In my judgment, Mr. Rehnquist has a respect, a reverence, for the law in our constitutional history which will cause him to bend over backward to prevent an intrusion of his political beliefs into his judicial decisions.

He meets the three exacting tests that I would impose on a nominee to the High Court. His legal intellect and integrity are of the highest excellence. He has demonstrated the kind of judgment and tempered advocacy which indicates a good judicial temperament. Finally, I believe him openminded in his search for solutions to the constitutional and legal interpretations which this Nation will face in the years ahead.

It seems imperative to me that, as a Nation, we once again achieve a common respect for the law and respect for the Supreme Court as the ultimate decisionmaker in our system of justice, and that respect requires the recognition of politically liberal and politically conservative justices that they properly contribute to the national welfare so long as they respect the Constitution and interpretations as being more important than their individual political viewpoints. I am confident Mr. Rehnquist will honor that separation.

That concludes my statement. Thank you.

The CHAIRMAN. Thank you.

I understand we recessed until 2:15. I did not know, so we will wait until 2:15.

Thank you, sir.

The Chair would like to make this statement. There has been a question of an investigation by the FBI in Arizona on voting practices. Now, there was such an investigation by the FBI. I have seen it. It in no way involved Mr. Rehnquist. At no place in the file does his name or anything that would suggest that he had anything to do with it appear.

Mr. Orfield?

TESTIMONY OF GARY ORFIELD, ASSISTANT PROFESSOR OF POLITICS AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY

The CHAIRMAN. Mr. Orfield, now, you have got a prepared statement?

Mr. ORFIELD. Yes, I do, Senator. I provided it to your office yesterday.

The CHAIRMAN. Let us put this in the record, and you take about 10 minutes.

Mr. ORFIELD. All right.

The CHAIRMAN. We will admit it into the record.

(The prepared statement referred to follows:)

STATEMENT BY GARY ORFIELD

The Senate faces a unique historical responsibility in deciding on the nomination of William Rehnquist to the Supreme Court. No earlier President facing an opposition Congress has had so many appointments in such a short period of time. Never before has the Senate had so clear a responsibility to protect the Court *from* a sudden and drastic imposition of a minority philosophy. While all of the President's appointments have been aimed at strengthening the conservative position on the Court, Mr. Rehnquist is the youngest and most rigidly doctrinaire nominee so far. He is a judicial activist of the right who narrows and expands his interpretations of the Constitution like an accordian to suit his political objectives. His nomination, like those of Judge Haynsworth and Judge Carswell, is further tainted by a record of serious insensitivity to the principle

of equal opportunity. I urge the members of the moderate majority in the Senate to exercise their Constitutional responsibility and reject this nomination.

Only six Presidents have had the opportunity Mr. Nixon has had to name four Justices in three years. In each of the earlier cases, the President's party controlled Congress and there was a clear majority in the nation. Washington, Jackson, Lincoln, and Franklin Roosevelt used their extraordinary opportunities wisely, naming Justices who made lasting contributions to our Constitutional tradition. The other two Presidents, Taft and Harding loaded the Court with rigid reactionaries, Justices who were largely responsible for the great constitutional crisis of the mid-30s. Today, in my judgment, President Nixon is using his power in the tradition of Taft and Harding. President Nixon, however, lacks their Congressional majorities. He is the first President to be elected without carrying either house of Congress since 1848. The President lacks a popular mandate and he faces a moderate Senate majority whose mandate was renewed in last year's elections. The Senate must now decide whether to permit Mr. Nixon to continue his efforts to construct a rigid conservative majority on the Court, a majority representing only the right wing of his own party. The Senate has both the Constitutional right and the political support to reject nominees hostile to the broad consensus of American values. Mr. Rehnquist is such a nominee.

My testimony today has two basic purposes. First, I will describe the Constitutional rights of the Senate in the appointment of Justices, reviewing the historic exercise of these rights. Second, I will analyze Mr. Rehnquist's social views and political philosophy and describe how they have shaped his legal judgments. My testimony will show that the Senate has frequently made political judgments in rejecting nominees and that it has every right to do so. Examination of Mr. Rehnquist's record will show that Senators concerned about the ability of our political system to make real the promise of equal protection of the laws and to keep alive the protections of the Bill of Rights must vote the Rehnquist nomination down.

THE SENATE'S POWER

During the period from 1930 till 1968 the Senate confirmed every Supreme Court nomination submitted by a President. It seemed that Senators had almost forgotten their traditional role in the selection process. In actuality, Presidents had been careful to anticipate Senate reaction and the period had seen no highly controversial nominations presented to a hostile Senate. This period ended with the Fortas filibuster in 1968. In the last four years, Presidents have nominated eight men—Fortas (for Chief Justice), Thornberry, Burger, Haynsworth, Carswell, Blackmun, Powell, and Rehnquist—but only two have so far been seated. Three other candidates President Nixon was prepared to name—Poff, Lillie, and Friday—were eliminated even before their nominations were announced. The power of the Senate has become unambiguously clear.

The Senate's authority rests on the most solid of Constitutional grounds. At the Constitutional Convention the issue was intensively discussed and there was wide support for giving exclusive authority over Court appointments to the Senate. The final compromise was intended to make the Senate a co-equal power in the appointment process. The Senate, Alexander Hamilton suggested in the *Federalist Papers* would provide a "check on the spirit of favoritism of the President . . ."

From the first, many of the confirmation fights have turned on questions of political beliefs. Senators, recognizing the essential difference between executive branch appointments and lifetime appointments to the country's highest tribunal, have rejected a higher proportion of appointees for the Court than for any other office.

Washington and Madison lost appointments on political grounds and Tyler was defeated four times after he broke with his party. Jackson faced bitter fights and Congress cut the size of the Court to deny Andrew Johnson appointments. In the years after the Civil War nominees' record on racial issues was a major consideration in several battles. In this century, civil rights issues have played a major role in each of the three defeats. In two of these cases, labor issues were also significant.

In contrast to the civics book view of the Court as a solemn impersonal assemblage, most Presidents have understood and acted on the fact a man's past experience and his settled beliefs will almost inevitably affect the way in which he views the great and unprecedented issues the Supreme Court must continually decide. In the past several years a large number of Senators have recognized

beliefs. In each case, however, the question was partially obscured by other arguments—the ethics question and the incompetency issue. In Mr. Rehnquist's case their responsibility to evaluate the fundamental beliefs of the nominees, men who will determine the meaning of the broad general phrases of the Constitution in a variety of future circumstances no one can foresee. During the Haynsworth and Carswell controversies this responsibility was crucial and the floor debates reveal that many Senators were very strongly influenced by the nominees' social the Senate must face its responsibility directly.

Judges, Presidents, and historians of the Court have time after time recognized the fact that a judge's settled values, even if they are unconscious, influence his decisions. In fact, Mr. Rehnquist has gone further in his only article on the Court. He has argued that even the unconscious biases of law clerks influence the Court's work and conceded that he himself "was not guiltless on this score." In a 1969 letter to the *Harvard Law Record*, Mr. Rehnquist applied this doctrine to the Court itself, arguing that if "a different interpretation of the phrases 'due process of law' or 'equal protection of the laws,' was desired, then men sympathetic to such desires must sit upon the high court."

Perhaps the best description of the way in which judges' values shape the law comes from the pen of Mr. Justice Holmes. He described the beliefs of judges as "the secret root from which the law draws all the juice of life." Most important cases, he said, pose questions of public policy. In answering these questions, judges draw on "the unconscious result of instinctive preferences and inarticulate convictions."

Another of our greatest jurists, Mr. Justice Frankfurther, believed that the very nature of the Supreme Court's work made it appropriate for the Senate to examine a nominee's philosophy:

> The meaning of "due process" and the content of terms like "liberty" are not revealed by the Constitution. It is the Justices who make the meaning. They read into the neutral language of the Constitution their own economic and social views. Let us face the fact that five Justices of the Supreme Court are molders of policy, rather than impersonal vehicles of revealed truth.

The Supreme Court's work is dominated by cases which cannot be solved by reference either to unambiguous words in the Constitution or to established precedents. Such cases can be handled in the lower courts. The Supreme Court must provide the final answers for large new questions, which often have produced deep divisions among the lower courts and among legal scholars. A Justice is continually confronted with broad choices among contending legal theories. Inevitably his experience and his settled values influence the choices he makes. Charles Warren, the greatest historian of the Court, makes a very similar observation. Justices, he says, "are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and environment and by the impact of history, past and present . . ."

Presidents have understood these facts and acted upon them. In the midst of the Lincoln-Douglas debates, after the country had been deeply polarized by the Court's *Dred Scott* decision on slavery, Abraham Lincoln quoted Thomas Jefferson on the danger of a Court out of touch with national values. "Our judges are as honest as other men, and not more so," said Jefferson. "Their power," he wrote, "is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control."

President Theodore Roosevelt, in a message to Congress, recognized the great political power possessed by American judges:

> Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. . . . for the peaceful progress of our people during the twentieth century we shall owe most to those Judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.

His successor, President Taft, saw the appointment of extremely conservative judges as perhaps the central accomplishment of his Presidency. Defying the progressives in his own party, he set out to appoint a Court majority which would preserve the status quo in spite of a change in the nation's political values. Later, during the 1920 campaign, he wrote an article arguing that the strongest reason for Harding's election was the need to maintain conservative control of the Court. "There is no greater domestic issue in this election," he said, "than the maintenance of the Supreme Court as the bulwark to enforce the guarantee

that no man shall be deprived of his property without due process of law." After Harding's election Taft became Chief Justice and Harding followed his advice in making his other appointments. The result of this process was the creation of a Court so rigidly conservative that it incapacitated the government when the President and the Congress sought solutions to the new problems of the Great Depression.

President Nixon has been attempting to redirect the Court and he has succeeded in greatly strengthening the Court's right wing. During his first year of service Chief Justice Burger was the most conservative member of the Court. A study of the decisions from October term of 1970–71 year showed that Justice Blackmun and Justice Burger voted together in 98 out of 102 cases and occupied the extreme right of the Court's political spectrum. Nixon's appointees make those of the last GOP President seem almost liberal. A President who campaigned as a moderate is giving the nation a Court representing only the right. With confirmation of the Rehnquist and Powell nominations, this new group of Justices would approach control of the Court.

For several reasons, the Rehnquist nomination is an extremely important challenge to the prerogatives of the Senate. If these nominations are confirmed, the available evidence suggests that Rehnquist will be the most doctrinaire of the President's appointments. He will also be the youngest. Finally, he would be the only one confirmed with a clear record of hostility to laws protecting the rights of black Americans. If Rehnquist serves to the average retirement age of twentieth century justices, he will be on the Court until 1994. History shows that he has a reasonable chance of serving into the next century. Long after this Administration is gone, after the next President has written his memoirs, and the Administration succeeding him is gone, Mr. Rehnquist would probably be casting one of the nine votes which will determine the meaning of the Constitution and the ability of our governmental structure to adapt to tumultuous changes. Senators must ask themselves whether Mr. Rehnquist is the kind of man who can be securely entrusted with vast power not only in this generation but in the society which will serve our children and grandchildren.

REHNQUIST'S RECORD

In announcing his choice of Mr. Rehnquist, President Nixon described him as a conservative "only in a judicial, not in a political sense." The nominee's record, however, shows that the President was wrong on both scores. Mr. Rehnquist has extremely conservative political views, but he is anything but a "strict constructionist", particularly when it comes to interpreting the Bill of Rights. His legal writings show little respect, for example, for the kind of strict literal interpretation of the Bill of Rights that characterized Mr. Justice Black's jurisprudence. He seems disposed to view narrowly the responsibility of both courts and legislators in protecting minority rights. In fact there is damaging evidence of his hostility to the rights of black Americans. While Mr. Rehnquist's writings suggest that he would narrowly interpret some sections of the Bill of Rights and the Fourteenth Amendment, he has often read the Constitutional grants of power to the executive branch very broadly indeed. He is loath, for example, to put any limits on the government's power to spy on its own citizens. As you follow his reasoning from issue to issue, he expands and contracts the Constitution like an accordion to accommodate his extremely conservative political views.

During the past two years, members of this Committee and the Senate as a whole have shown deep concern in examining the record of nominees on racial issues. In a period in which segregation in our cities is spreading rapidly, in which there is growing racial polarization, and in which the President refuses to enforce civil rights laws, Senators concerned with maintaining the possibility of a peaceful bi-racial society in the United States are well aware of the explosive symbolic consequences of putting a segregationist on our highest court. This concern was repeatedly reflected in the Haynsworth and Carswell debates. Now Senators must face up to the fact that Mr. Rehnquist has perhaps the most inexplicable and dismal record of any of Mr. Nixon's nominees on this central question.

Mr. Rehnquist, living in a state with 3 percent black population and holding no office which put him under public pressure, actively fought a modest public accommodations ordinance in Phoenix. Only seven years ago, just as the Senate was completing action on the 1964 Civil Rights Act, Mr. Rehnquist was one of a handful of Phoenix citizens who saw the local ordinance as a severe threat to

white mens' freedom. At a time when almost three-quarters of the Senate voted to prohibit public accommodations segregation across the country, Mr. Rehnquist was a lonely Western voice echoing the arguments of the Deep South. A decade after the *Brown* decision, Mr. Rehnquist was still outside the broad national consensus on this issue, a consensus which included more than three-fourths of the American public. He served as a local spokesman for a small minority on the right.

The Phoenix ordinance was designed to protect the rights of the sixth of the local population which was Mexican-American, the twentieth which was black, and the local Indian groups. Local Phoenix leaders had sponsored voluntary desegregation in 1960 and most restaurants had integrated without any problems. After one owner insisted on segregation in 1963, the city council decided to pass a local ordinance.

This idea so worried Mr. Rehnquist that he not only wrote a long letter to the local paper but also appeared before the city council to argue his case. He saw the idea as a "drastic restriction" on private property rights. While conceding that few wished to segregate, he said that their right to continue actions which "displease the majority" was more important than protecting people from blatant inequality and personal humiliation. He described the law as an "indignity on the proprietor" which sacrificed part of "our historic individual freedom." He was deeply offended by the idea that anyone could be forced to serve a family from an unpopular racial or ethnic group. There is nothing to indicate sensitivity to the rights of victims of discrimination.

Contrary to some reports that Mr. Rehnquist was merely a local Goldwater sympathist, the same ordinance which he deplored was actively and proudly supported by Senator Goldwater. While Mr. Goldwater opposed *Federal* legislation on the issue he endorsed the *local* Phoenix law. In his 1964 campaign book, *Where I Stand*, the Arizona Senator said that "just this year, I spoke out in favor of an improved public accommodations ordinance." Senator Goldwater was far behind the national majority on civil rights, but Mr. Rehnquist made Goldwater look like a civil rights activist.

Later, just four years ago, Mr. Rehnquist again injected himself into a local civil rights controversy when he attacked a voluntary local desegregation effort suggested by the Phoenix school superintendent. In 1967, after intensive discussion in the local press, the Phoenix school official suggested some relatively minor changes intended to reduce the high level of local segregation. Rehnquist attacked his proposals and argued that there was nothing wrong with the existing segregated schools.

The Phoneix school system had been officially segregated by state law until shortly before the Supreme Court's 1954 school decision. Segregated and terribly unequal schooling was commonplace in Arizona both for blacks and chicanos and conditions were particularly severe in Phoenix. Arizonans with Spanish-surnames typically completed only 7 years of school and in Phoenix they received an average of only six years of education. The smaller groups of black and Indian students in the system typically received 30 percent less formal education than the white students. The average white student in the city finished high school and began college. Achievement levels in the segregated schools were far below those in the white schools. The schools were failing miserably in holding and training the minority students.

Segregation of minority groups was a serious problem. Phoenix had a whole set of schools built and operated as ghetto schools. Even their names—Dunbar, Bethune, and Booker T. Washington—were the classic ghetto school names. The city had a long-established pattern of segregating its black faculty members largely in black schools. In a lengthy and carefully researched series of articles in 1967, the *Arizona Republic* exposed the extent of segregation, discussed the educational damage produced by separate education, and outlined possible remedies.

Phoenix school officials proposed no frontal attack on segregation, but called for freedom of choice desegregation with students paying their own bus fares to attend other high schools. The local superintendent also called for more exchanges between the various schools. Similar plans had failed to produce significant change in any city and had long since been rejected as meaningless tokenism in the South by Federal judges and HEW officials.

These modest proposals stirred Mr. Rehnquist's wrath. In a letter to the newspaper he claimed that the existing system had "served us well for countless years." Desegregation proponents, he said, "concern themselves not with the great majority, for whom it has worked very well. They assert a claim for special privileges for this minority, the members of which in many cases may

not even want the privileges which the social theorists urge be extended to them." In fact, local figures showed that the schools had served "us" well only from the perspective of an observer who thought "us whites" could be identified with the whole community. The school desegregation movement, in Phoenix as in other communities, was not intended to give special privileges to chicano and black students but only the basic right to an equal education. Phoenix was under a special obligation to provide this right, since it had long operated officially segregated schools and since local public housing segregation was the decisive factor in the segregation of several elementary schools. Finally, like many Southern segregationists, Mr. Rehnquist suggested that blacks really liked segregation, a proposition resoundingly rejected in every recent poll of black opinion.

The most important thing about Mr. Rehnquist's position on the school issue is what his letter reveals about his general attitude toward racial justice shortly before he assumed his present office. Thirteen years after the Supreme Court's historic conclusion that separating children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," Mr. Rehnquist still had no consciousness of the terrible results of segregation. He saw the whole issue as one of protecting the "freedom" of whites to attend all-white schools and preserve the status quo. He wrote:

> . . . We are not more dedicated to an 'integrated' society than we are to a 'segregated society; . . . we are instead dedicated to a free society in which each man is equal before the law . . .

Mr. Rehnquist seemed dedicated to a society in which whites were free from any legal obligation to desegregate and blacks were free to enjoy the fruits of segregation.

Mr. Rehnquist's defenders may respond that his testimony before this committee the other day shows he had a change of heart on the racial issue. Two responses are necessary. First, Supreme Court nominations seem to provide verbal renunciations of past insensitivity. Judge Haynsworth and Judge Carswell made similar but far stronger statements before this committee. Rep. Poff and others under consideration for nominations issued statements strongly supporting equal rights. After the events of the past two years no man is going to come before this committee and the nation admitting prejudice or insensitivity. In this light, Mr. Rehnquist's tepid statement that he now realizes the "strong concern of minorities for the recognition of their rights" is hardly reassuring. Belated support for nonsegregated public accommodations, seven years after this has become uniform national practice, does nothing to show that the nominee will deal fairly with the new legal issues emerging in the civil rights field.

After he came to Washington, Mr. Rehnquist's Arizona record of insensitivity to the rights of blacks and Mexican-Americans expanded to incorporate insensitivity to the rights of students, of those accused of crime, of citizens desiring privacy, of women, and even to the rights of Congress.

Mr. Rehnquist, who the President described as a nonpolitical lawyer's lawyer, was the author of one of the Nixon Administration's most strident attacks on campus activitists. He also wrote a long argument recommending Congressional defeat of the 1970 legislation which gave 18-year-olds the vote in Federal elections. The "lawyer's lawyer" gave a speech describing protesters as the "new barbarians" and he claimed they were as threatening to American society as big city crime. His talk was part of the Administration's concerted effort to make political gains by polarizing Americans against the young.

While Mr. Rehnquist was extremely concerned about a very small minority of students, he opposed legislation designed to give the great majority of young people who are committed to our political system the right to full participation. In a long statement he argued against Congressional passage of the Mansfield-Kennedy amendment to the 1970 Voting Rights Act. The 21-year-old limit, he said, did not discriminate against young citizens. He suggested that a change be postponed until the extraordinary majorities required for a Constitutional amendment could be obtained. Had Mr. Rehnquist's views prevailed, young citizens would still be excluded from the electorate.

In stating his position Mr. Rehnquist disagreed with the broader interpretations of Congressional power prepared by leading Constitutional lawyers and accepted by the great majority of Senators. Among the strict constructionists who disagreed with his narrow interpretation was his political mentor, Senator Goldwater.

Where it suited the Administration's purposes, on other sections of the Voting Rights Act, Mr. Rehnquist's convenient Constitutional accordian produced justifications for broad Congressional regulation of other aspects of state electoral purposes, such as literacy tests and registration deadlines.

In the field of women's rights, Mr. Rehnquist gave testimony supporting the Equal Rights Amendment but opposing important sections of the proposed "Women's Equality Act of 1971." He was against prohibiting sex discrimination in the housing market and refused to face the question of unequal opportunity in separate men's and women's school receiving Federal aid. He opposed granting the Equal Employment Opportunities Commission administrative enforcement power to prohibit job discrimination and recommended against authorizing the administrators of the Fair Labor Standards Act to enforce an equal pay rule. At the very least, his comments showed limited awareness of the seriousness of a group of problems of discrimination which will surely often come before the Supreme Court.

Mr. Rehnquist's reluctance to employ governmental power against discrimination is a striking contrast to his bold assertion of almost unlimited executive prerogatives in the pursuit of conservative objectives. On several occasions his positions have brought him into conflict with members of the Senate concerned with protecting the rights of individuals and upholding the prerogatives of Congress. He has, for example, sweepingly upheld the President's right to start wars without consulting Congress and opposed Senate efforts to regain some control of the process. By asserting the President's right to pocket veto legislation during very short vacation recesses of Congress he has laid the groundwork for expanded use of a form of veto which Congress cannot override. He strongly supported the flagrant violations of due process in the mass arrests of thousands of citizens during the May Day demonstrations. Judicial action is dismissing almost all of the resulting cases has been a powerful comment on the weakness of his position.

It is difficult to believe that the Senate would place on the Supreme Court a man who this year asserted an unlimited executive right to spy on private citizens and even on members of Congress. Mr. Rehnquist's dangerous doctrine about the inherent executive power granted by the Constitution was best answered by Senator Ervin: "There is not a syllable in there that gives the Federal Government the right to spy on civilians."

At a time when many Americans are worried about the activities of secret bureaucracies possessing elaborate technologies for invading privacy. Mr. Rehnquist's confirmation would be a cause for alarm. The nominee's statement that it would be perfectly appropriate for the Justice Department to spy on a United States Senator is certainly a high point for an Administration which has been notably insensitive to the rights of a coordinate branch of the government.

The members of this committee and the Senate must focus their attention not on all the details of the individual disputes but on the general pattern of Mr. Rehnquist's policy conclusions. His reading of the Constitution is obviously profoundly influenced by his extremely conservative political views. He construes the document as loosely as necessary to sustain executive power. At the same time he is very reluctant to employ public authority against various forms of discrimination. The accordian contracts and expands.

The Senate's Duty. Once again the Senate faces the unhappy necessity of rejecting one of the President's choices for the nation's highest bench. It is time for the Senate to teach the President that it will exercise its Constitutional prerogative to protect the nation's faith in the Supreme Court's devotion to the Bill of Rights and to equal protection of the laws. Mr. Rehnquist is a man behind his time, a man who failed to understand the movement for human rights and who would narrow the scope of our most cherished civil liberties. It would be a serious failing for the moderate majority of the Senate to put significant influence over our society's future in his hands.

Mr. ORFIELD. My name is Gary Orfield. I am assistant professor of politics and public affairs at Princeton University.

Senator GURNEY. What university?

Mr. ORFIELD. Princeton University.

I come here as a political scientist who has studied the role of Congress in Supreme Court confirmation proceedings——

The CHAIRMAN. Speak a little louder.

Mr. ORFIELD (continuing). Since the Founding Fathers, and also as one whose main interest in the field of scholarly activity is in civil rights law and civil rights enforcement.

I believe that in the nomination of Mr. Rehnquist to the Supreme Court the President has brought before the Senate a candidate who challenges the Senate in a particular fashion.

The President has had an opportunity that has been denied to all but six Presidents in American history to nominate four men to the Supreme Court in 3 years. He is the first President ever to have this opportunity who did not control Congress. He is, in fact, the first President since 1848 without controlling either House of Congress.

This division of political power between the Congress and the Presidency at the same time offers a time to reshape the Court and it puts the Senate in a position of particular responsibility. I believe that the Senate's responsibility is according to the constitutional convention and our political traditions coequal with that of the President and the Senate must make a judgment on the future of the Supreme Court.

This responsibility is very heavy in the case of the nomination of Mr. Rehnquist because with this nomination the President has not only chosen a candidate with a political philosophy which, I believe, is repugnant to most Americans but also with a political record which is tainted with serious insensitivity to the principle of equal opportunity.

Since my statement will be entered in the record, I will pass over many of the historic sections on the Senate's power. There has been a good deal of discussion on these issues already in these hearings and Senator Mathias submitted an able analysis of this question on November 4 in the Congressional Record which I call to the committee's attention.

I would like to go to the discussion of what I consider the most serious facts about Mr. Rehnquist's political record before coming to Washington and then to discuss some of his positions after arriving in Washington, positions which I think require very, very serious scrutiny of this nomination by Members of the Senate, and which I believe fully justify rejection of the nomination.

In announcing his choice of Mr. Rehnquist, President Nixon described him as a conservative "only in a judicial, not in a political sense." The nominee's record, however, shows that the President was wrong on both scores. Mr. Rehnquist is an extremely conservative individual in his political views, but he is anything but a "strict constructionist." He has anything but a conservative approach to precedent, particularly when it comes to interpreting the Bill of Rights. His legal writings show little respect, for example, for the kind of strict literal interpretation of the Bill of Rights that characterized Mr. Justice Black's jurisprudence. He seems disposed to view narrowly the responsibility of both courts and legislation in protecting minority rights. In fact there is damaging evidence of his hostility to the rights of black Americans. While Mr. Rehnquist's writings suggest that he would narrowly interpret some sections of the Bill of Rights and the 14th amendment, he has often read the constitutional grants of power to the executive branch very broadly indeed. He is loath, for example, to put any limits on the Government's power to spy

on its own citizens. As you follow his reasoning from issue to issue, he expands and contracts the Constitution like an accordion to accommodate his extremely conservative political views.

I want to go to a discussion of his record on the two central issues on race relations that were present in Phoenix during the time he lived there. I believe that this record is peculiarly disturbing because Mr. Rehnquist came from a State which had a minor racial problem, which had a consensus of a basically conservative community to do something about it, and with which there had already been a record of successful achievement of an integrating of all public accommodations in the community which the community was ready to move on. This background makes the radical nature of Mr. Rehnquist's hostility to equal rights self-evident.

Living in a State with only 3 percent black population, holding no office which would put him under public pressure, he actively fought a modest public accommodations ordinance in Phoenix. Only 7 years ago, just as the Senate was completing action on the 1964 Civil Rights Act, Mr. Rehnquist was one of a handful of Phoenix citizens who saw the local ordinance as a severe threat to white men's freedom. At a time when almost three-quarters of the Senate voted to prohibit public accommodations segregation across the country, and the critical vote was 5 days before Mr. Rehnquist's speech in Phoenix, Mr. Rehnquist was a lonely Western voice echoing the arguments of the Deep South. A decade after the *Brown* decision, Mr. Rehnquist was still outside the broad national consensus of this issue, a consensus which included more than three-fourths of the American public. He served as a local spokesman for a small minority on the right.

The Phoenix ordinance was designed to protect the rights of the sixth of the local population which was Mexican-American, the 20th which was black, and the local Indian groups. Local Phoenix leaders had sponsored voluntary desegregation in 1960, and it worked fine. It was not a new discovery that integration of public accommodations would work, something Mr. Rehnquist only discovered the other day; it worked for 4 years in Phoenix before this ordinance came before the city council.

According to a study published by the University of Arizona, there was only one restaurant in the entire town which desired to segregate. Because that restaurant desired to segregate, the local council decided to pass an ordinance.

The idea of passing this ordinance so worried Mr. Rehnquist that he not only wrote a lengthy letter to the local paper but also appeared before the city council to argue his case. He saw the idea as a "drastic restriction" on private property rights. While conceding that few wished to segregate, he said that their right to continue actions which "displease the majority" was more important than protecting people from blatant inequality and personal humiliation. He described the law as an "indignity on the proprietor" which sacrificed part of "our historic individual freedom." He was deeply offended by the idea that anyone could be forced to serve a family from an unpopular racist or ethnic group. There is nothing to indicate sensitivity to the rights of the victims of discrimination.

Mr. Rehnquist often talks about freedom. You often wonder whose freedom.

Contrary to some reports that Mr. Rehnquist was merely a local Goldwater sympathist, the same ordinance which he deplored was actively and proudly supported by Senator Goldwater. While Mr. Goldwater opposed Federal legislation on the issue he endorsed the local Phoenix law. In his 1964 campaign book, "Where I Stand," the Arizona Senator said that "just this year, I spoke out in favor of an improved public accommodation ordinance." Senator Goldwater was far behind the national majority on civil rights, but Mr. Rehnquist made Goldwater look like a civil rights activist.

Later, just 4 years ago, shortly before coming to Washington, Mr. Rehnquist again injected himself into a local civil rights controversy when he attacked a voluntary local desegregation effort suggested by the Phoenix school superintendent. In 1967, after intensive discussion in the local press, the Phoenix school official suggested some relatively minor changes intended to reduce the high level of local segregation.

The CHAIRMAN. Have you got much more? Your time is up.

Mr. ORFIELD. I will be done in about 2 minutes, Senator.

The CHAIRMAN. All right.

Mr. ORFIELD. Mr. Rehnquist attacked his proposals and argued that there was nothing wrong with the existing segregated schools.

The Phoenix school system has been officially segregated by State law until shortly before the Supreme Court's 1954 school decision. Segregated and terribly unequal schooling was commonplace in Arizona both for blacks and chicanos and conditions were particularly severe in Phoenix. Arizonans with Spanish surnames typically completed only 7 years of education. The smaller groups of black and Indian students in the system typically received 30 percent less formal education than the white students. The average white student in the city finished high school and began college. Achievement levels in the segregated schools were far below those in the white schools. The schools were failing miserably in holding and training the minority students. All this record was laid out in the Arizona Republic in a long series of articles to which Mr. Rehnquist was reacting.

Segregation of minority groups was a serious problem in Phoenix. Phoenix had a whole set of schools built and operated as ghetto schools during the time when there had been segregation under State law, patterns similar to that encountered in many Southern cities today. Even their names—Dunbar, Bethune, and Booker T. Washington—were classic ghetto school names.

The city had a long-established pattern——

The CHAIRMAN. Sir, your time is up.

Mr. ORFIELD. Thank you.

The CHAIRMAN. Place the rest of your statement in the record. We thank you very much for your testimony.

Are there any questions?

Senator HRUSKA. I have no questions, Mr. Chairman.

The CHAIRMAN. Barbara Hurst of the Ad Hoc Committee of Brown Students.

Please identify yourself for the record.