Mr. Torshen had told me the truth, and that the complete truth concerning the discoveries of the Special Commission had not reached the public. In addition, neither of the judges who had been found to have committed "positive acts of impropriety" by the Special Commission had returned the stock profits to the State of Illinois.

26. On September 14, 1972, I filed in the United States District Court for the Northern District of Illinois a complaint against the sitting and former justices of the Illinois Supreme Court and John Stevens, Esq. docketed as case number 72 C 2290. A copy of the complaint is attached to this affidavit as Exhibit A.

27. The case was assigned to Judge Richard McLaren, who had been appointed a federal judge while serving as Assistant Attorney General in the Nixon Administration under circumstances that later prompted the Judge to admit he had participated in certain activities relating to ITT. Judge McLaren apparently was a friend of Mr. Stevens as both had been prominent antitrust lawyers in the City of Chicago.

28. Judge McLaren dismissed the case without even allowing the summons to be issued. His action was appealed to the United States Court of Appeals for the Seventh Circuit and docketed as Appeal Number 73-1527. The case was argued before the Court of Appeals on December 4, 1973, and the action of

Judge McLaren was immediately reversed from the bench and the Court of Appeals on the same day entered its order reversing and remanding the case for further proceedings; a copy of the order is attached as Exhibit B.

29. The case was subsequently assigned to District Judge Richard Austin after strenuous efforts to remove Judge McLaren from the case were successful.

30. After receiving briefs from the parties, Judge Austin dismissed the case on August 6, 1974 and it was again appealed to the United States Court of Appeals for the Seventh Circuit.

31. On October 31, 1975, the Seventh Circuit affirmed Judge Austin's dismissal of the case in an order pursuant to (Local) Circuit Rule 28 which is unpublished and which cannot, by rule, be cited as precedent in any other case; a copy is attached hereto as Exhibit C. At no time did the Court of Appeals reach the merits of the controversy and at all times the Court ruled on preliminary procedural matters in sustaining a dismissal of the action.

32. Mr. Stevens had defended against the action on the grounds that he was immune from suit because of the duties he had performed for the Illinois Supreme Court.

33. I believe that Mr. Stevens concealed from the people of the State of Illinois, information which he assembled as a result of duties which he himself characterized as quasi-judicial, and which would have caused, if released to the public, the resignations of two additional members of the Illinois Supreme Court. Mr. Stevens apparently did so with the purpose and intent of restricting the scope of disclosures generated by the Court scandal and with the knowledge that he was restricting from disclosure information which tended to cast doubts on the legality and propriety of actions of certain members of the Illinois Supreme Court in addition to those who had been accused of unlawful conduct in news media reports. In acting as he did, it is my opinion that Mr. Stevens deprived the citizens of the State of Illinois of the loyal, honest and complete services of an individual (Stevens) who claimed that he was acting in an official, quasi-judicial capacity.

34. I believe the record in case number 72 C 2290 and related appeals will fully establish that I bear no personal animus against Mr. Stevens. Indeed, both my original complaint and subsequent briefs carefully circumscribed the allegations made against Judge Stevens (see page four of Appellant's Brief in case number 74–2042 reproduced as Exhibit D). I have never met Mr. Stevens.

35. I respectfully request that using the resources and supoena powers available to it, the Committee on the Judiciary of the United States Senate conduct a full and complete investigation of the allegations and matters contained in this affidavit with particular respect to receiving all materials still existing relating to othe investigatory efforts of the Special Commission so that the truth of my allegations can be established with reference to the actual documentary materials.

36. I respectfully request that I be called as a witness in any hearings conducted on the nomination of Mr. Stevens to be a Justice of the Supreme Court of the United States Supreme Court and affirm my willingness to assist the Committee on the Judiciary in any way in which I am able to do so.

37. For the record, I served as a temporary employee of the United States Senate in 1966 when I was on the staff of United States Senator Paul H. Douglas.

38. I have read the foregoing affidavit and the same is true and correct to the best of my knoweldge, information and belief.

ANTHONY R. MARTIN-TRIGONA,
*One IBM Plaza Suite 2910A,*
*Chicago, Ill.*

ACKNOWLEDGEMENT

STATE OF ILLINOIS,
*County of Cook, ss:*

Dorothy Gannaway, a Notary Public in and for the County and State aforesaid, hereby certifies that Anthony Robert Martin-Trigona appeared personally before her and stated that the foregoing affidavit is true and correct to the best of her knowledge, information and belief, for the uses and purposes therein set forth.

DOROTHY GANNAWAY,
*Notary Public.*

[SEAL]

Senator MATHIAS. The committee will stand in recess.

[A brief recess was taken.]

Senator MATHIAS. Judge, when we took a recess for the last roll-call vote, I stated that I would question you about the affidavit of Anthony Robert Martin-Trigona.

Before I go to that affidavit, I have a press release that apparently was issued today by Mr. Martin-Trigona which raises some question about the thoroughness of our examination and of my questions because one of the allegations of today's press release is that:

> Moreover, the question of how Mr. Stevens practiced law for 20 years and managed to amass only a miniscule net worth remains to be answered.

On any basis of fairness and impartiality, that question might also be asked of me, and I may be thought to have an undue sense of affinity with you. I will take whatever risks are involved. [Laughter.]

[The press release referred to follows:]

> While Washington press corps snoozes and snores and Senate Judiciary Committee seeks to muzzle witness seeking to disclosure germane testimony, an award-winning Chicago Daily News investigative reporting team is continuing to break new leads in the questions of ties between John Stevens and the Daley machine.
>
> In an atmosphere reminiscent of Watergate, the Washington Press corps is asleep and a Senate Committee is seeking to muzzle witnesses while an out of town newspaper continues to break new disclosures on a matter of major public importance.
>
> The Chicago Daily News, in its morning editions will carry reports of additional land trust connections between the Stevens law firm and the Daley Machine. Specifically, some years ago, Mr. Stevens senior partner Rothschild was an investor to the tune of almost $120,000 in a Tome Keane inspired and managed land grab of property from the City of Chicago. Mr. Rothschild also invested funds on behalf of an anonymous nominee through an apparent land trust relationship. The nominee may be Stevens.
>
> Moreover, the question of how Mr. Stevens practiced law for twenty years and managed to amass only a miniscule net worth remains to be answered. Despite the fact that Justice Powell was forced to disclose assets in the names of family members which had been generated as a result of his efforts, no such requests have been forthcoming from Judiciary Committee on this occasion. Thus, the American people are being led to believe that a leading antitrust lawyer in Chicago after twenty years ended up with a net worth of only $170,000, a per year figure of less than $10,000 in net asset accumulation.
>
> Anthony Robert Martin-Trigona has again advised the Judiciary Committee that he feels he is being muzzled and disclosures coming out of investigative reporting in Chicago are being ignored in an attempt by the Ford Administration to steamroller the nomination of John Stevens without adequate disclosure and examination.

Mr. Stevens, let me ask you first: Are you familiar with Mr. Martin-Trigona's affidavit?

Mr. STEVENS. Senator, during the recess I scanned it. I had previously been told about the substance of these charges. I think I am sufficiently familiar to answer anything that you wish to inquire about and I can say the same about the press release. I am prepared to answer any question you care to pose about either of those.

Senator MATHIAS. In substance, the affidavit says that in connection with the Special Commission in Relation to Document No. 39797, you were guilty of what might be called in today's vocabulary a cover-up. Would you like to tell us about that?

Judge STEVENS. It is sort of ironic because I am inclined to think that the performance of the work of that Special Commission is the

real reason why the course of events developed to bring me here today. That happened shortly before my original appointment, and I think it was because of a good deal of public attention that my name came to the attention of the people who were trying to find people, who might fill a vacancy.

But as I understand the substance of Mr. Martin-Trigona's charges, he says that Mr. Torshen, who was my assistant counsel, told him in a conversation that the commission—and specifically I suppose myself as general counsel—had information that two justices of the Illinois Supreme Court were guilty of misconduct which would have justified their removal, and that we had such information and we withheld it from the public and took no action with respect to it. This is simply not true.

We investigated charges of impropriety with respect to a particular case. *People* v. *Isaacs*, and as a result of very hard work in a very short period of time, with a very dedicated staff, uncovered factual information which justified a report by this special commission of five eminent lawyers of the city of Chicago, not all of the city of Chicago, but the bar of Illinois, it was not simply Chicago lawyers.

Senator MATHIAS. Could you supply in the near future the names of the members?

Judge STEVEN. We have, Senator. We have supplied the report of the special commission which identifies the five commissioners. They were the then president of the Illinois Bar Association, the then president of the Chicago Bar Association, and three other members selected by them.

But the substance of the report was that the evidence uncovered by the commission disclosed a significant appearance of impropriety by two members of the Supreme Court of Illinois and it recommended that those justices resign voluntarily. There was a dissent by one member who felt that the committee as a whole had exceeded its task by making that recommendation, that the assignment of the commission was merely to make a report on a particular matter.

But I had urged the commission, as its counsel, to make the recommendation. They did so and the justices ultimately resigned. We had no evidence of wrongdoing by any other member of the Illinois Supreme Court.

I know, I have not spoken to him myself but I am told, that Mr. Torshen, to whom these remarks are attributed by Mr. Martin-Trigona, has denied under oath that he said anything even remotely approaching what Mr. Martin-Trigona quotes him as saying. I am sure that Mr. Torshen would not have said we had evidence because we simply did not have such evidence and had we done so I am sure we would not have withheld it.

[A letter by Jerome T. Torshen follows:]

JEROME H. TORSHEN. LTD.,
ATTORNEYS AT LAW,
*Chicago, December 5, 1975.*

HON. JAMES EASTLAND,
*Chairman, Committee on the Judiciary,*
*U.S. Senate, Washington, D.C.*

DEAR SENATOR EASTLAND: The undersigned was privileged to serve as assistant counsel to Judge John Paul Stevens on the staff of the Special Commission of the Illinois Supreme Court ("the Commission"). As a result of the report of

the Commission, two Justices of the Illinois Supreme Court resigned. Subsequently, in an unrelated matter, our office, for a time, represented one Anthony R. Martin-Trigona in connection with Mr. Martin-Trigona's application for admission to practice law in the State of Illinois. We withdrew from that representation prior to the hearings resulting in denial by the Illinois Supreme Court of the said application. See *In re Martin-Trigona*, 55 Ill.2d 301, 302 N.E. 2d 68 (1973) (a copy of which opinion is attached hereto).

We have been advised that Mr. Martin-Trigona has submitted a document to your Committee which, in effect, charges that the undersigned advised Mr. Martin-Trigona that the Commission had obtained evidence sufficient to cause the resignation of two Justices in addition to those who had resigned, but that this evidence was, in some manner, suppressed. Apparently, it is charged that Judge Stevens was involved.

These charges are false, malicious and scurrilous. No such statements were ever made to Mr. Martin-Trigona. Moreover, no material was obtained by the staff of the Commission which indicated any impropriety, much less illegal conduct, on the part of any members of the Illinois Supreme Court other than those two Justices who resigned. I shall be pleased to so testify under oath before your Committee to remove this taint on the good name of Judge John Paul Stevens, if in your Committee's judgment, it is necessary or desirable.

I have known Judge Stevens for almost twenty years as a lawyer, as a colleague on the staff of the Commission and as a judge. He is a superb legal craftsman, a gentleman of impeccable character and deep sensitivity, and a man of the utmost integrity. His fitness for judicial office is, if anything, exemplified by the performance of his function as counsel to the Commission.

It is unfortunate that these charges were made. They are totally untrue and defamatory. They should not, in any way, mar the outstanding record of Judge Stevens or adversely affect the deliberations of your Committee in this most important matter.

Very truly yours,

JEROME H. TORSHEN.

Judge STEVENS. There is no basis whatsoever for a charge that the Commission or any of its staff, or I am sure myself either, failed in the discharge of the duties assigned to us. I think that the Commission, and I say this as a member of a team, did a magnificent job which I regard as one of the principal important professional achievements of my life.

Secondly, Mr. Martin-Trigona has released a press release which in substance says I have not made a full disclosure of my financial situation.

I am reminded that in addition to the letter of denial by Mr. Torshen, there is also a letter of denial by Mr. Pitts and by Mr. Greenberg, two letters of denial, one by each, the Cochairman of the Commission, who also substantiated what Mr. Torshen says.

[Affidavits by Mr. Pitts, Mr. Greenberg, and Mr. Torshen appear at pages 194, 197, and 198.]

Judge STEVENS. The press release, as I understand it, says I have not made an adequate disclosure of my financial circumstances, specifically, I have not disclosed the assets of my family and that I may have secret interests in some properties held in trust by others. I have no assets other than those which I have disclosed to the committee.

Our disclosure includes everything which I own, everything which my wife owns, and everything which I own as the trustee for the benefit of my two young daughters, with one inadvertent exception. Each of them has a savings account of approximately $500 which we inadvertently overlooked.

The charge in the affidavit also suggests that I have some business connections with Mr. Keane who was identified in questions yesterday.

who is a litigant in a matter with respect to which I disqualified myself. I was called last night by Senator Hruska who asked me if I could tell him what I knew about, I think it was the MC or NC company, something like that. I told him I did not recognize the name, which was true. I had no knowledge of it whatsoever.

Upon inquiry I found that the NC entity, whatever more precisely it is, was represented by my former partner, Edward Rothschild, who also was a nominee for certain members of his family in that business venture. Mr. Rothschild advises me that Mr. Keane had no interest whatsoever in that particular venture. I know I had no interest in it whatsoever, neither did any member of my family, nor to the best of my knowledge, anyone with whom I had any association whatsoever, other than Mr. Rothschild, and as I say, he was associated with the matter in a professional capacity, and also as he advises me, was a nominee for a minority interest which I understand were those of his children. But in any event, I think this is a matter that dates back to 1964, sometime like that. I certainly had no occasion at that time to have a nominee serve for me in any capacity.

It is a particularly sensitive area because the investigation that I ran emphasized certain judicial conduct where nominees did hold interest for judges and I am conscious of the fact that that is a method of concealment that has been used by others in the past. It has never been used by me and it never will be used by me.

Senator MATHIAS. But in any event, you are not, as the press release suggests, the nominee of Mr. Rothschild in any blind trust?

Mr. STEVENS. I am not, nor is he my nominee, and I should also say that, as you have observed, Senator, and I appreciate your comment, it is somewhat embarrassing to have to acknowledge that one's net worth is as small as it is. But I would like to point out that that is my net worth today. It is not my net worth when I went on the bench, and I did not have significant long-term advance notice of the possibility I might go on the bench. I think had I known 3 or 4 years in advance that I would be going on the bench and had time to make the adjustment, perhaps the figure would be different.

And as I say, if questions occur to any members of the committee either now or in the future about this matter, I have no reluctance whatsoever to discuss it with you. I might say also for the record I do not intend to respond to inquiries from the press about this or any similar subject, although I will respond to the Senators at any time, even subsequent to the close of the hearings, if you feel there is any reason to question the thoroughness of our disclosure.

Senator MATHIAS. I appreciate your very candid response. It is my understanding that the Chairman is going to provide some appropriate opportunity for Mr. Martin-Trigona to be heard, but I thought it was appropriate while you were before the committee to have an opportunity to express your own point of view on this subject.

Mr. Chairman, I have no further questions at this time.

Senator KENNEDY. We will recess until 2 o'clock.

[Whereupon, at 12:30 p.m., the committee recessed to reconvene at 2 p.m. the same day.]

Senator TUNNEY. The committee will come to order.

Judge Stevens, I join with my colleagues in welcoming you to the committee and congratulate you on your nomination to the court. Like my other colleagues that I have heard speak before me, I have had an opportunity with the help of staff to peruse your opinions on the court and your record and there is no question but that you have an extraordinarily distinguished career and it is clear that you have great ability.

I would like to ask you a few questions because I take very seriously the duty which is thrust upon the Senate by the Constitution in article 2, which states that appointments to the Supreme Court must be made with the advice and consent of the Senate. And I, as Chairman of the Judiciary Committee's Subcommittee on Constitutional Rights, feel that a few areas ought to be probed, with the recognition, of course, that you do not want to commit yourself on specific issues which may come up before the court. But I am more interested in your general philosophy and how you approach these problems and I feel that it will be useful to me in understanding your attitudes.

Judge, what do you understand the present state of the law to be on avoidance techniques, that is, when there is a possible nonconstitutional ground of ripeness or mootness, etc.?

Mr. STEVENS. As a general proposition, I think the doctrine has been pretty universally adhered to by the Supreme Court that it is our duty to avoid decision on a constitutional ground if there is a sufficient basis for deciding the case without reaching the constituitonal ground. I think you may have in mind the fact that in recent years the court appears to have expanded somewhat the doctrine of mootness and restricted somewhat the doctrine of standing and has perhaps reached fewer constitutional issues than come thought they could appropriately have done on the basis of past history.

So there seems to be a little area of narrowing the field of adjudication by these procedural techniques. I would not want to comment on any specific decision but I do recognize that there is some change that appears to be going on and it is in the way of perhaps reaching even fewer constitutional issues than the Court has in times in the past.

Senator TUNNEY. Is that trend one that you are in sympathy with generally?

Judge STEVENS. I really do not know how to answer that. I don't like to think of it in terms of a trend. I must confess there were some of those decisions, and I would not want to name them, but there were some in which I would have thought the Court would not have found mootness.

Well, I think I might mention one specifically.

I was surprised at the law school reverse discrimination case. I would have thought the court would have reached that issue on the basis of the facts. I think it is kind of hard to generalize on a trend but I think these are rather difficult technical questions sometimes and there is room for argument on both sides.

Senator TUNNEY. Well, in deciding whether standing exists or whether a class action properly lies, should the Supreme Court or a Justice take into account his belief, assuming he holds it, that the courts are too congested, that their dockets are too crowded?

Judge STEVENS. That is one of those factors, Senator, that perhaps unconsciously is always applying some built-in pressure against a judge. We are all concerned, and it is true and I think we have to be frank about it, we are all concerned about the overload problem. It affects us every day of our working lives and it inevitably may exert an unconscious pressure against us.

I think if one can disassociate oneself from that problem, one should, because really the issue should be addressed on the merits apart from those factors that affect our working conditions. So I do not think it is a proper factor, but I do not think we can deny the fact that it may have some input into the decisional process.

Senator TUNNEY. With regard to certiorari policy, how much discretion does the court have in deciding whether or not to take a case presented to it? Do you think it makes any difference whether the case comes to the court as an appeal or a petition of certiorari?

Mr. STEVENS. I think it makes some difference but not very much. That would be my impression because the Court seems to exercise a somewhat different form of discretion in processing appeals as of right. Instead of denying certiorari, it may summarily affirm or dismiss for want of substantial Federal question with maybe a one-line opinion or a citation of a case or something like that.

In a strict interpretation of the law, such action will have precedential effect, whereas the denial of certiorari does not. So there is a legal difference between the two.

My tentative conclusion, just based on watching the way the court works, is that there probably is not a very significant difference between the two. I think it would really be more orderly in the long run if the jurisdiction were entirely discretionary. I think the appeals as of right really do not serve any important interest.

Senator TUNNEY. What factors do you think a justice should take into account in deciding whether or not to cast his vote in favor of certiorari?

Mr. STEVENS. The principal factor would be the importance of the issue presented by the case to the country at large. I would think that is the major factor, and of course there one has to evaluate importance by whatever standards he can.

Senator TUNNEY. What do you consider to be the present state of the political question doctrine and do you see a trend?

Mr. STEVENS. We talked about that very briefly this morning and I pointed out what I am sure you are well aware of, Senator, that the term political question is used in two different senses: one, the jurisdictional sense and the other, the more or less popular sense. I think that really ever since *Baker* v. *Carr* the political question objection to Federal jurisdiction has been narrowed.

I mean the court has taken more cases that would previously have been considered political questions. But it is still very definitely a viable doctrine and there are still areas within our framework of Government where it is quite clear from the Constitution that final decision of the matter was intended to be placed in another branch of Government, other than the judiciary.

A simple example is the declaration of war. Clearly the Court does not declare war and there are matters that are clearly committed to other political departments, and then the judiciary should not, it has no jurisdiction to participate.

Now the second phase of it is that there are controversies that have political overtones and ramifications but nevertheless represent justicable issues and in those areas the court has the responsibility to act just as it does with respect to other litigation.

Senator TUNNEY. Regarding lobbying in the Court, do you think it is appropriate for members of the Court to lobby their brethren as to how they should vote and the position they should take in cases that are pending before the Court?

Mr. STEVENS. Well, I hope the first amendment applies to the Supreme Court as well as to other branches of Government. I would certainly not feel there was any, that a Justice should have any inhibition about stating frankly to a colleague how he analyzes an issue.

It happens to be the practice in our court, as a matter of custom, and I think personal preference of all the judges, that we do not discuss cases in advance of argument. We find that we like to come with free, independent appraisals of the issue and we first have an opportunity to discuss it really with counsel in oral argument and then after in our conference. We think that is a healthy approach.

I really do not know what the tradition is on discussing the merits within the Supreme Court, but I do not see anything inappropriate about discussions by less than the entire membership of the Court on a particular matter.

Senator TUNNEY. Regarding dissenting and concurring opinions, how does a Justice decide when to dissent or concur and what contribution, if any, do you feel that dissents and concurring opinions have made in the development of doctrine in the Court?

Mr. STEVENS. Senator, I spoke very briefly to that subject this morning.

Senator TUNNEY. You do not need to repeat it if you have already addressed it. Have you already covered that this morning?

Mr. STEVENS. Well, let me be sure, because I do not want you to read the record and feel that it is incomplete. It is not that extensive.

My own personal philosophy, which is not shared by all judges, is that if I do not agree with the result of the majority, I dissent, even if it may be a very brief dissent, or if I find something in the reasoning that is unacceptable, I try to write a brief concurrence. I think the litigants are entitled to know how the judges appraised the arguments and to be sure that all of them understood the arguments that were presented.

And I think preserving in the record of the opinion of the case itself the fact that there was a diverse point of view, of points expressed in the Court, may make a record that will help at a future date when the same issue may be again presented for reexamination.

So I think dissenting opinions do perform an appropriate and important function in the entire process.

Senator TUNNEY. Judge, I was not able to be here at the time that Senator Mathias was questioning you about your financial connections, but I did have a member of my staff present, and as I understand it you were asked this morning by Senator Mathias about any financial con-

nections that you might have with Tom Keane and a former partner, Edward Rothschild, in which one of you acted as a nominee for the other and you denied that there was any such a relationship between you and them. Is that correct?

Mr. STEVENS. Let me state it precisely. I have had no business transactions with Tom Keane whatsoever. As I explained a day or two ago, I was retained by his firm in two matters. But these were not as a principal or investor, these were a matter of litigation. I was not a participant in any way, shape, or form in the entity, the name of which I do not recall at the moment, that was formed back in 1964, as I understand it. And I am advised by Mr. Rothschild that neither was Mr. Keane.

Mr. Rothschild handled the legal work for this particular investment group and, as I understand it, on the basis of what he told me this morning, he was also a participant to the extent of a very small percentage as a nominee for his children.

He was not a nominee for me, nor I for him.

Senator TUNNEY. Were there any other types of financial involvement at any time between you and Tom Keane?

Mr. STEVENS. I do not like the word other, Senator, there was none.

Senator TUNNEY. Was there any connection between your family business and Keane?

Mr. STEVENS. I have no family business.

Senator TUNNEY. Or members of your family and Tom Keane?

Mr. STEVENS. No.

Senator TUNNEY. What about your former partner, Rothschild, and Tom Keane, is there any connection there?

Mr. STEVENS. I think not. As I say, the entity about which questions were raised was one for which he performed legal services and I think an assumption was made that Tom Keane was an investor in the entity.

I have no knowledge one way or another, but Mr. Rothschild assures me that Tom Keane had no interest in the venture whatsoever.

Senator TUNNEY. And Mr. Rothschild has told you personally that there was no connection?

Mr. STEVENS. Today, he told me that, that is correct.

Senator TUNNEY. I understand that yesterday you explained why you recused yourself in Tom Keane's case. I believe that it appears in the transcript at page 75 (printed hearing page —).

Yet, I am informed that you sat in several redistricting cases involving plans drawn by Tom Keane during his tenure with the city council.

Is that report which was made to me accurate or inaccurate?

Mr. STEVENS. I sat in the case entitled *Cousins* v. *Wigoda* which did involve a redistricting plan of the city of Chicago, with respect to which Tom Keane is one of the leading members of the council, he was a witness, and was an important participant in the enactment of the ordinance that gave rise to the litigation.

I do not recall whether he was a party to the case or not. And frankly, the thought of disqualifying myself on that case never—had never occurred to me on the basis of the quite remote connection I had had with Mr. Keane.

I looked at it much more closely in the case in which he was a defendant in a criminal proceeding and as I think I also mentioned in my answer yesterday, it was more in the category of the notorious criminal trial in which there really is a compelling interest of avoiding even the slightest suggestion of any appearance of impropriety, and I simply did not think of the problem when the *Cousins* case was before the court.

Senator TUNNEY. Mr. Chairman, Senator Mansfield has sent word that he wants me to be on the floor to offer my amendment at 2:30. It will take me only about 10 minutes and I will be back.

Would it be all right if I now reserve the balance of my time and come back in about 15 minutes?

Chairman EASTLAND. Certainly.

Senator TUNNEY. Thank you very much, judge. I will have a few more questions on substantive issues.

Chairman EASTLAND. How much more time do you need?

Senator TUNNEY. I would think about 20 to 25 minutes. I have some questions on substantive issues which I would like to ask. The judge is very succinct in what he says and I think, therefore, it would not take any more than about 25 minutes.

Chairman EASTLAND. That is not a filibuster, is it? [Laughter.]

Senator TUNNEY. Well, I hope that my questions are succinct too.

Senator SCOTT of Pennsylvania. Judge, I think the whole aspect of the hearings and your background and your experience indicates your qualifications for this post.

I have only one question: In the event that any constitutional amendment were enacted, would your opinions, your prior opinions regarding the substance of that amendment have any impact on your judicial handling of the interpretation of that amendment, should it come before you?

Mr. STEVENS. I should think not, Senator. It is difficult to conceive of a situation in which a prior opinion construing something other than the amendment before us would be relevant on the construction of an amendment which was not even part of a law in the earlier case.

I suppose sometimes the thinking you do about an issue carries over when you have to analyze a similar issue, but certainly you must approach it with a fresh mind and I am sure I would do so.

Senator SCOTT of Pennsylvania. Well, I think your presentation of your views has been impressive and I will not use up any more of the committee's time.

Thank you.

Judge STEVENS. Thank you, Senator.

Chairman EASTLAND. We will recess now to the call of the Chair.

[A short recess was taken.]

Senator TUNNEY. The committee will come to order.

Judge, before I left the room to go to the floor of the Senate, I indicated I intended to ask you some substantive questions and I would just like to touch on a few areas.

Capital punishment. I know that Senator Kennedy questioned you about this earlier, but what do you understand *Furman* v. *Georgia* to have held? What questions do you think the decision left unresolved for the Court?

Judge STEVENS. Senator, I read *Furman* v. *Georgia*, which I recall is a case in which each of the nine Justices wrote a separate opinion, in the summer after the decision was announced, and the opinions are, I think, more than a hundred pages in length if my memory serves me right. I have not read the case since the summer after it was announced.

I know that a consensus of the five Justices that comprised the majority was that the capital punishment in the particular cases before the Court should not be carried out. Now I think it would be most unwise for me to try to extrapolate from these separate opinions on the basis of a 5-year-old recollection, on what I think the precise holding of the case is.

I think it would be given attention and importance which would be highly unwarranted.

Senator TUNNEY. I understand.

Assuming that the question is one of cruel and unusual punishment, how does one go about deciding whether punishment is cruel or unusual? Have you thought in those terms? That is, what is the relevance of history or of the framers' thinking or of contemporary moral sentiment or public opinion or political philosophy that is current at the time?

Judge STEVENS. Senator, as I recall the interpretation of the eighth amendment, there are basically two kinds of arguments that are made in support of a claim that punishment is cruel and unusual.

One is that the particular punishment is so disproportionate to the particular offense, such as a death sentence for possession of marihuana, that it might seem to be disproportionate and one might apply such an argument.

On the other hand, another kind of argument is that in absolute terms, certain kinds of punishment, such as, I think whipping is an example that is given, are considered so barbaric by present-day standards that they would be considered cruel and unusual within the meaning of the amendment.

And I think there is certainly some truth to the notion that one has to consider both the social conditions at the time the amendment was adopted or the intent of the framers and the background in which a particular punishment is being given out today. That is about as much as I can say.

Senator TUNNEY. What about the first amendment? I know you addressed this in one of the questions, and we hear many catch-word phrases regarding our first amendment coverage: clear and present danger, preferred status under the first amendment, absolutes, and so forth.

Just how does the Court go about deciding a first amendment case today? Does it balance, in your view, or should it balance?

Judge STEVENS. Yes. I think even in the first amendment area, there is some balancing that must be done because cases are not, do not arise in neat pigeonholes. There is a question as to whether what is regulated is merely the time and place of speaking as opposed to the content of speaking. And there is quite a different approach depending upon what kind of issue is raised.

You have to look both at the interest of the speaker and the public interest in having the communication become a part of the public

domain. There are various factors and I think you will find in my opinions some recognition of both sides of the public interest in communication. I think you might find that in some of the cases involving the rights of prisoners for example.

Senator TUNNEY. Do you care to indicate what you think are some of the most important factors in balancing a decision in a first amendment case?

Judge STEVENS. Yes; I would say that a most important factor, I would not want to limit myself to this as a formula for deciding all first amendment cases, but a significantly important factor—and I guess that is pretty redundant—is the question of whether there really is communication involved and whether it is communication as opposed to conduct or overt conduct.

We find on a scale which sometimes involves gray areas, between communication and conduct, where it falls. If it is within the area of communication, then perhaps you get to the question of whether there is any element of appropriate regulations in the area of time, place or manner of speaking, because, of course, the Court many times has said that this is a permissible area of control. Certainly I imagine you might resent it if someone strode into this room and started making a speech about baseball or something of that nature. So there are restrictions that must apply.

But the paramount consideration is, I think, that the judge's evaluation of the right to speak and the right to communicate should be divorced entirely from his own appraisal of the substance of what is said. It is not for him to either sympathize or be unsympathetic to the message which is transmitted. But rather he should be concerned with the channels of communication so that, be it one which he detests or supports, it is able to find itself in the free marketplace of ideas.

Senator TUNNEY. If a trial judge, let us say in a State court, has entered an order restricting what the press may publish about a pending case, what factors enter into the Supreme Court's review of such an order? What interests do you think are at stake, and how does one go about resolving them—without asking you to resolve them today?

Judge STEVENS. Well, again, of course, I have to avoid any comment about the particular case that has been in the press lately. But very simply, the two rights at stake are, on the one hand, the interests of society in knowing what is happening in a public trial and, on the other hand, the interest in procedural fairness to both litigants, the State which is bringing the proceeding and the defendant which must receive a fair trial. So there is a very difficult clash of interests in these cases but those are the easily identified conflicting interests in this area.

Senator TUNNEY. Do you see any trends in the Supreme Court's first amendment decisions?

Judge STEVENS. Yes. I might say something for the record here because I have received some support on a basis that is not entirely warranted. It has been said that I have never been reversed.

I was reversed in a case called *Gertz* v. *Welch* which involved the extent of protection to the press afforded by the so-called New York Times rule, and on the basis of the decisions up to that point, we concluded that a claim of libel was foreclosed by the first amendment protection. The Supreme Court reversed this, and I think changed the law rather substantially in a direction of narrowing the first

amendment protection from libel and slander liability that prevailed heretofore.

I do not know if one case makes a trend, but it was a recent case that goes in the direction I have described.

Senator TUNNEY. What about the obscenity cases, for example, *Miller* v. *California*, in which, apparently, judging from the standards in that case, they generally made prosecution easier. Is that your impression of *Miller* v. *California?*

Judge STEVENS. Yes; I would say that that decision seems to have led to additional prosecutions and therefore those with prosecutorial responsibility have apparently concluded that the decision does make it easier. I think, again, I have not had an obscenity case since those were decided. So, again, what I say is based simply on reading the options when they came out. But unquestionably, they represent some change in the law and some lessening of first amendment protection in the obscenity area.

Of course, there are pros and cons involving the desirability of extending that protection in that particular area.

Sentator TUNNEY. What about the doctrine of substantial overbreadth which makes attacks on the face of a statute more difficult?

Judge STEVENS. That doctrine is sometimes misunderstood as having application to all kinds of broad statutes. I think, properly interpreted, the doctrine applies only to statutes which are overly board in their interference with the right to communicate, in other words, in the First Amendment area. I think that sometimes the doctrine is misapplied in the areas other than the First Amendment area.

And of course, the underlying rationale of the doctrine is that the great interest in fostering free speech and not having statutory deterrents to speech justifies departure from the traditional rule that decisions will only be made adjudicating the rights and interests of the particular litigant before the court.

And in the over-breadth area, because of the high value placed on the First Amendment, the Court has, on occasion, held invalid statutes which are over-broad in the sense that they chill the exercise of free speech. I think the Court has been rather consistent in this area although there is some confusion in the opinions between that doctrine and the doctrine of vagueness, as applied in the Fourteenth Amendment area. I think it is really a separate problem.

Senator TUNNEY. I understand that yesterday, I was not here, in answer to a question from Senator Kennedy, you said that the tension between fair trial and free press might be handled by, quote, "control of release of information" close quote. Is that correct?

Judge STEVENS. Let me try to state it again.

The Senator was asking me, if I recall correctly, about the desirability of legislation limiting the right of the press to comment on trials, and I suggested that, to take the problem by separate parts, perhaps we should first address the problem of the appropriate extent of control which might be imposed by court rule, or by professional disciplinary rules, on the kind of comment that either the prosecutor or the defendant's attorney migh make about the subject matter of the trial and try to let the facts find their way into the record in an admissable way and an orderly way. And then the press would have its first opportunity to comment after the record was made.

I think that the particular undesirable thing that happens is that, on the basis of partial information and hearsay and secondhand suggestions, the press, in effect, makes statements, not intending to do so, which seriously hamper the ability of the defendant to receive a fair trial because the public gets an impression of what the facts are before all the evidence is heard. And that is what we are trying to avoid.

I said that I thought that if it is approached that way, it perhaps is a matter which the courts and we drafters of court rules and disciplinary rules should address in the first instance. And then maybe there would be something left that Congress needs to address. But I sort of think this is one that we have to tackle first.

Senator TUNNEY. Were you thinking of sealing criminal records or shutting off preliminary hearings to the public when you were talking about the control of release of information?

Judge STEVENS. No. The sort of thing I was thinking about would be a representative of the enforcement agency making a press release to the effect that we have obtained a confession and we are sure the man is guilty, or a premature announcement of a confession before the voluntariness of the confession has been determined in the adversary proceeding, comments on the evidence when it is not sure the evidence is admissible or reliable, and things of that character.

I did not have in mind the possibility of impoundment of public records. There are some times in the juvenile area where that may be appropriate. There may be areas where the damage by public comment on a young man is unfortunate, and that weighs the interest of a public debate.

I would not want to go beyond that, but I would not want to foreclose entirely the possibility of some area where we might want to put some limit on what we put in the public domain.

Senator TUNNEY. At the present time, I am sponsoring legislation to require the up-dating of criminal arrest information and, among other things, to deal arrest records of individuals who have not committed an offense for 7 years after their last supervision. Under my bill, law enforcement agencies could continue to have access to the information, but others could not, on the theory that the statistics demonstrate that a person who has gone for 7 years without committing a crime is highly unlikely to commit a second crime. And there generally is a sense, on the part of some, that a person is entitled to a second chance.

I wonder if you have had a chance to think about this problem. The press had contact with my office and they are deeply concerned that somehow they are being denied an opportunity to get what they think is important information as it relates to individuals.

Do you have any impressions with respect to the general problem?

Judge STEVENS. Senator, of course I should not try to address the merits of a bill I have not studied, but I think I could say this, that I have had occasion to write at least one opinion in what was a rather severe attempt by the prosecutor to make use of information in an arrest, or maybe he was trying to use a misdemeanor, for impeachment purposes which we thought was clearly improper, and I have also written an opinion on the subject to the extent to which a prior conviction is properly used for impeachment purposes when the defendent elects to testify in his own behalf, and we have expressed concern about the use of convictions.

Now this is, of course, even more severe than arrests which are, I believe more than 10 years old is the time suggested in the Federal rules, basically on the theory that, I suppose, underlies your legislation, that once a man has paid his debt to society, if he has a blameless record thereafter, he is entitled like everyone else to the presumption of innocence.

So I think you could find something that is somewhat sympathetic to the thrust of what you are suggesting.

Senator TUNNEY. It is a difficult problem.

Judge STEVENS. Yes. And I have to say that, of course, in those opinions, there is no countervailing first amendment problem that I recognize you are sympathetic to too.

Senator TUNNEY. Well, if a person has a national security job, there is the argument that can be forcefully made that his entire life history ought to be known, and that if a person holds himself out for public office his entire record should be scrutinized by the voters.

Judge STEVENS. I am familiar with that problem.

[Laughter.]

Senator TUNNEY. Yes, I am too. I will be more familiar with it next year.

[Laughter.]

Senator TUNNEY. Judge Stevens, with regard to the fourth amendment, search and seizure warrants, and so forth, what trends do you see in the Supreme Court's fourth amendment decisions of recent years? Let us start off with consent.

Judge STEVENS. I take it you are asking whether there should be something akin to the *Miranda* warnings as a precondition to a consent to a search, or something of that kind?

Senator TUNNEY. I am not asking for your value judgment as to what ought to be and what ought not to be as much as I am asking what you think the trend is in the Court at the moment.

Judge STEVENS. Well, sometimes it is hard to evaluate with precision because sometimes things are taken as a trend which are merely the arresting of a prior trend. In other words, a refusal to extend the law even further than it has been extended in the past is sometimes interpreted as a reversal and that really is not necessarily the case.

For example, the admissibility in a grand jury proceeding of illegally seized evidence, it had simply not been passed upon before the *Calandra* case, I think was the name of it, and when the Court addressed that, it expressed concern with the importance of a broad investigory power for the grand jury and said that that interest was sufficient to overbalance the fourth amendment interests.

I do not know whether I would say that represents a trend or really a refusal to extend the law further.

Similarly, in the right to counsel area, the Court—this is not really responsive so I should not go into that.

Senator TUNNEY. Leaving that aside for the moment, have you had any decisions on the consent issue? Have you personally written opinions on consent?

Judge STEVENS. The closest one that I can recall was a case involving the execution of a search warrant which pursuant to a statute authorized entry into a domicile if entry had been refused. The officers knocked on the door, and a few seconds later, busted it down, and entered a home and conducted a search.

We found that the waiting of an interval of 2 or 3 seconds did not constitute consent. I think that is perhaps about as close as I have written on the precise point.

Senator TUNNEY. How about the exclusionary rule which makes unconstitutional the product of illegal search and seizures? Some say this has come under increasing attack in the Court. Do you have any views with respect to this rule?

Judge STEVENS. Well, yes, I think it has come under attack and I think the attacks are increasing. I think it is true that the public sometimes has difficulty understanding why evidence which tends to establish guilt in a fairly convincing way must be excluded from a trial, it is somewhat inconsistent with the truth determining function of the trial, but of course the countervailing value at stake is the great interest in the privacy of the citizen and the concern that, unless the exclusionary rule is enforced, there may not be an adequate deterrent to police conduct which none of us would approve. So again there is tension here. I am not sure I should go beyond that. I have never had to address the question of whether there should be an exclusionary rule and this perhaps is an example of a difference between the job of a court of appeals judge and a Supreme Court Justice. It is part of the framework of the law which I accept, as the data with which I work, that we have such a rule in the law now. It is part of what I work with every day.

Now if an appropriate case requires that it be rethought, I suppose I would have the duty to think of it in terms that I have not yet been called upon to do.

Senator TUNNEY. If Congress were to enact a statute giving damages to those who had been the subject of unlawful searches and seizures, do you think this might be a factor in the course of deciding whether or not to retain or abolish the exclusionary rule?

Judge STEVENS. Well, I think, Senator, there is already such a statute, at least with respect to such searches by State agents, in section 1983 of the Civil Rights Act, the Ku Klux Klan Act, authorizing the damage remedy. I think part of the concern is not really the absence of some remedy, but concern as to whether or not the remedy is effective, because of the natural tendency of the jury to understand the sincere motivation of an officer's conduct in trying to get evidence to establish guilt and the disinclination to award damages to one who may be, appear to be, guilty of a crime. So there is a question of whether even though the remedy exists it is effective in accomplishing the purpose for which it is intended. I am more or less parroting the arguments that have been made and I have heard, but I want to avoid trying to state anything in the nature of a final conclusion.

Senator TUNNEY. What trends do you see in the Supreme Court right-to-counsel cases of recent years? You started to go into it.

Judge STEVENS. Well, of course, the major case is *Angler*, I think is the name, which extended the right to counsel in misdemeanor cases, which was a profoundly important case in making sure that in any case which might involve incarceration of the defendant that he or she would be represented by counsel. There has not been the same extension, as I recall, to the provision of counsel in the discretionary appellate review. I frankly am not sure as I sit here whether the Court has held that there should not be counsel or it is just under consideration.

Senator TUNNEY. I think that in *Moss* v. *Moffett* which distinguished *Douglas* v. *California*, the court has refused to extend that.

Judge STEVENS. So those two cases can be cited with the trend going in both directions at once. The right to counsel has been extended to misdemeanor cases but not extended to discretionary review.

Senator TUNNEY. Do you have anything that you would care to express on the general subject of right to counsel that might help the committee in any future action?

Judge STEVENS. Yes; I don't hesitate in saying that I think one of the most important aspects of procedural fairness is availability of counsel to the litigant on either side. I could not overemphasize the importance of the lawyer's role in the adversary process and it is unquestionably a matter of major importance in all litigation.

Senator TUNNEY. Judge, I want to thank you very much for the answers that you have given to my questions. I appreciate the fact that your answers were not only direct but also I felt extremely erudite. They demonstrate to me that you are a man of great fairness and great understanding as well as great intellectual capacity. I am very pleased that we have had the opportunity to talk about some of these problems and to have laid out a bit of a record as to what your thinking is on some of these key issues that are going to be coming before the court.

Again I want to congratulate you on your nomination.

Judge STEVENS. Thank you, Senator Tunney.

Chairman EASTLAND. Judge, you are excused.

Judge STEVENS. Thank you, Mr. Chairman.

Chairman EASTLAND. The National Organization for Women. Who represents them? Would you identify yourself for the record, please?

## TESTIMONY OF MARGARET DRACHSLER, NATIONAL ORGANIZATION FOR WOMEN (NOW)

Ms. DRACHSLER. My name is Margaret Drachsler. I am here representing the National Organization for Women.

Chairman EASTLAND. You may proceed.

Ms. DRACHSLER. Thank you.

The National Organization for Women (NOW) is an organization of 60,000 women, with over 700 chapters throughout the country.

I am here this afternoon to express my grave concern regarding both the nomination of John Paul Stevens to the Supreme Court and the manner in which it was accomplished. First of all, this appointment was made by a President who has not been elected to the Presidency and who was never elected to any office by a constituency larger than a congressional district.

In contrast, each member of this committee has a statewide constituency.

At the outset, NOW wishes to express the feelings of millions of women and men today, it is time to have a woman on the Supreme Court. After 200 years of living under laws written, interpreted, and enforced exclusively by men, we have a right to be judged by a court which is representative of all people, more than half of whom are women. The President owes us a duty to begin to eliminate the 200 years of discrimination against women. In our judicial system this