NOMINATIONS OF WILLIAM H. REHNQUIST AND LEWIS F. POWELL, JR.

MONDAY, NOVEMBER 8, 1971

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

The committee met, pursuant to recess, at 10:30 a.m., in the Caucus Room, Old Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Hart, Kennedy, Bayh, Burdick, Tunney, Hruska, Fong, Scott, Thurmond, and Mathias.

Also present: John H. Holloman, chief counsel, Francis C. Rosenberger, Peter M. Stockett, Hite McLean, and Tom Hart.

The CHAIRMAN. The committee will come to order.

Now the Chair cannot tell from those who filed requests to testify whether they are for the nominee, Mr. Powell, or against him. I am placing Mr. Holloman at the end there and I want all those who want to testify against the nominee to give him their names.

If they are not present we can make arrangements.

Mr. Powell, I have read the FBI files on you; it was a full field investigation. I certainly think you are highly qualified and I am going to vote to confirm you.

Senator Ervin?

Senator ERVIN. Mr. Powell, I have known you by reputation for a long time. I know you are reputed to be one of the very finest lawyers in America; and from everything I have heard about you I think that you will do what Chief Justice John Marshall declared in the *Marbury* v. *Madison* case is the duty of a Supreme Court Justice, and that is to accept the Constitution as the rule for the Government of our official action as a member of the Court and for that reason it will afford me pleasure to vote for you. I have no reservations.

TESTIMONY OF LEWIS F. POWELL, JR., NOMINEE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Mr. POWELL. Thank you very much, Senator.

The CHAIRMAN. Senator Bayh?

Senator BAYH. Mr. Powell, let me publicly extend my congratulations to you for the confidence that the President has placed in you. I have had a chance to work with you during your tenure as president of the bar association and I have certainly felt that that experience has been a fine one for me.

If I may, may I ask you just a general question to start, relative to what you feel the proper role of the Senate is in this experience that we are sharing here.

Do you feel that the Senate can in good conscience, perhaps ought to in good conscience, explore not only the legal competence and the moral integrity of a prospective Justice but should also explore what the individual feels from a philosophical standpoint?

Mr. POWELL. I know of no limits on what the Senate should explore, Senator Bayh.

Senator BAYH. I am sure you are aware of the concern that I have. I am sure as a leader of the bar of many years you probably experienced this concern before I did, as a relative neophyte lawyer, over the importance of maintaining the quality of judges, not only from the standpoint of legal competence but also from the standpoint of public acceptance. May I ask you some questions relative to your own personal financial background?

Mr. POWELL. Of course.

Senator BAYH. You submitted to the chairman, as I recall, a financial statement covering yourself, your wife, and your son. You are familiar with that statement, I trust?

Mr. POWELL. I am.

Senator BAYH. To the best of your knowledge, does this represent an accurate picture of your complete financial holdings?

Mr. POWELL. That statement listed all of the securities which either I, my wife, or my son owned. That statement does not include certain cash which I have; it does not include life insurance; it does not include any tangible personal property and I may say for the benefit of my wife, who is in the room, she claims all of it except my guns. [Laughter.]

Senator BAYH. Do you keep those locked up and away from her? [Laughter.]

Mr. POWELL. That hadn't occurred to me yet.

Senator BAYH. Knowing her and knowing you, I don't suppose that is much of a problem to either one of you.

Let me explore, if I may, some of the legal problems that may be created by this.

First of all, let me compliment you on the success that you have evidenced during your practice by being able to accumulate such a substantial portfolio. I think this speaks well of your business and your legal competence.

It does raise, as you know, certain questions to those of us who are concerned about how a judge—I am not sure immunizes is a good word, but let me use it—immunizes himself from possible temptation. Neither you nor most judges would succumb to such temptation but from the standpoint of appearance and propriety, what are your thoughts as to what you can do or should do or are prepared to do relative to this significant stock portfolio so that it might not give the appearance of impropriety in certain cases that you may be called to sit upon?

Mr. POWELL. Senator Bayh, I agree that that is a troublesome problem. In the relatively limited time available, I have tried to acquaint myself with what has been done by certain other members of the Court. Also, I have read the preliminary draft of the proposed

new canons of judicial ethics and I have had my partners do some research. I would recognize as the binding principle, to which I will attempt to adhere, both to the letter and the spirit, the canons of judicial ethics. I recognize they are not legally binding on the members of the judiciary but I think increasingly they will be so regarded. I am aware also of 28 U.S.C.A. 455, and obviously I would comply with that.

Senator BAYH. 455, of course, uses the specific test of a "substantial interest"?

Mr. POWELL. That is correct.

Senator BAYH. Would you care to give us your impression, Mr. Powell, of how you feel the canons of ethics interpret substantial interest?

Mr. POWELL. They interpret it very narrowly. The proposed new canons, I think, use the phrase "any interest."

Senator BAYH. And you feel this would be the personal test you would subject yourself to?

Mr. POWELL. Yes. I would say this, to amplify that response, Senator Bayh: Obviously I have some problems. The canon, as I read it, imposes a duty on a judge as promptly as he reasonably can to dispose of securities which are in companies which are likely to come before the Court. Obviously, one would have to do some speculating as to the latter part of that standard. There is a further condition that his obligation is to dispose of them where he can do so without substantial loss.

The principal holding which I have, and which my family also has, including not only my wife and son but my two sisters and a brother, is a holding that came to us through gifts from my father many years ago. We could not sell that holding without very substantial tax adjustments.

Senator BAYH. Could you give us the name?

Mr. POWELL. It is Sperry & Hutchinson.

Senator BAYH. The S. & H.?

Mr. POWELL. The S. & H. Green Stamp Co.; that is right. My father's family furniture manufacturing company was merged into the Sperry & Hutchinson Co. a couple of years ago, so that the family has substantial or comparatively large holdings in that company.

Senator BAYH. How do you insulate those from your holdings or do you feel it is necessary?

Mr. POWELL. I would certainly have to disqualify myself if a case came to Court involving that company.

Senator BAYH. There has been some question—I think I heard you speculate, this speculation at least has been attributed to you—relative to a blind trust for your holdings. Would you care to share your thoughts with the committee ultimately as to how that would meet the problem that confronts you?

Mr. POWELL. I would be happy to do so.

I was first informed this was a technique that might be helpful and that had been used by others. My investigation through lawyers in my office is not yet complete; and yet I would say as of now I think a blind trust would probably be of little assistance. It may be a duty, in fact the new canons suggest there is a duty, on a judge to

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ascertain what he does hold. If that affirmative duty exists, a blind trust would be a bit awkward.

Senator BAYH. I would suppose that a blind trust might work for some of your holdings, perhaps most of them. The one that you referred to where you would have significant tax liability just wouldn't be disposed of by a blind trust—it would be the sort of thing that would be ever present as a reminder?

Mr. POWELL. However you made it, I think, in a situation such as you have described, you would have that problem.

Senator BAYH. You feel that the canons of ethics, 28 U.S.C.A. 455, should be construed in the strictest sense as far as you are concerned?

Mr. POWELL. I certainly do.

Senator BAYH. Could you give the committee the benefit of your thoughts relative to the emphasis that the Court as of this date has placed on avoiding the appearance of impropriety? They brought in the appearance of impropriety in the *Commonwealth Coatings* case as well as specific interests or specific impropriety. The Court in that 1968 case held that a judge had a responsibility to avoid the appearance of impropriety as well as impropriety. I don't ask you to deal with trying to second guess the Court, but to give us your opinion as to—perhaps I should put it this way: Give us your opinion as to the significance that the appearance of impropriety should play as a judge interprets the substantial interest clause and the canons of ethics.

Mr. POWELL. I would agree that the appearance of impropriety certainly merits serious consideration. It is quite important for the public to have confidence in the members of the Court that they have no interest other than to do justice under law.

Senator BAYH. There are a number of other questions——

Mr. POWELL. Senator Bayh, I would just like to add one comment to be sure that I have answered your inquiry completely.

I would endeavor promptly to limit my list of investments so as properly to comply with the letter and spirit of the canons. There are some investments I would certainly wish to retain; I mentioned one of the major ones. There are several others that are involved in corporations which I have represented over many years. If they should be involved in litigation in court—certainly for the foreseeable future—I would not take part in it.

Senator BAYH. Could you broaden the previous discussion we have had in which we have dealt with ownership or interest in a party. The substantial interest test at least in *Commonwealth Coatings* has been interpreted to mean there must be an interest in the specific party, but the party that has been related to the party which the judge has an interest in. Could you give us your thoughts relative to how you, as a judge, feel you should look at cases that come before you in which you have served as counsel?

Mr. POWELL. Well, most certainly I would not take any part in those cases, Senator Bayh. There are all sorts of situations that I have thought about and, of course, you have——

Senator BAYH. Could you give us a broader thought on this?

Mr. POWELL. Well, how far does one go over the years with respect to old clients of one's firm? I think that raises a host of questions. As you know, having practiced law with distinction yourself, you have all

sorts of clients. We have had hundreds of clients; some come back year after year; others we never see again. Some are retained, most are not. So I think the specific answer would have to be made in relation to the specific factual situation. I certainly can assure you that my own effort and every inclination would be to lean over backward in this respect to avoid the appearance of impropriety; and yet, I suppose every judge has to bear in mind if he leans over backward too far when it is not really justified, he imposes additional burdens on other members of the court.

Senator BAYH. I have introduced a measure, and Senator Hollings from South Carolina has introduced a measure, which we hope this committee will be able to look upon with favor, that would deal with giving the Federal judiciary, particularly at a lower level, the opportunity to lessen this burden of the obligation to sit so that we deal with the appearance of impropriety to a greater degree than we have in the past.

Mr. Chairman, I want to yield temporarily back to my senior colleagues on some questions they may have, but I would like to pursue one other question in this ethical field as long as we are there.

Let me say for the record I am sure it is not necessary for you, for your information, but I don't ask these questions because I have doubt about your ability to meet them head on; I am confident from what I know of you that you would, but I just want the record to be clear and I want you to have a chance to express your feelings on them.

We have dealt with the need to remove oneself, to keep oneself, because of relationship with a party, and financial, pecuniary interests, or the need to be careful, as careful as one can, with what one owns as a judge, so that he not be in a position of having to excuse himself. What obligation do you feel a judge has to meet the tests of the new canons of ethics relative to past opinions that he may have expressed? Is that as important a thing to consider, as well as interests in the party or appearance of impropriety so far as client-lawyer relationship with a prospective party is concerned?

Mr. POWELL. I believe one of the provisions of section 2, or article 2 rather, of the proposed new canons says in substance the judge should not serve in a case with respect to which he has formed a fixed opinion or has a fixed view as to the issue involved; and I would certainly accept that as a sound rule.

Senator BAYH. We had rather detailed discussion with the other nominee, Mr. Rehnquist, relative to his feelings in the whole area of the right to privacy, and the inherent right of the Federal Government to become involved in snooping and this type of thing. So that I might get your thoughts on where you feel this might enter, if at all, as you look at some of the cases, prospective cases, could you give us your thoughts relative to what rights you feel the Federal Government has in the area of so-called fourth amendment rights, wiretapping, and surveillance or the broader rights of the right of privacy which have been protected in the rather broad ground of the first, fourth, and, perhaps, in the fifth amendment? Could you give us your thoughts in those areas?

Mr. POWELL. It covers a lot of ground, doesn't it?

Senator BAYH. You don't need to confine yourself to 25 words or less. [Laughter.]

Mr. POWELL. I will address first of all the broader question of what you described as the right of privacy, and I may say that my views, perhaps, have changed dramatically over the past two and a half weeks. I now think the right of privacy would be a very fine thing. [Laughter.]

Senator BAYH. I have shared that concern for 17 years.

Mr. POWELL. I am sure you have. Seriously, I once read the *Griswold* case; I suppose you have reference to it?

Senator BAYH. Yes, sir.

Mr. POWELL. I have not read it recently. I remember, of course, as every law student does, there was no specific provision of the Constitution that spelled out a right of privacy; the right was inferred from a collection of other rights. I suppose the correct posture for me to take at this moment is that I would certainly view any such case with an open mind and attempt to reach a decision based on the facts and the law and the Constitution.

I would say, not as a prospective judge but generally as a citizen, that I think all Americans have the right not to have their privacy unduly intruded upon; there is no question about that.

Do you wish me to move on into the wiretapping area which you mentioned?

Senator BAYH. If you would, please.

Mr. POWELL. I wrote a letter to you, Senator Bayh, when I received a request through the Justice Department for copies of talks that I had made, and knowing of your interest in this particular area, I sent you copies of the only talks of which I have any recollection that I have made relating to electronic surveillance. I would like to say for the benefit of the committee that as a civilian lawyer without any criminal trial experience, my first interest in the criminal law arose when I was president-elect of the American Bar Association, and I was trying to plan a program for my year as president; and I ended up with three programs which seemed to me to be fairly significant. One was the initiation of the criminal justice project of the American Bar Association with which I am sure all members of this committee are familiar.

I had to do some study in connection with that. I will pass over that project for a moment and move to the President's Crime Commission—President Johnson's Commission on Law Enforcement and the Administration of Justice. I was assigned to two subcommittees of that Commission: One was the Subcommittee on the Courts; the other was the Subcommittee on Organized Crime. That was my first, literally my first, insight and information as to what organized crime in this country really is doing to our people.

It was there for the first time that I became interested with the problem of whether or not electronic surveillance was needed by law enforcement and whether adequate safeguards could be imposed by legislation which would protect the public against the intrusion that this form of surveillance makes possible.

A majority of the President's Commission, including myself, found that the law was then in a very chaotic state. You are all familiar with it: I will not review it, but under the *Olmstead* case, wiretapping was not deemed to be a violation of the fourth amendment and yet under the Communications Act of 1934, the fruits of the surveillance

were not admissible in court. So we had the worst of all worlds, with uncontrolled wiretapping allowed but the fruits of it not being available for use even in proper criminal proceedings.

So the principal thrust of the Crime Commission's report was that Federal legislation was urgently needed.

It was needed, we thought, for two reasons: First, to outlaw all unauthorized wiretapping, and that was done in unequivocal language in the Omnibus Crime Act of 1968.

The second principal recommendation of the Commission was that a court-controlled system of wiretapping be established by the Congress to deal with cases of major crime, directed primarily against organized crime. That recommendation may have had some influence on the Congress in the enactment of title III of the act of 1968.

At that point, my interest in the subject, except from a purely academic way, ended until the ABA criminal justice project decided to put out standards in this area, standards primarily to guide the States; and so, as I am sure you know, Senator Bayh, the ABA house of delegates last February did adopt standards with respect to electronic surveillance, and I served on the ABA Criminal Justice Committee; I supported those standards.

I have made, as I recall, three talks in which I mentioned this subject, and I think I sent all of those to you.

Senator BAYH. You mentioned the concern you have over organized crime. Every member of this committee shares that concern. You mentioned the effort that we made in the 1968 act in which wiretapping is permitted with certain protections, particularly the securing of a court order. You mentioned outlawing of all unauthorized taps. Could you give us your thoughts relative to whether, as you look at the need to balance the security of our society and deal with organized crime against the concern over the invasion of our individual rights, specifically now we are talking about fourth amendment rights, whether it would not be a fair test to subject all wiretapping, to have the one who is going to use the wiretap to get a court order?

Mr. POWELL. I think you are now moving, if I understand your question, into the areas of national security and domestic subversion. The ABA standards did incorporate provisions with respect to national security cases but did not require a prior court order. This involves action by a foreign power in espionage or comparable situations. The ABA standards did not address the far more troublesome area of internal security surveillance.

I have never studied that. I alluded to it in two of the talks which I sent to you. I understand that at least one case is either on the docket or on its way to the Court, and I doubt whether I should go beyond what I have said on that topic.

Senator BAYH. Let me just read the ABA final draft and the tentative draft and ask you if you would care to comment further than you already have.

The final draft dealing with this specific point says, and I am sure you are familiar with this, but just to refresh your memory to have it in the record, let me read it: "The special committee rejected any reading of the fourth amendment that would invariably require compliance with a court order system before surveillance in interest in national security could be termed constitutionally reasonable."

The tentative draft has the following language:

> The Committee considered and rejected language which would have recognized a comparable residuary power in the President not subject to prior judicial review to deal with purely domestic subversive groups. This is not, of course, to say that there may not be domestic threats to the national security. It is to say, however, that there is a valid distinction in how each ought to be treated insofar as these techniques are concerned.

Would you care to comment further on those thoughts expressed by the ABA committee?

Mr. POWELL. I think they accord with my recollection, Senator Bayh, and I was on that committee.

Senator BAYH. I want to try to raise this question so we can get a little more depth into your concern over this matter of how you might respond to my concern without putting you in an untenable position relative to a case which might very well be before you.

What circumstances do you feel might justify the use of electronic surveillance?

Mr. POWELL. You mean beyond organized crime?

Senator BAYH. Yes; let's say beyond that.

Mr. POWELL. Senator, I hesitate, really, to try to get into factual situations. I realize the line, and I think I have said this, between what is a purely foreign security problem and a purely domestic security problem may be very difficult to draw in some cases. I would think in most cases it would not be difficult to draw. I think one would have to examine the facts very carefully. I think we would all feel far more optimistic about moving with confidence where you are dealing with foreign agents of a potential enemy than you would where you are dealing with Americans, particularly if all that they are doing independently of any foreign government of any kind is to express hostile opinions.

I think these are the extremes, and I would rather not try to describe any factual situation. I have no idea, for example, what the actual facts are in the case before the Court. I think I read a couple of the lower court decisions once. I have not read the Sixth Circuit Court of Appeals' opinion.

Senator BAYH. What is the test that you feel would be required for a tap to be placed under the 1968 act?

Mr. POWELL. Well, the statute outlines a number of requirements that must be met. I am sure I cannot recall them all.

There is the requirement of showing probable cause, and of showing that the necessary evidence to convict the suspected criminal cannot be obtained in any other way. There must be a limitation on the time, which cannot exceed 30 days. If there should be a desire to extend that time, there must be a new application to the court and a fresh showing of the continued or new probable cause; and again the results of the tap have to be reported.

There are some other requirements, but these are the essential ones, as I recall them.

Senator BAYH. First of all, let me just say I think the Government has an obligation to protect itself from those who obviously by design have as their motive, their intention, to destroy the ability of this Government to function. I think this goes far beyond the right of self-expression and this type of thing. I am trying to express concern and to

get your opinion relative to how you balance off this, on the one hand, versus the fact that it is possible to envision the chief law enforcement officials in this country—and I just take a hypothetical question—being motivated by politics so that criticism per se in essence becomes subversiveness. I think we must protect ourselves from this possibility.

You mentioned probable cause. Would it be unreasonable for a judge or for a Senator to suggest that this requirement be applied to "domestic subversives"?

Mr. POWELL. As I recall, some of the discussion we had on the Criminal Justice Committee tried to deal with this problem and that was considered. It was also considered whether or not perhaps other standards could not be prescribed by law.

The situation is obviously different from organized crime. As you say, I don't think anybody would support uncontrolled surveillance against citizens because they criticized the Government. On the other hand, as you move closer and closer to cooperation and coordination with agents of an alien power who are trying to act in a hostile way to our Government, you can see that prescribing standards becomes extremely difficult.

Senator BAYH. All right. Then you brought in a criterion there that might not exist. If I might just be specific. If you have "domestic insurgents" or subversives cooperating with a pattern with their national agents, that is one thing. I suppose it is fair to say that in your judgment that would be—would meet the criterion which would give the President the power without court sanction to go in to tap?

Mr. POWELL. In view of the possibility of this matter coming before the Court, I think I had better stand where I already stand, which is in support of the American Bar Association's standards, which I must say I think would meet the situation that you described.

Senator BAYH. Let's take that in cooperation and concert with international agents. How does that differ from normal criminal activities? Why could not the protections and safeguards of the 1968 act be applied there?

Mr. POWELL. Well, this was obviously one of the problems that caused the ABA committee to decide that it did not have enough information, really, to deal with the problem. In other words, I don't think—I speak only for myself; I have no idea what sort of information is available to the responsible people in government concerning possible acts of violence, for example, against a government building. It may be contemplated solely by Americans, not agents of a foreign power.

Senator BAYH. I would think that any attorney general or any chief law enforcement official of a community would have not only the right but the responsibility to keep the building from being blown up if he knew this were about to happen. But can you give me your thoughts relative to why this could not be done by first going to a Federal judge and going through the confidential procedure for putting a tap on under the 1968 act?

Mr. POWELL. I would certainly say this: If I were in the Congress of the United States I would address that problem very seriously. In other words, I would see if you could not devise standards that would be compatible both with the public interest and public protection, and with whatever necessities may exist with respect to responsible law

enforcement people; and I think in the talk that I made to the Richmond Bar Association I suggested, when I put this problem aside in a paragraph just in the interest of clarity, that this may be an area in which legislation is necessary.

Senator BAYH. Well, I concur that Congress would fulfill its responsibility if the law could be more definitive. But it has not. Congress has not followed the advice and thus we find ourselves in a position where there is no law. Thus a final determination, I suppose, is going to be made by those who sit on the high bench and this it is a very delicate thing to ask questions about; but it is an important thing for some of us to know before a man is placed on that Court. So could you give us your thoughts, which might be more generally relative to circumstances that might exist, factors in your mind which argue favorably in allowing a wiretap or against allowing a wiretap when we are talking about citizens of this country who have no close link or visible link or any link with foreign agents?

Mr. POWELL. Senator, I think I can say that I understand your concern and I think if I were sitting where you were I would be asking the same questions.

The only hesitation I have is in resorting to speculation, and it would be speculating to a large extent because I have not studied how this problem might be dealt with. I would certainly undertake a study of it and I would think that many, if not most, of the safeguards that are in the act of 1968 could be applied. I would not wish to identify those that couldn't be—I may be getting into areas that could possibly embarrass me if I should be confirmed to the Court.

Senator BAYH. As much as I would like for you to be more definitive, I don't want you to be if you are going to get across that line, and I know your sincerity and I know how your interests are. Let me pursue it from a little different angle. If you as a judge would make a determination that the information necessary to protect society, whether it is a Federal building or the President or Mr. Kissinger or whoever it might be, that steps could be taken—that the information could have been acquired by using the safeguards of the 1968 act, and yet they were not used, would you tend to believe that this was a breach of the constitutional rights of the individuals involved?

Mr. POWELL. Conceivably that may be the very issue before the Court. I don't know enough about it to know. I can only say that I share, believe me, I share deeply the concerns that you have expressed and that I know are in your mind, and I think every American shares deep concern at the thought of any monitoring by electronic surveillance or otherwise of what people think on political, social, or economic issues. But when you move into the area of threatening to commit a crime or conspiring to commit a crime, that seems to me to come very close to the provisions of title III.

Senator BAYH. Let me try another time to be less specific. Instead of asking you about a hypothetical situation, which may be the case in the sixth circuit decision or others, do you feel that as a judge one of the factors you should consider in ruling on the constitutionality of a given act by a government agency or agent would be whether the same information could have been acquired by using the protection, secured by court order, to a tap rather than an Executive order to tap? Is that one factor you should consider in the deliberative process?

Mr. POWELL. I would certainly consider all law and facts that seemed to me to be relevant.

Senator BAYH. Is that relevant?

Mr. POWELL. I would think it would be relevant, and I would certainly consider the entire case in light of the Bill of Rights and the restrictions in the Constitution of the United States for the benefit of the people of our country.

Senator BAYH. But one thing you would consider is whether the country could be secure, the community or the person involved be protected, that protection could be provided, by means other than an arbitrary Executive tap? That would be one factor you would consider in your deliberations?

Mr. POWELL. I would consider that and all other relevant facts and circumstances under the law.

Senator BAYH. Do you anticipate that the Court will have difficulty in trying to distinguish between domestic insurgents or domestic agents and international agents?

Mr. POWELL. Senator, I wish you wouldn't ask me that question. I don't think I ought to speculate as to just what the Supreme Court might do, whether or not I am on it.

Senator BAYH. Would you, in your own mind, have difficulty, if you studied this for the ABA, differentiating between type of subversives?

Mr. POWELL. I think the record is pretty clear on that, what the ABA did.

Mr. BAYH. How about Mr. Lewis Powell?

Mr. POWELL. I was a member of the committee and voted for the action that prevailed, and I suppose that——

Senator BAYH. But do you feel—getting back to the initial line of questioning, which was the reason I opened this, realizing that some of my colleagues have questions in another area and I may have too if they don't ask them first—do you feel that because of the very strong position you have taken as a member of this ABA committee and because of some very strong positions you have taken in that FBI Journal article and some other statements, that you might be confronted already?

Mr. POWELL. I might be what?

Senator BAYH. You might already be confronted with the need to excuse yourself, minus these questions which you are handling very delicately and I think appropriately. But is it conceivable that you have already expressed such strong views in this area that you might be compelled to excuse yourself in a case that came before you on the subject matter?

Mr. POWELL. I would reserve final judgment until I were confronted with the problem, but I would say without any hesitation as I think my Richmond Bar talk demonstrated, I have no fixed view on the delicate area that you have been discussing. I do have a fixed view on the other two areas, and am on record, at least I had a fixed view when those reports were submitted. I have not studied either one in depth since then, but at that time I certainly agreed with the Crime Commission Report and the ABA position. But on the third issue, domestic subversion, I have no fixed view. I have not studied it with that care. I can see all sorts of problems that you have outlined.

Senator BAYH. May I read just one quote from an article attributed to you entitled "Civil Liberties Repression: Fact or Fiction? Law-

Abiding Citizens Have Nothing to Fear" under your byline, which appeared in the Richmond Times-Dispatch on August 1 of this year, which reads as follows:

> There may have been a time when a valid distinction existed between external and internal threats. But such a distinction is now largely meaningless. The radical left, strongly led and with a growing base of support, is plotting violence and revolution.

Now, that may or may not be true. If they are, we have to deal with it. But first of all perhaps I should ask does the question from this article reflect your present views and aren't those views rather strong in the area? Aren't you rather specific in an area where you said you had not made up your mind already?

Mr. POWELL. The article was one that I wrote for the Richmond Times-Dispatch and it was picked up by the FBI Journal and more recently by the New York Times. I actually wrote the article, and I think this may be of interest in light of your line of questioning, not to address this subject specifically but to address the issue of repression; and if I may digress for a moment because this does seem to me to be important, I have four children. I have two who are in college, one in law school, a daughter at UCLA, and a son who is a sophomore at Washington and Lee. I spend a good deal of time with the young and one of the things that distresses me most is the widely prevailing view among the young that America is a repressive society. Now, I can understand how a good many of them would have that impression and certainly acts of repression exist in this country; they have always existed. And I am afraid they always will; but it seems to me, though, they are episodic and not the result of any systematized point of view on the part of anybody, and on balance I have the deep conviction that America is the freest of all lands. I have a deep conviction that the Bill of Rights is revered not only by the citizens but by the courts and the legislative and executive bodies of our country.

As a lawyer I am satisfied that criminal justice, with all of its faults, and heaven knows there are many, criminal justice nevertheless is commendable, on the whole, in the United States of America, and that most people, once they get to a court of record—I am not talking at the moment about problems we are all familiar with in the courts where the misdemeanors are tried, but at the felony level—I firmly believe, and I cited, I believe, Judge Traynor, former chief justice of California, for the view that one is more likely to have a fair trial in the United States than in almost any other country in the world, as long as the safeguards of a fair trial exist and as long as free speech and free press exist, the right to assemble exists in this country, I do not believe our society is repressive. I think it is terribly unfortunate for the young of our people to think that it is. That is not to say that they shouldn't fight to eliminate whatever examples of repression or unfairness or injustice exist and there are plenty of them, but to turn against the structure of our whole free society seems to me a disaster.

I wrote the article with that point in mind. I was not writing a law review article. I think the language you read—I think the language was accurate—was addressed primarily to this hazy area where internal security and national security, where internal dissidents are cooperating or working affirmatively with, or are very sympathetic to countries, other powers, that may be enemies of the United States.

This is a very difficult area. Drawing that line, as I have said, is very perplexing.

But to come back to your question, I do not consider it was a fixed view considering the circumstances under which it was expressed, the brevity of expression—I was not writing a law review article. And yet I would add one other point, Senator, just to be absolutely clear: If I should go on the Court, and this Sixth Circuit case comes up after I come on the Court, I will be very conscious of the fact that I have written a few things, very few, really, in this area; and it may well be that I will disqualify myself. At the moment I would rather not say positively that I will or I won't.

Senator BAYH. Well, I asked the question not to go to the specifics of the rightness or wrongness of your allegations here but there are a number of people, perhaps older people, who are concerned about our being a repressive society.

I don't have any youngsters in college. I have talked to a lot of good people who are, and I found one of the things that was impossible to do is to sterotype the so-called younger generation. Some of the loud voices don't necessarily represent the masses.

You said that you would consider this. This is quite frankly a hazy area, and that is why I am asking the question. If it were written in the law, if we had cases on point, I would not be bothering with it.

Mr. POWELL. I understand.

Senator BAYH. This is a hazy area. Congress has not enacted and the Court has not ruled, and as one who is concerned with the propriety or impropriety or the appearance of impropriety, I think it is important that prospective nominees look hard at what they said so far as the responsibility they may have at a future date relative to a case that comes before them where what they have written and what they said prejudged the circumstances.

Mr. POWELL. I will not be insensitive to that, Senator Bayh, I can assure you.

Senator BAYH. I will ask, Mr. Chairman, that two or three paragraphs of this quotation be put in the record because although the area is hazy and this is not a law review article, let me say that the wording is rather specific. Perhaps in fairness to you, Mr. Powell, rather than taking two or three paragraphs, I ought to ask unanimous consent to put in the whole article.

Mr. POWELL. I would prefer that, Senator Bayh.

(The material referred to follows:)

[From the Richmond Times-Dispatch, Sunday, August 1, 1971]

CIVIL LIBERTIES REPRESSION: FACT OR FICTION?—"LAW-ABIDING CITIZENS HAVE NOTHING TO FEAR"

(By Lewis F. Powell Jr.)

(Lewis F. Powell Jr., a Richmond lawyer who has closely followed developments in the exploding field of "civil liberties," is a former president of the American Bar Association. He has also served as chairman of the State Board of Education, chairman of the Richmond School Board and member of the 15-man Blue Bibbon Defense Panel named by President Nixon to study the Defense Department.)

At a time when slogans often substitute for rational thought, it is fashionable to charge that "repression" of civil liberties is widespread. This charge—directed primarily against law enforcement—is standard leftist propaganda. It is also made and widely believed on the campus, in the arts and theater, in the pulpit, and

among some of the media. Many persons genuinely concerned about civil liberties thus join in promoting or accepting the propaganda of the radical left.

A recent syndicated article, by AP writer Bernard Gavzer, cited several such persons. According to Prof. Charles Reich of Yale, American "is at the brink of . . . a police state". Prof. Allan Dershowitz of Harvard decries the "contraction of our civil liberties."

The charge of repression is not a rifle shot at occasional aberrations. Rather, it is a sweeping shotgun blast at "the system," which is condemned as systematically repressive of those accused of crime, of minorities and of the right to dissent.

Examples ritualistically cited are the "plot" against Black Panthers, the indictment of the Berrigans, the forthcoming trial of Angela Davis and the mass arrests during the Washington Mayday riots.

The purpose of this article is to examine, necessarily in general terms, the basis for the charge of repression. Is it fact or fiction?

There are, of course, some instances of repressive action. Officials are sometimes overzealous; police do employ unlawful means or excess force; and injustices do occur even in the courts. Such miscarriages occur in every society. The real test is whether these are episodic departures from the norm, or whether they are as charged part of a system of countenanced repression.

The evidence is clear that the charge is a false one. America is not a repressive society. The Bill of Rights is widely revered and zealously safeguarded by the courts. There is in fact no significant threat to individual freedom in this country by law enforcement.

Solicitor General Griswold, former dean of the Harvard Law School and member of the Civil Rights Commission, recently addressed this issue in a talk at the University of Virginia. He stated that there is greater freedom and less repression in America than in any other country.

So much for the general framework of the debate about alleged repression. What are the specific charges?

The attack has focused on wiretapping. There seems almost to be a conspiracy to confuse the public. The impression studiously cultivated is of massive eavesdropping and snooping by the FBI and law enforcement agencies. The right of privacy, cherished by all, is said to be widely threatened.

Some politicians have joined in the chorus of unsubstantiated charges. Little effort is made to delineate the purposes or the actual extent of electronic surveillance.

The facts, in summary, are as follows: The Department of Justice employs wiretapping in two types of situations: (i) against criminal conduct such as murder, kidnapping, extortion, and narcotics offenses: and (ii) in national security cases.

Wiretapping against crime was expressly authorized by Congress in 1968. But the rights of suspects are carefully safeguarded. There must be a prior court order, issued only upon a showing of probable cause. The place and duration are strictly controlled. Ultimate disclosure of the taps is required. There are heavy penalties for unauthorized surveillance. Any official or FBI agent who employs a wiretap without a court order in a criminal case is subject to imprisonment and fine.

During 1969 and 1970, such federal wiretaps were employed in only 309 cases. More than 900 arrests resulted, with some 500 persons being indicted including several top leaders of organized crime.

The government also employs wiretaps in counterintelligence activities involving national defense and internal security. The 1968 Act left this delicate area to the inherent power of the president.

Civil libertarians oppose the use of wiretapping in all cases, including its use against organized crime and foreign espionage. Since the 1968 Act, however, the attack has focused on its use in internal security cases and some courts have distinguished these from foreign threats. The issue will be before the Supreme Court at the next term.

There can be legitimate concern whether a president should have this power with respect to internal "enemies." There is, at least in theory, the potential for abuse. This possibility must be balanced against the general public interest in preventing violence (e.g. bombing of Capitol) and organized attempts to overthrow the government.

One of the current myths is that the Department of Justice is usurping new powers. The truth is that wiretapping, as the most effective detection means, has been used against espionage and subversion for at least three decades under six presidents.

There may have been a time when a valid distinction existed between external and internal threats. But such a distinction is now largely meaningless. The

radical left, strongly led and with a growing base of support, is plotting violence and revolution. Its leaders visit and collaborate with foreign Communist enemies. Freedom can be lost as irrevocably from revolution as from foreign attack.

The question is often asked why, if prior court authorization to wiretap is required in ordinary criminal cases, it should not also be required in national security cases. In simplest terms the answer given by government is the need for secrecy.

Foreign powers, notably the Communist ones, conduct massive espionage and subversive operations against America. They are now aided by leftist radical organizations and their sympathizers in this country. Court-authorized wire-tapping requires a prior showing of probable cause and the ultimate disclosure of sources. Public disclosure of this sensitive information would seriously handicap our counter-espionage and counter-subversive operations.

As Atty. Gen. John Mitchell has stated, prohibition of electronic surveillance would leave America as the "only nation in the world" unable to engage effectively in a wide area of counter-intelligence activities necessary to national security.

Apparently as a part of a mindless campaign against the FBI, several nationally known political leaders have asserted their wires were tapped or that they were otherwise subject to surveillance. These charges received the widest publicity from the news media.

The fact is that not one of these politicians has been able to prove his case. The Justice Department has branded the charges as false.

The outcry against wiretapping is a tempest in a teapot. There are 210 million Americans. There are only a few hundred wiretaps annually, and these are directed against people who prey on their fellow citizens or who seek to subvert our democratic form of government. Law-abiding citizens have nothing to fear.

In the general assault on law enforcement, charges of police repression have become a reflexive response by many civil libertarians as well as by radicals.

Examples are legion. Young people are being incited not to respect law officers but to regard them as "pigs". Black Panther literature, in the vilest language, urges the young to assault the police.

The New York Times and the Washington Post reported, as established fact, that 28 Panthers had been gunned down by police since January 1968. Ralph Abernathy attributed the death of Panther leaders to a "calculated design of genocide". Julian Bond charged that Panthers are being "decimated by police assassination arranged by the federal police apparatus." Even Whitney Young referred to "nearly 30 Panthers murdered by law enforcement officials."

These charges, upon investigation (by the New Yorker magazine, among others), turned out to be erroneous. The fact are that two—possible four at most—Panthers may have been shot by police without clear justification. Many of the 28 Panthers were killed by other Panthers. There is no evidence whatever of a genocide conspiracy.

But the truth rarely overtakes falsehood—especially when the latter is disseminated by prestigious newspapers. Millions of young Americans, especially blacks, now believe these false charges. There is little wonder that assaults on police are steadily increasing.

The latest outcry against law enforcement was provoked by the mass arrests in Washington on May 3. Some 20,000 demonstrators, pursuant to carefully laid plans, sought to bring the federal government to a halt.

This was unlike prior demonstrations in Washington, as the avowed purpose of this one was to shut down the government. The mob attempted to block main traffic arteries during the early morning rush hours. Violence and property destruction were not insignificant. Some 39 policemen were injured. Indeed, Deputy Atty. Gen. Kleindienst has revealed that the leaders of this attack held prior consultations with North Vietnamese officials in Stockholm.

Yet, because thousands were arrested, the American Civil Liberties Union and other predictable voices cried repression and brutality. The vast majority of those arrested were released, as evidence adequate to convict a particular individual is almost impossible to obtain in a faceless mob.

The alternative to making mass arrests was to surrender the government to insurrectionaries. This would have set a precedent of incalculable danger. It also would have allowed a mob to deprive thousands of law-abiding Washington citizens of their rights to use the streets and to have access to their offices and homes.

Those who charge repression say that dissent is suppressed and free speech denied. Despite the wide credence given this assertion, it is sheer nonsense. There is no more open society in the world than America. No other press is as free.

No other country accords its writers and artists such untrammeled freedom. No Solzhenitsyns are persecuted in America.

What other government would allow the Chicago Seven, while out on bail, to preach revolution across the land, vastly enriching themselves in the process?

What other country would tolerate in wartime the crescendo of criticism of government policy? Indeed, what other country would allow its citizens—including some political leaders—to negotiate privately with the North Vietnamese enemy?

Supreme Court decisions sanctify First Amendment freedoms. There is no prior restraint of any publication, except possibly in flagrant breaches of national security. There is virtually no recourse for libel, slander or even incitement to revolution.

The public, including the young, are subjected to filth and obscenities—openly published and exhibited.

The only abridgement of free speech in this country is not by government. Rather, it comes from the radical left—and their bemused supporters—who do not tolerate in others the rights they insist upon for themselves.

Prof. Herbert Marcuse of California, Marxist idol of the New Left, freely denounces "capitalist repression" and openly encourages revolution. At the same time he advocates denial of free speech to those who disagree with his "progressive" views.

It is common practice, especially on the campus, for leftists to shout down with obscenities any moderate or conservative speaker or physically to deny such speaker the rostrum.

A recurring theme in the repression syndrome is that Black Panthers and other dissidents cannot receive a fair trial.

The speciousness of this view has been demonstrated recently by acquittals in the New Haven and New York Panther cases—the very ones with respect to which the charge of repression was made by nationally known educators and ministers.

The rights of accused persons—without regard to race or belief—are more carefully safeguarded in America than in any other country. Under our system the accused is presumed to be innocent; the burden of proof lies on the state; guilt must be proved beyond reasonable doubt; public jury trial is guaranteed; and a guilty verdict must be unanimous.

In Recent Years, dramatic decisions of the Supreme Court have further strengthened the rights of accused persons and correspondingly limited the powers of law enforcement. There are no consitutional decisions in other countries comparable to those rendered in the cases of Escobedo and Miranda.

Rather than "repressive criminal justice," our system subordinates the safety of society to the rights of persons accused of crime. The need is for greater protection—not of criminals but of law-abiding citizens.

A corollary to the "fair trial" slander is the charge that radicals are farmed and tried for political reasons. This is the world-wide Communist line with respect to Angela Davis. Many Americans repeat this charge against their own country, while raising no voice against the standard practice of political and secret trials in Communist countries.

The radical left, with wide support from the customary camp followers, also is propagandizing the case of the Berrigans.

The guilt or innocence of these people remains to be determined by juries of their peers in public trials. But the crimes charged are harldy "political." In the Davis case a judge and three others were brutally murdered. The Berrigans, one of whom stands convicted of destroying draft records, are charged with plots to bomb and kidnap.

Some trials in our country have been politicized—but not by government. A new technique, recently condemned by Chief Justice Warren Burger, has been developed by the Kunstlers and others who wish to discredit and destroy our system. Such counsel and defendants deliberately seek to turn courtrooms into Roman spectacles—disrupting the trial, shouting obscenities and threatening violence. It is they—not the system—who demean justice.

The answer to all of this was recently given by former California Chief Justice Roger J. Traynor, who said: "It is irresponsible to echo such demagogic nonsense as the proposition that one group or another in this country cannot get a fair trial. . . . No country in the world has done more to insure fair trials."

America has its full share of problems. But significant or systematic government repression of civil liberties is not one of them.

The radical left—expert in such matters—knows the charge of repression is false. It is a cover for leftist-inspired violence and repression. It is also a propaganda line designed to undermine confidence in our free institutions, to brainwash the youth and ultimately to overthrow our democratic system.

It is unfortunate that so many nonradical Americans are taken in by this leftist line. They unwittingly weaken the very institutions of freedom they wish to sustain. They may hasten the day when the heel of repression is a reality—not from the sources now recklessly defamed but from whatever tyranny follows the overthrow of representative government. This is the greatest danger to human liberty in America.

Senator BAYH. Let me just explore that a bit, because you talk about the concern for individual rights, free speech.

Are you of the opinion that certain types of governmental activity can have a chilling effect on the exercise of these rights? In other words, would you give the committee your thoughts on this question: although we have a right to free speech, the right to exercise it, does the presence of governmental agents, the presence of people taking pictures, the presence of a tail on you, following you wherever you go, might this not inhibit one's use of these individual rights?

Mr. POWELL. I can certainly say I don't want anybody tailing me, Senator Bayh. I think it is a little difficult to say, to describe the circumstances under which taking pictures would have inhibiting effect. There are a certain number of people who enjoy having their pictures taken. I would prefer not to, and it would chill me, I can tell you that.

Senator BAYH. Well, we are talking about a delicate balance here. You recognize that in speaking for the Justice Department, some high representatives of that branch of our Government have said that all that is necessary to protect these rights is to have self-discipline.Do you feel that self-discipline is enough to protect our right of free speech, our right to petition, and the others inculcated in the Bill of Rights and the 14th amendment?

Mr. POWELL. Well, I certainly don't wish to comment on anything that——

Senator BAYH. I don't ask you to do that.

Mr. POWELL (continuing). On what the Justice Department says. No; I would not trust any government to self-discipline, Senator Bayh. I think the purpose of the Bill of Rights was to assure there are limitations on what the Government can do.

Senator BAYH. The whole Bill of Rights was so designed, was it not? From the beginning of this Government our Founding Fathers had had rather sad experience with self-discipline and they put that Bill of Rights in there to try to provide some discipline other than self-discipline?

Mr. POWELL. I come from the State that produced Mason, Jefferson, Madison. I think Mason wrote the first Declaration of Rights that went into a constitution in Virginia—well, in this country, perhaps was the model from which our Bill of Rights was drawn. I think it was Madison who led the fight to have the Bill of Rights incorporated into the Constitution for the reasons you have stated.

Senator BAYH. You mentioned the picture-taking incidents. If you had a peaceful assembly in a public place, and there were those present who were criticizing public officials or public policy peacefully, and agents or representatives of law enforcement agencies were present taking pictures around, you don't feel that would have a

chilling effect? This is not the kind that you keep for your scrapbook, you know. [Laughter.]

Mr. POWELL. It is a little hard for me to answer that, Senator. I would think the facts and circumstances would have to be examined carefully. I don't know whether any law is applicable to this or not. I am sure there is no specific constitutional provision as to taking pictures, but I think one can conceive of circumstances where there are no laws and there certainly should be.

Senator BAYH. If there are no laws and there is a court sitting to try to determine whether a person's individual privacy was violated, it should consider whether this was a reasonable tool to be used by the governmental agencies?

Mr. POWELL. I am tempted to say yes, but the honest truth is that I have never considered this area. I have had the general feeling, and I have had one or two clients ask me about harassment by other individuals, not government, for example—telephone calls in the middle of the night, people constantly observing what someone else does. The laws in our State were woefully inadequate. I have not thought, although I must confess I have never studied it carefully, that there was any constitutional provision that would prevent a private citizen from doing this. I just have not studied this, Senator Bayh. But it is a practice that obviously is distasteful to the public, I would think, carried to the extremes that you indicated.

Senator BAYH. Let me just ask one more general question and then I want to yield back to my colleagues so they can ask some questions.

Talking about the right of privacy rather than dealing with a specific factual situation, which perhaps you should not give us your opinion about—and, for the record, this is not just the present administration because this practice started earlier—talking about protecting the rights of individual citizens, we discovered, under the able leadership of our distinguished colleague from North Carolina, the chairman of the subcommittee of which I am proud to be a member, that the U.S. Army had embarked upon a massive spying effort in which some 7 million dossiers were compiled of average individual citizens, in which pictures were taken of anyone who carried a sign or made a speech protesting governmental policy; and we found Sunday school classes, young adult classes, that had been infiltrated by the Army; we found one peace rally in Colorado at which, I think, there were 119 people involved and about 50 of them were governmental agents—are these factors that should be taken into consideration by a judge in his deliberations to see whether a person's constitutional rights had been violated, whether that type of continuous activity was not the kind that the Supreme Court has talked about earlier when they discussed the chilling effect of the invasion of privacy?

Mr. POWELL. I would certainly not favor the type of activity you have described. I read about it in the press. To the extent it exists, I think it is extremely unfortunate; and if a case arose involving those facts, I would certainly think that the Court would have to consider them.

Senator BAYH. Thank you, Mr. Powell.

Mr. Chairman, I will yield back.

The CHAIRMAN. Senator Tunney?

Senator TUNNEY. Thank you very much, Mr. Chairman.

Mr. Powell, when President Nixon announced your nomination, he indicated that he felt that you would be a strict constructionist and a judicial conservative.

What do those terms mean to you?

Mr. POWELL. Senator, the only think I have written out in preparation for this hearing is a partial answer to your question. I read in the press that this question had been asked others.

I would say by way of preface that obviously I am not speaking for the President of the United States. I am trying to sort out my own views. As a lawyer, it rarely occurs to me to think, in fact, it has never occurred to me until recently to think of judicial philosophy. I do have a view as to the role of the Court and I will address that in a moment. I would think that one's philosophy, whether it be with respect to social or economic problems or political problems, whether he is conservative, liberal, or moderate, to use the current terminology, does not necessarily relate to his concept of the role of the Court as a judicial institution. So, if I may, with the permission of the chairman, I would like to read what I wrote out in very simple terms indicating my own concept of the role of the Court.

My thoughts about the role of the Court, expressed as simply as I can, may be summarized as follows:

(1) I believe in the doctrine of separation of powers. The courts must ever be mindful not to encroach upon the areas of the responsibilities of the legislative and executive branches.

(2) I believe in the Federal system, and that both State and Federal courts must respect and preserve it according to the Constitution.

(3) Having studied under then Professor Frankfurter, I believe in the importance of judicial restraint, especially at the Supreme Court level. This means as a general rule, but certainly not in all cases, avoiding a decision on constitutional grounds where other grounds are available.

(4) As a lawyer I have a deep respect for precedent. I know the importance of continuity and reasonable predictability of the law. This is not to say that every decision is immutable but there is normally a strong presumption in favor of established precedent.

(5) Cases should be decided on the basis of the law and facts before the Court. In deciding each case, the judge must make a conscious and determined effort to put aside his own political and economic views and his own predilections and to the extent possible to put aside whatever subtle influences may exist from his own background and experience.

And, finally, although all the three branches of Government are duty bound to protect our liberties, the Court, as the final authority, has the greatest responsibility to uphold the rule of law and to protect and safeguard the liberties guaranteed all of our people by the Bill of Rights and the 14th amendment.

Senator TUNNEY. Thank you very much, Mr. Powell, for that statement. I think that it is one which any person who studied the Constitution could basically agree with.

I am curious about its application, however, to some specific areas. You talked about a strong presumption in favor of judicial precedent. On the other hand, I noted in an article or, rather an interview that you gave in Dunn's Review in September 1968, you answered a

question to this effect: "We have witnessed in recent years an unprecedented concern for the rights of accused persons. In many areas this was overdue but the net effect of court decisions over the past decade has been adverse to law enforcement." Now, in a number of areas the decisions were made by the Supreme Court with a 5 to 4 majority. Do you feel that there is a strong presumption in favor of judicial precedent where you have a 5 to 4 majority of the Court?

Mr. POWELL. I feel that that presumption exists with respect to all precedents. I think the lawyers would also add that generally the longer a case has existed, the more frequently it has been cited and relied upon, the stronger the presumption against overruling it inevitably becomes.

I think, also, if a case is decided by a divided Court and is a recent decision, the presumption perhaps is less vigorous than if it had been decided earlier by a unanimous Court. Just, for example, nobody would suggest today that *Brown* against *Board of Education*, unanimously decided in 1954, is not the law of the land.

Senator TUNNEY. Mr. Powell, I have had an opportunity to read a number of things that you have written, and I would like to quote from some of your speeches and get your comments on what each means, because most of them were rather brief statements of principle, and I think perhaps you could elaborate on them.

You indicated again in this Dunn's Review, "Crime in the Streets Interview," in 1968, and I quote:

"I do think the mass media have considerable responsibility for the spirit of lawlessness and violence that prevails in our country."

Mr. POWELL. Do you wish a comment on that?

Senator TUNNEY. If you could, comment on that.

Mr. POWELL. I have not read that interview since the time I gave it, but if that is all I said, it may have been what I was thinking about was this: I have been deeply interested in education, and one of the things that has impressed itself very deeply on my consciousness in the education world is the impact of television, not only with respect to children in my home but on the basis of studies that have been made in the school systems. Television does have a profound effect on the young. With all due respect to our friends who arrange some of the television programs, there has, in my judgment, over a period of time—I think there has been improvement recently, by the way—but there has been, over a period of time, it would seem to me, far too much emphasis on violence, and violence is one of the scourges of our society; and it has concerned me deeply to see this emphasis on violence, viewed daily by millions of young children. I think that is what I had in mind.

Senator TUNNEY. Were you suggesting a possible censorship of mass media?

Mr. POWELL. No, indeed.

Senator TUNNEY. What are your views on censorship of the mass media or the press?

Mr. POWELL. I believe deeply in the first amendment, and I certainly do not approve of any censorship. I don't think anything I have ever written suggested that.

Senator TUNNEY. Mr. Powell, I would like to ask you just a few questions with regard to civil rights.

Do you feel that the black man has achieved equality in our society under the law?

Mr. POWELL. I do feel that legislation enacted by the Congress and for the most part by the States—and I speak of my State of Virginia, which has just adopted a new constitution; I served on the commission which wrote it—I think under the law our black citizens have achieved equality, I think, by law, perhaps, to a greater extent than in any other country with which I have familiarity.

The question which remains quite clearly is whether, (1) in the implementation of the law at all levels and (2) in the hearts and minds of men, the desired equality has been attained, and I would answer, I think, both of those negatively at this point.

Senator TUNNEY. When President Nixon accepted the nomination to the Presidency in Miami in 1968, he said:

> Let those who have the responsibility of enforcing our law and our judges who have the responsibility to interpret them be dedicated to the great principles of civil rights.

I wonder if you could tell the committee in your own personal record what you have done to advance that dedication to those principles?

Mr. POWELL. I had not written out anything, Senator Tunney, but I did take some notes to try to refresh my recollection. This is not a direct response as to civil rights but it may give you and other members of the committee, Mr. Chairman, some flavor of my extracurricular activities over a fairly long life. This may be an inappropriate comment, but I had a mother and father who had a deep conviction that all human beings were equal and that no one was better than anyone else; and I inherited that and have never departed from it.

I have tried in addition to being active, very active practicing law and very active in the profession, to engage in outside activities which seem to me to be useful in my community and State.

I was an early volunteer in legal aid work in the city of Richmond and went on the board of the Family Services Society which administered under the Community Chest most of the social work for both black and white. I became president of the Family Services Society fairly early in my career.

The criminal justice project of the American Bar Association, which I mentioned earlier, was only one area in which I devoted much of my attention when I was president of the bar association.

The second area related to providing legal services to the poor and this meant primarily for the blacks, and I think some of the statements that have been filed here and to which I will not allude in any detail, document the role that I played in that critical point in our history.

I have referred to the criminal justice project—there are 16 volumes of that and I think if any of you gentlemen have had an opportunity to review them you will be impressed, as I am, by the fact that they are designed to make meaningful the inscription on the front of the Supreme Court Building: "Equal Justice Under Law."

I have spent a good deal of time in education, and some of the statements I think were filed here have alluded to what was done and some of the things I didn't do, some of the things that, perhaps, I tried to do. I am sure that many would view in a different light

my service on the school board in the city of Richmond but we kept the schools open and we tried to be fair to all concerned.

I have served as an officer and on the board of the American Bar Foundation, and if anyone has examined a list of the studies that we have made and the publications that the American Bar Foundation has produced during my tenure over the past 2 years as president, I think he will find a fairly genuine concern for the areas about which you asked me.

There are articles that I have written that may possibly be relevant in this area. I have had a special interest in the jury trial and its preservation and the avoiding of any impairment of it because it is so fundamental to our system. I did an article in the Washington and Lee Law Review on Jury Trials. I did a study, in fact took a leading role in trying to assure fair trial on the very thorny problem of fair trial—free press. Some of the gentlemen in the media are familiar with that and they didn't always agree with me, but I realize a balance had to be drawn and I think real progress has been made in that respect.

I was a participant and a planner of the Conference on Legal Services that was held here in Washington jointly sponsored by the Justice Department and the OEO, at which the entire thrust of the 3-day conference was to assure more adequate legal services for the people who needed them most. For the most part they were our black brothers.

Senator TUNNEY. I have had the opportunity to read materials that have been made available to the committee concerning your record on civil rights, and I felt it was important that you have an opportunity to express yourself today. I think that your record has demonstrated that you are very deeply concerned about giving equal opportunities to all Americans.

I would like to ask just one or two more questions.

Senator HART. Mr. Chairman, if the Senator would permit me to ask just one question in pursuit of this——

Senator TUNNEY. I yield.

Mr. POWELL. Senator Hart.

Senator HART. Have you at any time in the last 10 years in writing or speech voiced opposition to a public accommodation law or ordinance?

Mr. POWELL. No.

Senator TUNNEY. Mr. Powell, do you believe that philosophy is a factor to be considered in confirmation of the Senate of a Supreme Court nominee, or do you feel that evaluation of personal philosophy by the Senate has the effect of politicizing the Court more than it should be politicized?

Mr. POWELL. Has the effect of what, sir?

Senator TUNNEY. Politicizing the Court?

Mr. POWELL. As I said, earlier, I would not consider any inquiry off limits. There may be some inquiries that I think would be inappropriate for me to respond to, but I certainly have no objection to any questions that you or other members of the committee may care to ask me about philosophy. I may not be able to field them very well, but I will do the best I can.

Senator TUNNEY. One last question on that score: With regard to the Constitution, and it gets back to the question of strict constructionism, do you believe that the Constitution is a living document,

and one in which a judge is going to be called upon to make philosophic evaluations based on a 20th century context rather than an 18th century context?

I am thinking particularly of the due process clause; and I am thinking specifically of one example where the Justices were called upon to make a determination of due process without any legal precedents, to my knowledge; that is, the *Billy Sol Estes* case, where television was allowed in the courtroom.

Now, do you feel that under those circumstances that a Justice has to rely exclusively upon historical precedent, or do you feel the Justice can take a look at the world around him and apply a standard of fairness based on what he sees in the modern context?

Mr. POWELL. I think we would all agree that one must start from the language of the Constitution itself, endeavoring to ascertain the meaning of the language. I think we all recognize, as you imply, that certain language in the Constitution, such as the due process clause, the equal protection clause, the commerce clause, for example, in itself affords little in the way of specific guidelines merely as language.

Of course, there is a vast body of history with respect to due process, say, which certainly goes back to 1215, to Magna Carta, and all the English meaning that has been read into it over the years.

But it seems to me that what is really important with respect to the great freedom clauses—those you have mentioned—are the spirit and intent of the Bill of Rights, and obviously they have to be considered in the light of the case before the court.

Senator TUNNEY. Thank you, Mr. Chairman. I yield back. I would like to reserve time after other members of the committee have had an opportunity to question the witness.

The CHAIRMAN. Senator Fong?

Senator FONG. Thank you, Mr. Chairman.

Mr. Powell, I want to join my colleagues in congratulating you on your nomination as Associate Justice of the Supreme Court.

You are a man of considerable holdings, Mr. Powell. I presume so far as holdings in real estate, you shouldn't have any trouble while acting as an Associate Justice, but you have quite a few holdings in various companies. How do you propose to handle your ownership in or stocks in these various companies?

Mr. POWELL. Senator, I think you were perhaps not in the room when Senator Bayh asked me that question. I am happy to answer it again.

Senator FONG. I should like for you to do so.

Mr. POWELL. Right. The shortest answer I can give, and I will elaborate to whatever extent you wish, is that I will endeavor to the best of my ability to comply with the canons of judicial ethics and with the relevant statute which is 28 U.S.C.A. 555. The canons, which are now undergoing revision, provide in substance on this point that a judge should dispose of securities, where he can do so without substantial loss, in companies which are likely to come before the Court.

As I said to Senator Bayh in considerable detail, I have given this a good deal of consideration. He recognizes it as a real problem for me. I have read several articles that have been written on it,

one by Professor Davis, a second that appeared in the Duke Law Review, "Law and Contemporary Problems."

I would endeavor to try to minimize my problem by selling off securities where I can do so without the type of loss referred to in the canons.

Senator FONG. In other words, you will reduce your holdings in these various corporations to holdings in a few companies?

Mr. POWELL. That will be my objective.

Senator FONG. Yes.

Mr. POWELL. I will have some problems, as I stated to Senator Bayh.

Senator FONG. I can understand.

Mr. POWELL. There are several companies which for one reason or another I will not be able certainly in the foreseeable future to get out of.

Senator FONG. Of course, if you have holdings in just a few companies, you could remember such holdings in these particular companies. If you have holdings in a lot of companies, there may come a time when you will forget that you have a particular holding?

Mr. POWELL. That is right, and I can assure you that I will take whatever safeguards or steps may be appropriate or necessary so that I will know which companies I do have holdings in.

Senator FONG. In other words, you will then be able to remember in which companies you have holdings. Then, if cases arise involving those companies, you will disqualify yourself, is that correct?

Mr. POWELL. Yes.

Senator FONG. I heard your remark this morning that within the last 2½ weeks, your views on the right of privacy have dramatically changed. Is that a serious statement, or was that made in jest?

Mr. POWELL. From a personal point of view, it was quite serious. I would hate to have to live in the spotlight that certainly descended on my family the night the President made this announcement. But that is not a lawyer's judgment. I think any human being would have reacted to it the same way. So, from the viewpoint of deciding legal issues, I think that was a statement made in jest.

Senator FONG. Do you feel that your views on the right of privacy have changed because of the questioning and because of the various articles that have appeared in the paper, or because this committee has given it such a thrust——

Mr. POWELL. Oh, no; I don't object at all to this committee performing its duty. I was talking about people stopping me on the street and people wanting to interview my wife and my daughter and coming into our home for conferences. We were delighted to see them all, but I had never seen quite so many before. [Laughter.]

Senator FONG. I see.

Have you changed in your thinking relative to the right of privacy within the past few weeks now that you have been nominated for the Supreme Court? It is one thing to be nominated to the Supreme Court and another to be a private lawyer.

Mr. POWELL. Well, it certainly has changed my life and I would agree with you, my views have changed to that extent.

Senator FONG. I see. I have not read your article in the Richmond Times-Dispatch in August, but I understand that you stated that

"The outcry against wiretapping is a tempest in a teapot." Did you make that statement?

Mr. POWELL. I think I did, sir.

Senator FONG. Could you give us the thrust of that article which appeared in the Richmond Times-Dispatch relative to wiretapping?

Mr. POWELL. Yes, Senator Fong. And, again, as I previously said to Senator Bayh, this was written for the newspaper, directed primarily to the issue whether or not America has a repressive society, and my view was that the number of wiretaps as reported to the officer who administers the court system for the U.S. courts, and I have seen those reports each year, suggests that a relatively limited use has been made of the act of 1968?

Senator FONG. I believe in that Times-Dispatch article you did state that there were only 309 wiretaps from 1969 to 1970; is that correct?

Mr. POWELL. That is what I said, and I think that refers to the Federal cases.

Senator FONG. Yes, Federal wiretaps.

Mr. POWELL. Right. And I believe, Senator, that I have since seen a report that indicated that for last year there were 597, both State and Federal.

Senator FONG. Now, isn't it a fact as stated by Attorney General Mitchell that each wiretap averaged 1,498 intercepts, or separate telephone conversations? If that is true, then actually there were 462,882 seperate telephone conversations in the 309 cases?

Mr. POWELL. I have not seen those figures but I am sure you have it correct, if they are available.

Senator FONG. As I pointed out when Mr. Rehnquist was before this committee last week, I was one of four Senators who voted against final passage of the omnibus crime bill primarily because I thought that the wiretap provisions went too far.

As early as May 1968, when the omnibus crime bill was under consideration, I voiced my strongly held opinion that wiretapping and electronic surveillance were enormously dangerous practices presenting an extraordinary threat to our individual liberties. Wiretapping not only picks up the conversation of the person whose telephone is tapped but also all the innocent people who happen to call or be called on that telephone or whose name is mentioned on that telephone. An unending and unknown force is put into effect when a telephone is tapped. This is true even of court-authorized wiretaps. Even more dangerous, I believe, are taps and bugging and surveillance without court order.

In 1968, I stated that:

> In a democratic society privacy of communication is absolutely essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.

I pointed out that—

> When we open this door of privacy to the government . . . when the door is widely agape . . . it is only a short step to allowing the government to rifle our mails and search our homes. A nation which countenances these practices," I said, "soon ceases to be free."

As early as May 1968, I pointed out that I was fearful that if wiretapping and eavesdropping practices were allowed on a widespread scale, we would soon become a nation in fear—a police state.

As the hearings this year before the Constitutional Rights Subcommittee clearly indicated, whether based upon fact or fancy, we are coming very close to being a nation in fear, all the way from Congressmen, to mayors, to soldiers, to students voicing their fears that they were under surveillance. I am, therefore, particularly interested in hearing from you directly as to your position in regard to wiretapping and electronic surveillance, in general as it relates to the fourth amendment, if you have any philosophical and legal reasons for such position.

Mr. POWELL. I have previously stated, Senator Fong, that my first opportunity to study this subject came when I was a member of the President's Crime Commission. I was appointed to the Subcommittee on Organized Crime, and it became fairly obvious to us, certainly to me, that unless the Government had the authority to wiretap subject to court order in a strictly controlled system, that there would be little hope, if any, of ever coming to grips with organized crime in this country.

Senator FONG. I agree with you we should have court authorized wiretapping on organized crime and in crimes dealing with the national security, but when we go further than that, I think we are really stepping onto very, very dangerous ground. For example, we allow wiretapping in anything that amounts to a felony. As long as it is not a misdemeanor, the prosecutor can go in and ask for authorization to wiretap. How do you feel about that?

Mr. POWELL. I think the category that certainly the Crime Commission was concerned with was primarily organized crime, but it is a little difficult just to say organized crime and nothing else. Organized crime itself engages in criminal activity that covers a fairly broad spectrum of crimes running from murder to extortion, to arson, to kidnaping, and the like. So that I suppose that when the bill was drafted—I had nothing whatever to do with that—that it was deemed necessary to include a spectrum of the major felonies, and the American Bar Association Committee felt the same way when it recommended standards for State legislatures.

Senator FONG. In some States, gambling is more than a misdemeanor.

Mr. POWELL. Well, perhaps the term "gambling" needs to be defined. I am not—I don't know the answer to that. But our study of organized crime. to my surprise, indicated that gambling is the principal activity of organized crime in the final anslysis, and that of the profits that range fantastically from $5, $6, possibly $7 billion a year, from illegal and illicit activity, profits that come primarily from the poor and uneducated people of our country, most of those profits come from gambling.

I see the problem that worries you but the other side of that problem is also very worrisome if we are ever going to bring organized crime within the law. This is what prompted us in the deliberations of the Crime Commission. As I said, I started out without having any preconceived notions whatever.

Senator FONG. Do you feel that there should be wiretapping such as we have at the present time, when we find some of our people are

in constant fear, that their phones have been tapped. That fear is present whether it is well-founded or not. Is it good for such fear to be so widespread? People fear they have been tapped, followed, and bugged. Do you think this is good for the country?

Mr. POWELL. I believe that the Congress was wise in putting, as I recall, a 7-year time limitation on title III; and I believe, Senator McClellan has either introduced a resolution or requested that a study be made before the 7 years expire, addressed primarily to the concerns that you have mentioned, Senator, and I agree that these concerns do exist, and I think the Congress should watch this situation with the diligence which apparently you are.

Senator FONG. I thank you for that answer, Mr. Powell.

Mr. Powell, the fifth amendment reads in pertinent part that:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. * * *

Despite this I understand that in your dissent to President Johnson's National Crime Commission report, you not only opposed the *Miranda* decision of 1966 but you also opposed several Supreme Court decisions protecting the constitutional right against self-incrimination. It is my understanding that you suggested a constitutional amendment to overcome a 1965 ruling that a prosecutor may not comment on the refusal of a defendant to take the witness stand in a State court. Did you feel that way?

Mr. POWELL. There were seven members of the President's Crime Commission who did recommend that unless there could be legislative relief that consideration should be given to a constitutional amendment which would have the effect of overruling the case—I think it was *Griffin* against *California*—where, by a divided Court, the constitution of California which permitted comment on the failure of an accused to take the stand was held unconstitutional under that amendment.

Senator FONG. Do you still feel that the prosecutor should have a right of comment in a case where the defendant does not take the stand?

Mr. POWELL. That was my opinion at that time, Senator. I have not given it mature consideration since. The *Griffin* case is now—this was 1964—7 years old so it has become a precedent that I think is generally followed.

Senator FONG. As I understand, your criminal trial practice has been very limited; is that correct?

Mr. POWELL. It has been nonexistent, Senator.

Senator FONG. You have not practiced criminal law at all?

Mr. POWELL. No, sir.

Senator FONG. That makes it difficult for you to comment.

Mr. POWELL. It is very difficult.

Senator FONG. I see.

Our system of justice is really based on the premise that a man is innocent until proven guilty. If you say that the prosecution may comment on the defendant's not testifying, are you not really shifting the burden of proof to the accused to prove himself innocent rather than requiring the State to prove his guilt beyond a reasonable doubt?

Mr. POWELL. Well, that argument is a very persuasive one. I think the argument that one deals with at the time, and again I am drawing

on a rather ancient memory, is that the language in the fifth amendment says no one shall be compelled to give testimony against himself in a criminal case, and it didn't seem to me that there was compulsion involved in the circumstances you described.

Senator FONG. I am studying, Mr. Powell, several reforms of our Federal grand jury proceedings so as to assure greater legal protection to persons subpoenaed to testify as "witnesses on behalf of the Government" with a view to introducing remedial legislation.

Without considering any specific legislative proposal, would you care to express your views on the practice of subpoenaing a witness to testify before a grand jury on behalf of the Government, when the Government has already produced evidence to that grand jury upon which an indictment is sought against this so-called "witness on behalf of the Government"?

Is not the Government really asking a person to testify against himself in violation of the fifth amendment? In other words, where a grand jury has already been given evidence upon which they are going to indict this man, if they call him under subpoena and say, "You come here and be a witness for the Government," isn't that really tricking him?

Mr. POWELL. Senator, I think perhaps I am not qualified to comment. I have never been before a grand jury in my life. I am not really familiar with the procedure you described. In fact, I never heard of it before.

Senator FONG. Well, do you think it is fair to subpena a person before a grand jury as a witness for the Government after the prosecutor has presented evidence to that very grand jury sufficient to warrant an indictment of that person without his testimony and then ask him a lot of questions?

Mr. POWELL. I wouldn't want to express a legal opinion, but I would say it is very unfriendly. [Laughter.]

Senator FONG. You say it is unfriendly. I will withdraw the question.

Mr. POWELL. Thank you very much.

Senator FONG. The wiretapping provisions were designed to secure evidence so that you can indict an individual. Don't you think once an indictment has been obtained that we should stop there. We shouldn't keep on hounding a person until the day of trial. After a while he reaches the point where he feels he can't even talk to his attorney on the telephone.

Mr. POWELL. Well, he certainly ought not to have his conversations with his lawyer wiretapped. Is that being done?

Senator FONG. Many attorneys tell me they fear that their wires have been tapped. They can't even talk to their clients. A client calls them up and his attorney says, "I am afraid our wire has been tapped." The client too feels he has been tapped. So, neither one can communicate with the other except by personal contact.

Mr. POWELL. Well, I did not know there was wiretapping after a man had been brought to trial.

Senator FONG. After indictment.

Mr. POWELL. After indictment? Pretrial?

Senator FONG. Yes, sir. Evidence has been collected by wiretap to indict him. Do you think that one surveillance should stop there or

do you think that the Government should have the right to continue to wiretap until the date of trial?

Mr. POWELL. Is this with respect to—well, perhaps I shouldn't inquire. I really don't have a basis for a judgment, Senator. I was wondering whether, though, it did apply to the same crime on which the indictment was based or some other crime?

Senator FONG. The same crime. Do you think it is unfair? It is unfriendly; isn't it?

Mr. POWELL. It is unfriendly. I am not familiar with the practice.

Senator FONG. Thank you, Mr. Powell.

Mr. POWELL. Thank you, sir.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Mr. Chairman, I have no questions to ask.

I would just like to take this opportunity to say a few words in behalf of Mr. Powell.

Lewis F. Powell, Jr., is eminently suited and qualified to serve as an Associate Justice of the Supreme Court. He is widely regarded as one of the Nation's most respected and admired lawyers. He has served with distinction as president of the American Bar Association, president of the American College of Trial Lawyers, and president of the American Bar Foundation.

As president of the American Bar Association in 1964 and 1965, Mr. Powell took an active role in spearheading an ABA program of compiling a set of standards for criminal justice. He also was largely responsible for the American Bar Association's endorsement of the OEO legal services program in February 1965.

Mr. Powell is universally regarded by the local community and the people of his State and it appears that no individual or groups are opposed to him from his State.

Throughout his distinguished legal career Lewis Powell has continually exhibited his ability to grasp legal issues and to analyze legal problems. His outstanding academic achievements show he is intellectually capable of upholding the high tradition upon which the Supreme Court was founded and that he will be a credit to the Court.

For these reasons I heartily endorse the nomination of Lewis F. Powell, Jr., to serve as an Associate Justice of the Supreme Court of the United States.

I thank you, Mr. Chairman.

The CHAIRMAN. Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman.

I would like to join with other members of the committee in welcoming Mr. Powell here and offering him congratulations.

Mr. Powell, through the years you have gained a reputation which follows very appropriately in the footsteps of famous Virginians named to the committee, men as George Mason, James Madison, and Thomas Jefferson. As one of those who has very strongly defended the right to dissent, as protected by the first amendment, how do you feel about nonviolent demonstrations as a means to dissent?

Mr. POWELL. I think I have said many times, Senator Mathias, that I share the view you expressed with respect to the sacredness of the right to dissent. I have also said that it seems to me that certain types of demonstrations create a problem that you do not find with certain other types of expression; and I have expressed concern over

the types of demonstrations that are very difficult to control and that get out of hand and that lead to violence, and violence breeds reaction and the reaction sometimes is repressive.

I think that, in a few sentences, sums up my view. I obviously believe in the right peacefully—peaceably I guess it is, to assemble.

I would add this general observation, that the democratic processes in this country seem to me to be basically very sound; and I sometimes wonder if one tries to project himself into the future what historians will say if the massive street demonstration becomes too much of a substitute for the type of rational discussion where there can be a free exchange of views on a rational basis in a different type forum. That is a broad concern.

I would say in fairness that the great majority of the demonstrations in the country, it seems to me, have been orderly and well conducted and well managed. There have been some notable exceptions.

Senator MATHIAS. Do you find it difficult to reconcile the concept that the right to dissent is one of the cherished civil liberties protected by the Constitution with the fact that you say we may have to qualify this, this right, if you are not to expose yourself to the dangers that you have outlined, the danger of repression?

Mr. POWELL. I am afraid I didn't quite follow you, Senator.

Senator MATHIAS. I think we agree that the right to dissent is a basic civil liberty——

Mr. POWELL. Yes.

Senator MATHIAS. Of the United States? You have commented that dissent, even nonviolent dissent, which gets out of hand, may become repressive in itself. At some point then it implies that you would qualify the right of dissent, even nonviolent dissent, and I wondered if you had any difficulty reconciling that with your basic concept of the civil liberty that is involved?

Mr. POWELL. I think what I intended to say was that the line between a peaceful demonstration and one that becomes not peaceful sometimes is difficult to draw. Demonstrations have been known to get out of hand. When they do get out of hand, then government must act; and so the consequences may be varied and somewhat unattractive. If they get out of hand they impair the rights of innocent people. If they get out of hand they also provoke action that sometimes may be overreaction, but I do not—I certainly do not express any reservation whatever as to the right peacefully to demonstrate.

Senator MATHIAS. The difficult line it would seem would be the line that must be drawn by executive officials, policemen, and ultimately by courts as to where you make this qualification, where you come to the dividing line——

Mr. POWELL. Yes.

Senator MATHIAS (continuing). As to what is in fact a nonviolent demonstration of dissent and what has within it the seeds of a greater danger?

Mr. POWELL. Yes.

Senator MATHIAS. One of the most important matters facing the organized American bar in the last several years has been that of affording legal services to not only the indigents but also to those citizens who have limited means. I wonder if you would outline for the committee what your position has been on this subject?

Mr. POWELL. I share the view you express, especially as of today, as contrasted perhaps with the midsixties when the bar moved very vigorously to try to broaden, as indeed the Congress did, the availability of legal services for the poor. The problem today with respect to the people who are not properly classified as the poor, but who have incomes above the poverty level but not large enough to enable them readily to hire counsel, is quite acute. Toward the end of my term as president of the American Bar Association I appointed a committee under the chairmanship of William McAlpin of St. Louis, I drew the resolution that specified the authority and powers of the committee, and it was directed to examine this whole problem including the question whether group legal services is an answer; and that committee has produced several reports.

The American Bar Foundation has made an elaborate study. Nobody has yet found satisfactory answers that are broad enough to deal with the problem, but I certainly concur in your judgment that it is one of the more serous problems confronting the organized bar.

Senator MATHIAS. Would you feel that it is a function of the profession to provide this representation or does it become a function of government?

Mr. POWELL. I would hope that the profession can find reasonable solutions. I doubt that you will ever find a solution that assures that every citizen can find a lawyer when he wants him at a price which he can afford to pay. But there have been forward movements with respect to group legal services. There is currently some experimentation with respect to insurance to provide coverage comparable in a sense to Blue Cross; there has been some activity, particularly in the larger cities, with neighborhood legal offices and, of course, the old technique of lawyer referral is a system which I think almost every bar continues to utilize in this respect.

Senator MATHIAS. As a member of the President's Commission on Law Enforcement and Administration of Justice, you joined with several others in the minority statement which criticized the approach taken by the Supreme Court in *Miranda* and in the *Escobido* cases, and you later, writing for the FBI Law Enforcement Bulletin in October of this year, in effect, reaffirmed that judgment. You said, and I am quoting from the FBI Journal: "In recent years dramatic decisions of the Supreme Court have further strengthened the rights of accused persons and correspondingly limited the powers of law enforcement. There are no constitutional decisions in other countries comparable to those rendered in the cases of *Escobido* and *Miranda*."

Now, I am wondering if, No. 1, you think these cases should be overruled?

Mr. POWELL. I would think perhaps, Senator Mathias, it would be unwise for me to answer that question directly. I will certainly say that as of the time the supplemental statement was written for the Crime Commission Report that I thought the minority opinions were the sounder opinions. Those decisions, as I recall, were 5 to 4. I was concerned with the impact of those decisions on two separate but obviously related issues. One was the right of the law enforcement people to do on-the-scene interrogation primarily before they got back to the stationhouse and, second, was the impact of those decisions on voluntary confessions.

Now, the previous—on the first point as to on-the-scene interrogation, it seemed very difficult to me then, and perhaps it still is, although it is really not my field—I did ride in police cars in Richmond when I was on the Commission; and it is pretty awkward, really, when you are on the scene and a crime has been committed and you have one suspect or one fellow who you know was involved and not to be able to interrogate him to try to put your hands on who his confederates were; so it is a very real problem.

The other problem relating to confessions is a more philosophical one. Most of the convictions in the criminal courts of our country are on pleas of guilty, and most of the pleas of guilty resulted—our Commission studies disclosed—from admission of guilt, and it seemed at the time those decisions were decided, at least the minority of judges so thought, that the requirement that everyone be advised immediately of his right to counsel and that he understand clearly that he had that right then and there, would result in eliminating to a large extent the type of admissions that had been relied on so largely in the criminal justice system over the years.

I personally then preferred the English system which is based on whether or not the confessions are voluntary in fact, and that was the rule in the United States until those decisions.

Now, I have not made any recent thorough study. I am aware that there are some analyses that have been made. I think there was one made by the Yale Law Journal that indicates that some of the fears that I had with respect to on-the-scene interrogation, for example, have not materialized in fact, but I personally have not seen the data.

Senator MATHIAS. What I take you to be saying is that you feel that whatever safeguards are provided by the rules in those cases are inappropriate at this particular point in the criminal process?

Mr. POWELL. I would rather put it this way: We said in our supplemental statement that we recognized that the Court had very difficult issues to decide. Indeed on the facts in Escobido, I think, the Court decided the case, plainly correctly, but our concern was with respect to the scope of the opinion rather than with the precise decision.

We thought that it was one of those very close constitutional issues and there was no criticism whatever of the majority. We recognized it had a perfectly clear line of argument to support its decision. I just happened to have the view that the minority opinion was the sounder one.

Senator MATHIAS. In the next line in this same article, you used the phrase, I think you quoted before, that "The need is for greater protection—not of criminals but of law-abiding citizens."

Would you say that increasing protection for law-abiding citizens is necessarily at the expense of the other?

Mr. POWELL. No, not necessarily, and I would like to make it perfectly clear that I don't think I have ever criticized the Court for deciding these historic cases. In fact, in my talks to the New York State Bar Association and to the fourth circuit judicial conference, I emphasized the fact that probably most of the decisions of the so-called Warren court in the criminal justice area will be regarded as landmarks in the law. The two you mentioned were two that were exceptions from the broad sweep of my judgment on that line of decisions.

I would make the general observation, Senator Mathias, and here I speak primarily as a citizen, not being in the criminal law myself,

that these cases have contributed to the delay that is now one of the more serious problems in the system. We all know, all of us who are lawyers know, that the criminal process now drags out in our country far too long either for the good of society or for the good of the person accused of crime; and I would think that the first priority in terms of all who have responsibility—the Congress and the courts and the organized bar—is to address the problem of delay in courts. It is in the civil system also, but in the criminal system about which we are now talking it has reached the point that causes real concern.

Senator MATHIAS. I certainly agree with you and that is why I joined with the other members of the committee here in sponsoring the Speedy Justice Act which——

Mr. POWELL. Yes.

Senator MATHIAS (continuing). Implements that concept.

Would you go so far in providing greater protection for citizens as to support some compensation of victims of crime? Would that be one of the steps that the Government might take?

Mr. POWELL. I think the English have moved into that area and it has interested me; and I think I have suggested that it certainly merited serious study. It is a great tragedy to be a victim of crime and have no resources with which to compensate one's self. What it would cost in view of the magnitude of crime in our country, I have no idea; but this is a tragic void in our system.

Senator MATHIAS. At least it is an area which you feel might be usefully reviewed and surveyed?

Mr. POWELL. I certainly do.

Senator MATHIAS. Turning, if we might, to your own backyard, I understand that when a part of Chesterfield County was annexed by the city of Richmond, that you favored that annexation. I am also told that one of the effects of the annexation was to dilute the voting power of the black community within the city of Richmond since it annexed areas that are primarily white and the city council of Richmond is elected at large and not by wards or districts. I am wondering if you would comment on the role which you took in supporting that annexation?

Mr. POWELL. I will be happy to do so.

My only connection with this entire subject, apart from being a citizen in the community, is this: The mayor of the city of Richmond and the city attorney had arranged a conference with the Attorney General to discuss the Attorney General's role under the Voting Rights Act of 1965 with respect to the annexation.

For the benefit of members of the committee who may not be aware of it, the city of Richmond had annexed a portion of the adjacent county of Chesterfield and, under Virginia law, a city is separate and apart from all counties. In other words, it is not a part of any county. It has its own tax structure and the county has a separate tax structure.

Senator MATHIAS. One of the anomalies that Maryland and Virginia share.

Mr. POWELL. Do they have——

Senator MATHIAS. The city of Baltimore is in no county.

Mr. POWELL. Well, you understand this part of the problem.

The mayor asked me if I would accompany him to the conference because of my having served as chairman of the Commission which

wrote the council-manager form of government for the city of Richmond; and when we wrote that new charter for the city we abolished the ward system which had been an inequity in our city, as I viewed it, for many years; and we went to elections at large.

There had been periodic discussions of going back to some form of ward system without regard to this annexation phase.

I had also, when asked for my opinion, opposed going back to a ward system. A ward system in a city as small as Richmond seems to me to be undesirable. In any event I went with the mayor to see the Attorney General and I gave the Attorney General a memorandum which I think has been filed with this committee; and in that memorandum I argued that the annexation was in the best interests of all of the citizens of the community, and I feel that way deeply.

It undoubtedly had the effect of diluting the black vote, but every annexation, certainly in States which have the population mix that Virginia has, would have that effect.

I was in the preceding annexation case in the city of Richmond as counsel for Henrico County and I had some familiarity with annexation law and with the reasons why annexations are allowed in the State of Virginia; and I can assure this committee that those reasons had nothing whatever to do with race. They were economic, and if the city of Richmond is compelled to stay within its present boundaries, it will result, in the long run, in my judgment, in a disastrous situation for all of the people who are forced to live there.

Senator MATHIAS. One final question, Mr. Chairman.

It seems to me that the general public—what we might call law-abiding citizens—has the greatest interest of all in the reduction of the rate of recidivism and, therefore, in the kind of a criminal process which results in speedy trials, better prisoner rehabilitation, and a more effective penal system which is corrective and not just a period of storage. Would you agree? Would you say that this great mass of citizens—these law-abiding citizens—have themselves an interest in an enlightened criminal system, and in the safeguards which are provided by such a criminal system?

Mr. POWELL. I certainly subscribe to that.

Senator MATHIAS. Thank you very much, Mr. Chairman.

Senator MCCLELLAN (presiding). Thank you.

Mr. Powell, I wish to congratulate you upon receiving this nomination and also strongly to commend the President for making the nomination.

I find that after examining every bit of available information about you, there is no room for doubt about your qualifications. You appear to be eminently qualified, and you are so regarded by members of the bar throughout the country.

I was especially pleased to receive two letters from leading members of the bar in my State, one from Mr. Edward L. Wright, a past president of the American Bar Association, and one from Mr. Courtney C. Crouch, a past president of the Arkansas Bar Association, both of whom know and worked with you in the American Bar Association.

I would like to insert these letters in the record if they have not already been—one hasn't because I received it this morning.

Mr. Wright, in his letter to me of November 2, stated:

I have known Lewis F. Powell, Jr., intimately for many years and have worked extremely closely with him in many American Bar Association matters. He is a truly great man, whether measured by his impeccable character, his outstanding intellect, or his unselfish activities in the genuine public interest. In my opinion he will become one of the outstanding and recognized jurists of all times to sit on the Supreme Court of the United States.

I thought you would be interested to know what your friend and associate, Mr. Wright of Arkansas, said.

(The letter referred to appears in the hearing on November 4, 1971.)

Senator McCLELLAN. I now quote from a letter I received this morning from Mr. Courtney C. Crouch, a past president of the Arkansas Bar Association. I believe he was president at the time you served as president of the American Bar Association. He says:

I first became acquainted with Mr. Powell in 1964 as our paths crossed when he was President of the American Bar Association and I was President Elect of the Arkansas Bar Association, and since that time I have followed his career with great interest and hold him in the highest esteem.

His reputation as one of the outstanding lawyers of the nation and his impeccable character are so well known that anything I might say would be guilding the lily.

Suffice to say, in my opinion the President made a very wise selection when he sent the name of Lewis F. Powell, Jr., to the Senate. He will add great stature to our High Court.

I was very pleased to receive those communications and others from my State.

Mr. POWELL. Thank you very much, Senator.

CROUCH, BLAIR, CYPERT & WATERS,
ATTORNEYS AT LAW,
Springdale, Ark., November 1, 1971.

Hon. JOHN L. MCCLELLAN,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: I sincerely hope that your Judiciary Committee will look with great favor upon the Honorable Lewis F. Powell, Jr. for one of the positions on the Supreme Court.

I first became acquainted with Mr. Powell in 1964 as our paths crossed when he was President of the American Bar Association and I was President Elect of the Arkansas Bar Association, and since that time I have followed his career with great interest and hold him in the highest esteem.

His reputation as one of the outstanding lawyers of the nation and his impeccable character are so well known that anything I might say would be guilding the lily.

Suffice to say, in my opinion the President made a very wise selection when he sent the name of Lewis F. Powell, Jr. to the Senate. He will add great stature to our High Court.

With very kindest personal regards.

Sincerely yours,

COURTNEY C. CROUCH.

Senator McCLELLAN. Mr. Powell, I have not known you very well personally. The first time I think that you came to my attention is when you served on the President's Crime Commission back in 1967. I admired your work there and I want to refer to some of it a moment later. In the meantime, I would like to ask you just a few questions and make a brief statement for the record.

A lot of the questioning here at this hearing has centered on wiretapping. The Congress in 1968 passed the Omnibus Crime Control Act, title III of which dealt with wiretapping. I note from the record in the Senate that an effort was made in the Senate—title III of the

act was in the bill as reported out by the Senate Judiciary Committee—to strike out title III of the bill.

You are familiar with this history, but I would point out for this record, that after considerable debate, the Senate voted 68 to 12 not to strike title III out of the bill.

The part of title III dealing with the constitutional right of the President to direct and order wiretapping in security cases was discussed only briefly, but it was included in the motion, of course, to strike the whole title. No separate amendment was offered to strike that portion of the bill. We dealt with it on the theory that if the President had the constitutional power to order that kind of surveilliance to protect the country from foreign enemies or to protect the internal security of the country, anything that we legislated, anything we tried to do by limiting him, would be unconstitutional, even though there might be, in that particular area, still some doubt as to whether he has those powers.

However, I do believe six Presidents, beginning with President Roosevelt, have recognized or assumed that they did have such powers under the Constitution and no effort by legislation, so far as I know, has ever been made to deny the power to the President because it was believed that it is was not his under the Constitution.

When the 1968 act reached final passage in the Senate the vote was—with title III in it—72 to 4 for passage.

In the House, the bill passed with title III in it by a vote of 368 to 17.

The 1968 act authorizes, as you know, States to enact wiretapping laws not inconsistent with the Federal statute. Since then, some 18 or 36 percent of the States have adopted similar statutes.

Now, the point I wish to make is this: From my viewpoint the legislature, the Congress, has established national policy with respect to wiretapping by these votes, as I have indicated.

Now, as a member of the court, although you might think this not a wise policy, and you might disagree with the policy that the legislature—the Congress—has adopted and you might feel it was unwise to grant these powers under court supervision, would you feel that you had a right simply because you may disagree with the policy to hold the act unconstitutional?

Mr. POWELL. Well, as I have said, Senator, I would certainly not consider it appropriate to inject my own personal views with respect to a constitutional question of an act of Congress.

Senator MCCLELLAN. In my judgment, when the Congress has spoken, that is the law of the land; it is the national policy; and it seems to me that those who disagree with that policy should find their remedy in the halls of Congress.

It is no question of whether you favor the act, as I see it, or whether you like all of its provisions or don't. The only thing that would be before you would be did the accused receive a fair trial under due process; and is the statute constitutional?

Let me ask the question another way. If you found it constitutional, would you, and I am sure you would, but I ask this for the record, would you enforce it as a member of the highest court of the land?

Mr. POWELL. The answer to that is clearly an affirmative.

Senator MCCLELLAN. Certainly.

Then, the view I have—and I won't ask you to agree or disagree—I feel where the Congress enacts a statute that is constitutional, it is binding on the Supreme Court. I don't think it has the right to, by edict or some process, to legislate or attempt to legislate that act away or to hold it to be invalid because of personal views on what policy should be. That is what "strict constructionism" is to me. I don't know what it means to others, but I believe if the act is constitutional, it is the Congress' prerogative to set national policy in those areas within the framework of the Constitution and that that policy should stand and not be overruled by a court because the court's philosophy is that it was bad policy.

Mr. POWELL. I certainly subscribe to those views, Senator.

Senator MCCLELLAN. Mr. Powell, as I mentioned a while ago, you first came to my attention as a member of the President's Crime Commission in 1967. In the report of the Crime Commission, additional views were submitted by you and Mr. Jaworski, Mr. Malone, and Mr. Storey. I have before me the excerpts of those views from that report. I have read them and read them approvingly.

May I inquire if you still subscribe to the general views expressed in the additional views that you submitted at that time?

Mr. POWELL. As I think I said in response to questions from Senator Mathias, they were certainly my views at the time. I know of no reasons why at this time I should have different views although in fairness, it is a fact that some of the issues have not been reexamined by me since my study as a member of that Commission.

Senator MCCLELLAN. Very well.

I have also before me a copy of your bar association of the city of Richmond address of April 15, 1971. You are familiar with that?

Mr. POWELL. I am, sir.

Senator MCCLELLAN. In general, does that still reflect your views?

Mr. POWELL. It does.

Senator MCCLELLAN. And your philosophy?

Mr. POWELL. Yes, sir.

Senator MCCLELLAN. I should like to have these items inserted in the record without objection at this point.

I have also asked the staff of the Criminal Laws and Procedures Subcommittee to prepare in a memorandum a summary of all wiretapping legislation and decisions and to attached thereto excerpts from some of the debate, particularly on the question of the President's powers, the memorandum of President Franklin D. Roosevelt, who really initiated this concept that the President has the inherent power under the Constitution to order wiretapping in internal security cases, the memorandum from Mr. Tom Clark, Attorney General, to President Truman, dated July 1946, together with President Truman's notation thereto, and the memorandum of June 30, 1965, of President Lyndon Johnson regarding the same subject.

I ask unanimous consent that these be inserted in the record so that readers of this record will have this information on this particular subject.

Very well, they will be inserted.

Are there any other quick questions before we recess for lunch?

(The material referred to follows.)

The Challenge of Crime in a Free Society

(Additional views of Messrs. Jaworski, Malone, Powell, and Storey)

We have joined our fellow members of the Commission in this report and in commending it to the American people. This supplemental statement is submitted in support of the report for the purpose of opening up for discussion—and perhaps for further study and action—areas which were not considered explicitly in the report itself. These relate to the difficult and perplexing problems arising from certain of the constitutional limitations upon our system of criminal justice.

CONSTITUTIONAL LIMITATIONS

The limitations with which we are primarily concerned arise from the Fifth and Sixth Amendments to the Constitution of the United States as they have been interpreted by the Supreme Court in recent years. The rights guaranteed by these amendments, and other provisions of the Bill of Rights, are dear to all Americans and long have been recognized as cornerstones of a system deliberately designed to protect the individual from oppressive government action. As they apply to persons accused of crime, they extend equally to the accused whether he is innocent or guilty. It is fundamental in our concept of the Constitution that these basic rights shall be protected whether or not this sometimes results in the aquittal of the guilty.

We do not suggest a departure from these underlying principles. But there is a serious question, now being increasingly posed by jurists and scholars,[1] whether some of these rights have been interpreted and enlarged by Court decision to the point where they now seriously affect the delicate balance between the rights of the individual and those of society. Or, putting the question differently, whether the scales have tilted in favor of the accused and against law enforcement and the public further than the best interest of the country permits.

It is concern with this question which prompts us to express these additional views. As the people of our country must ultimately decide where this balance is to be struck, it is important to encourage a wider understanding of the problem and its implications.

In 1963 Chief Judge Lumbard of the Court of Appeals of the Second Circuit warned:

> *[W]e are in danger of a grievous imbalance in the administration of criminal justice* * * *.
>
> *In the past forty years there have been two distinct trends in the administration of criminal justice. The first has been to strengthen the rights of the individual; and the second, which is perhaps a corollary of the first, is to limit the powers of law enforcement agencies. Most of us would agree that the development of individual rights was long overdue; most of us would agree that there should be further clarification of individual rights, particularly for indigent defendants. At the same time we must face the facts about indifferent and faltering law enforcement in this country. We must adopt measures which will give enforcement agencies proper means for doing their jobs. In my opinion, these two efforts must go forward simultaneously.*[2]

The trends referred to by Judge Lumbard have had their major impact upon law enforcement since 1961 as a result of far-reaching decisions of the Supreme Court which have indeed effected a "revolution in state criminal procedure." [3]

THE COURT'S DIFFICULT ROLE

The strong emotions engendered by these decisions, for and against both them and the Court, have inhibited rational discourse as to their actual effect upon law enforcement. There has been unfair—and even destructive—criticism of the Court itself. Many have failed to draw the line, fundamental in a democratic society, between the right to discuss and analyze the effect of particular decisions, and the duty to support and defend the judiciary, and particularly the Supreme Court, as an institution essential to freedom. Moreover, during the early period of the Court's restraint with respect to State action, there were many examples of gross injustice in the State courts and of indefensible inaction on the part of State

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[1] See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965); Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 Nw. U.L. Rev. 506 (1966); Traynor, *The Devils of Due Process in Criminal Detection, Detention and Trial*, 33 U. Chi. L. Rev. 657 (1966).

[2] Lumbard, *The Administration of Criminal Justice: Some Problems and Their Resolution*, 49 A.B.A.J. 840 (1963). Judge Lumbard is chairman of the American Bar Association's Criminal Justice Project.

[3] George, *Constitutional Limitations on Evidence in Criminal Cases* 3 (1966).

legislatures. In short, there was often a pressing need for action due to neglect elsewhere, and many of the great decisions undoubtedly brought on by such neglect have been warmly welcomed.

Whatever the reason, the trend of decisions strikingly has been towards strengthening the rights of accused persons and limiting the powers of law enforcement. It is a trend which has accelerated rapidly at a time when the nation is deeply concerned with its apparent inability to deal successfully with the problem of crime. We think the results must be taken into account in any mobilization of society's resources to confront this poblem.

THE ACCUSATORY SYSTEM

In any attempt to assess the effect of this trend upon law enforcement it is necessary to keep in mind the essential characterstics of our criminal system. Unlike systems in many civilized countries, ours is "accusatory" in the sense that innocence is presumed and the burden lies on the State to prove in a public trial the guilt of the accused beyond reasonable doubt. The accused has the right to a jury trial, and—in most if not all States—the added protection that a guilty verdict must be unanimous.

Other characteristics which have marked our system include the requirements of probable cause for arrest, prompt arraignment before a judicial officer, indictment or presentment to a grand jury, confrontation with accusors and witnesses, reasonable bail, the limitation on unreasonable searches and seizures, and habeas corpus.

Argument and controversy have swirled around the interpretation and application of many of these rights. The drawing of a line between the obvious need for police to have reasonable time to investigate and the right of an accused to a prompt arraignment occasioned one of the most intense controversies.[4]

There also has been serious dissatisfaction with the abuse of habeas corpus and especially the flood of petitions resulting from decisions broadening the power of Federal courts to review alleged denials of constitutional rights in State courts.[5] No other country affords convicted persons such elaborate and multiple opportunities for reconsideration of adjudication of guilt.[6]

Another constitutional limitation, affecting criminal trials and now being increasingly questioned,[7] requires that a conviction be set aside automatically whenever material evidence obtained in violation of the Bill of Rights was received at the trial. The purpose of the rule is not related to relevance, truth or reliability, for the evidence in question may in fact be the most relevant and reliable that possibly could be obtained. Rather, the reason assigned for the preemptory exclusion is that there is no other effective method of deterring improper action by law enforcement personnel.

ESCOBEDO AND MIRANDA

But the broadened rights and resulting restraints upon law enforcement which have had the greatest impact are those derived from the Fifth Amendment privilege against self-incrimination and the Sixth Amendment assurance of counsel.

The two cases which have caused the greatest concern are *Escobedo* v. *Illinois* [8] and *Miranda* v. *Arizona*.[9] In *Miranda* the requirements were imposed that a suspect detained by the police be warned not only of his right to remain silent and that any statement may be used against him at trial, but also that he has the right to the presence of counsel and that counsel will be furnished if he cannot provide it, before he can be asked any questions at the scene of the crime or elsewhere. The suspect may waive these rights only if he does so "voluntarily, knowingly and intelligently" and all questioning must stop immediately if at any stage the person indicates that he wishes to consult counsel or to remain silent.

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[4] See *Mallory* v. *United States*, 354 U.S. 449 (1957).

[5] *Fay* v. *Noia*, 372 U.S. 391 (1963); *Townsend* v. *Sain*, 372 U.S. 293 (1963). In 1941 fiscal year there were only 127 petitions; by 1961 there were 984. The number escalated to 3,531 in 1964; during the first 6 months of fiscal 1965 there were 2,460 applications (an increase of 32.7 percent over the previous 6 months' period). See 90 A.B.A. Rep. 463 (1965). The *Townsend* case, to take one dreary example, was in the courts for more than 10 years after conviction of the defendant, with 6½ years being consumed in various habeas corpus proceedings. The great majority of these petitions are not meritorious. See Ibid.

[6] The Commission's report, ch. 5, contains helpful recommendations as to what the States can do to minimize frivolous habeas corpus petitions.

[7] See Friendly, *supra* at 951–53.

[8] 378 U.S. 478 (1964).

[9] 384 U.S. 436 (1966).

Although the full meaning of the code of conduct prescribed by *Miranda* remains for future case-by-case delineation, there can be little doubt that its effect upon police interrogation and the use of confessions will drastically change procedures long considered by law enforcement officials to be indispensable to the effective functioning of our system. Indeed, one of the great State chief justices has described the situation as a "mounting crisis" in the constitutional rules that "reach out to govern police interrogation." [10]

THE FATE OF POLICE INTERROGATIONS

If the majority opinion in *Miranda* is implemented in its full sweep, it could mean the virtual elimination of pretrail interrogation of suspects—on the street, at the scene of a crime, and in the station house—because there would then be no such interrogation without the presence of counsel unless the person detained, howsoever briefly, waives this right. Indeed, there are many who now agree with Justice Walter V. Schaefer who recently wrote:

The privilege against self-incrimination as presently interpreted precludes the effective questioning of persons suspected of crime.[11]

In *Crooker* v. *California*, the Court recognized that an absolute right to counsel during interrogation would "preclude police questioning—*fair as well as unfair* * * *." [12] Mr. Justice Jackson, familiar with the duty and practice of the trial bar, perceptively said:

[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.[13]

There will, it is true, be a certain number of cases in which the suspect will not insist upon his right to counsel. If he makes admissions or a formal confession, the question whether his waiver of counsel was "voluntarily, knowingly and intelligently" made will then permeate all subsequent contested phases of the criminal process—trial, appeal and even post conviction remedies. And the prosecution will bear the "heavy" burden of proving such waiver; mere silence of the accused will not suffice; and "any evidence" of threat, cajolery or pressure by the government will preclude admission.

The employment of electronic recorders [14] and television possibly may enable police to defend such an interrogation if conducted in the station house. But in the suddenness of a street encounter, or the confusion at the scene of a crime, there will be little or no opportunity to protect police interrogation against the inevitable charge of failing to meet *Miranda* standards. The litigation that follows more often than not will be a "trial" of the police rather than the accused.

There are some who argue that further experience is needed to determine whether police interrogation of suspects is necessary for effective law enforcement. Such experience would be helpful in defining the dimensions of the problem. But few can doubt the adverse impact of *Miranda* upon the law enforcement process.

Interrogation is the single most essential police procedure. It benefits the innocent suspect as much as it aids in obtaining evidence to convict the guilty. Mr. Justice Frankfurter noted:

Questioning suspects is indispensable in law enforcement.[15]

The rationale of police interrogation was well stated by the Second Circuit Court of Appeals in *United States* v. *Cone:*

The fact is that in many serious crimes—cases of murder, kidnapping, rape, burglary and robbery—the police often have no or few objective clues with which to start an investigation; a considerable percentage of those which are solved are solved in whole of in part through statements voluntarily made to the police by those who are suspects. Moreover, immediate questioning is often instrumental in recovering kidnapped persons or stolen goods as well as in solving the crime. Under these circumstances, the police should not be forced unnecessarily to bear obstructions that irretrievably forfeit the opportunity of securing information under circumstances of

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[10] Traynor, *supra* at 664. Chief Justice Traynor discussed this "mounting crisis" in the Benjamin N. Cardozo Lecture at the Association of the Bar of the City of New York on Apr. 19, 1966, prior to the Court's decision in *Miranda*.

[11] Schaefer, *supra* at 520. See also Justice Schaefer's first lecture in the 1966 Julius Rosenthal Lectures. Northwestern University Law School 8 (unpublished manuscript).

[12] 357 U.S. 433, 441 (1958), the holding of which was overruled in *Miranda*, *supra* at 479 n. 48. [Emphasism in original.]

[13] *Watts* v. *Indiana*, 338 U.S. 49, 59 (1949) (dissenting opinion).

[14] As recommended in *Model Code of Pre-Arraignment Procedure* § 4.09 (Tent. Draft No. 1, 1966).

[15] *Culombe* v. *Connecticut*, 367 U.S. 568, 578 (1961), quoting *People* v. *Hall*, 413 Ill. 615, 624, 110 N.E. 2d 249, 254 (1953).

spontaneity most favorable to truth-telling and at a time when further information may be necessary to pursue the investigation, to apprehend others, and to prevent other crimes.[16]

THE FUTURE OF CONFESSIONS

The impact of *Miranda* on the use of confessions is an equally serious problem. Indeed, this is the other side of the coin. If interrogations are muted there will be no confessions; if they are tainted, resulting confessions—as well as other related evidence—will be excluded or the convictions subsequently set aside. There is real reason for the concern, expressed by dissenting justices, that *Miranda* in effect proscribes the use of all confessions.[17] This would be the most far-reaching departure from precedent and established practice in the history of our criminal law.

Until *Escobedo* and *Miranda* the basic test of the admissibility of a confession was whether it was genuinely voluntary.[18] Nor had there been any serious question as to the desirable role of confessions, lawfully obtained, in the criminal process. The generally accepted view had been that stated in an early Supreme Court case:

[T]he admissions or confessions of a prisoner, when voluntary and freely made, have always ranked high in the scale of incriminating evidence.[19]

It is, of course, true that the danger of abuse and the difficulty of determining "voluntariness" have long and properly concerned the courts. Yet, one wonders whether these acknowledged difficulties justify the loss at this point in our history of a type of evidence considered both so reliable and so vital to law enforcement.

THE "PRIVILEGE" AND CRIMINAL TRIAL

The impact upon law enforcement of the privilege against self-incrimination as now construed by the Court is not confined to the *Miranda* issues of interrogation and confession. The privilege has always protected an accused from being compelled to testify; it now prevents any comment by judge or prosecutor on his failure to testify; and it limits discovery by the prosecution of evidence in the accused's possession or control.[20] It was not until 1964 that the privilege was held applicable to the States by virtue of the 14th amendment,[21] and the final extension came in 1965 when the Court held invalid a State constitutional provision permitting the trial judge and prosecutor to comment upon the accused's failure to testify at trial.[22]

The question is now being increasingly asked whether the full scope of the privilege, as recently construed and enlarged, is justified either by its long and tangled history or by any genuine need in a criminal trial.[23] There is agreement, of course, that the privilege must always be preserved in fullest measure against inquisitions into political or religious beliefs or conduct. Indeed, the historic origin and purpose of the privilege was primarily to protect against the evil of

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[16] 354 F. 2d 119, 126, *cert. denied*, 384 U.S. 1023 (1966). Perhaps the best published statement of the considerations favoring in-custody interrogation is that found in the *Model Code of Pre-Arraignment Procedure*, Commentary § 5.01, at 168–74 (Tent. Draft No. 1, 1966). See also Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 Colum. L. Rev. 62 (1966); Friendly, *supra*, at 941, 948.

[17] Mr. Justice White, joined by Mr. Justice Harlan and Mr. Justice Stewart, said "[T]he result [of the majority holding] adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not." *Miranda* v. *Arizona*, *supra* at 538 dissenting opinion).

[18] Indeed, until very recently and back through English constitutional history, a distinction had been made between the privilege against self-incrimination and the rules excluding compelled confessions. See Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949); 3 Wigmore, *Evidence* 819 (3d ed. 1940). But see *Bram* v. *United States*, 168 U.S. 532, 542 (1897). In the United States, the common law and the due process clauses of the Constitution were construed to provide a voluntariness standard for the admissibility of confessions. See *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935 (1966). The Fifth Amendment was adopted in 1791. Before that time, in England and in this country, the privilege was construed to apply only at judicial proceedings in which the person asserting the privilege was being tried on criminal charges; at preliminary hearing the magistrate freely questioned the accused without warning of his rights and any failure to respond was part of the evidence at trial, such evidence being given by testimony of the magistrate himself. See Morgan, *supra* at 18. Dean Wigmore and Professor Corwin suggest that the intent of the framers of the Fifth Amendment was to retain these limitations upon the privilege See Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 2 (1930); 8 Wigmore, *Evidence* § 2252, at 324 (McNaughton rev. 1961).

[19] *Brown* v. *Walker*, 161 U.S. 591, 596 (1896). Moreover, as Judge Friendly has pointed out: "[T]here is no social value in preventing uncoerced admission of the facts." Friendly, *supra* at 948.

[20] See 8 Wigmore, *Evidence* § 2264 (McNaughton rev. 1961). Beyond the trial itself, the privilege protects grand jury witnesses (*Counselman* v. *Hitchcock*, 142 U.S. 547 (1892)); witnesses in civil trial (*McCarthy* v. *Arndstein*, 266 U.S. 34 (1924)); and witnesses before legislative committees (*Emspak* v. *United States*, 349 U.S. 190 (1955); *Quinn* v. *United States*, 349 U.S. 155 (1955)).

[21] *Malloy* v. *Hogan*, 378 U.S. 1 (1964).

[22] *Griffin* v. *California*, 380 U.S. 609 (1965).

[23] See, e.g., McCormick, *The Scope of Privilege in the Law of Evidence*, 16 Texas L. Rev. 447 (1938); Schaefer, *supra;* Traynor, *supra;* Warden, *Miranda—Some History, Some Observations and Some Questions*, 20 Vand. L. Rev. 39 (1966).

governmental suppression of ideas. But it is doubtful that when the Fifth Amendment was adopted it was conceived that its major beneficiaries would be those accused of crimes against person and property.

Plainly this is an area requiring the most thoughtful attention. There is little sentiment—and in our view no justification—for outright repeal of the privilege clause or for an amendment which would require a defendant to give evidence against himself at his trial. But a strong case can be made for restoration of the right to comment on the failure of an accused to take the stand.[24] As Justice Schaefer has said:

[I]t is entirely unsound to exclude from consideration at the trial the silence of a suspect involved in circumstances reasonably calling for explanation, or of a defendant who does not take the stand. It therefore seems to me imperative that the privilege against self-incrimination be modified to permit comment upon such silence.[25]

Any consideration of modification of the Fifth Amendment also should include appropriate provision to make possible reciprocal pretrial discovery in criminal cases. One specific proposal, meriting serious consideration, is to accomplish this by pretrial discovery interrogation before a magistrate or judicial officer.[26] The availability of broad discovery would strengthen law enforcement as well as the rights of persons accused of crime,[27] and would go far to establish determination of the truth as to guilt or innocence as the primary object of our criminal procedure.

OTHER COUNTRIES LESS RESTRICTIVE

We know of no other system of criminal justice which subjects law enforcement to limitations as severe and rigid as those we have discussed. The nearest analogy is found in England which shares through our common law heritage the basic characteristics of the accusatory system. Yet, there are significant differences—especially in the greater discretion of English judges and in the flexibility which inheres in an unwritten constitution. There is nevertheless a developing feeling in England, parallel to that in this country, that criminals are unduly protected dy the present rules. The Home Secretary of the Labor Government, speaking of proposed measures to aid law enforcement, recently said:

The scales of justice in Britain are at present tilted a little more in the favor of the accused than is necessary to protect the innocent.[28]

One of the measures recommended by the Labor Government is to permit a majority verdict of 10, rather than the historic unanimous vote of all 12 jurors.[29] Leading members of the English bar are pressing for further reforms. After pointing out that "the criminal is living in a golden age," Lord Shawcross has commented:

The barriers protecting suspected and accused persons are being steadily reinforced I believe our law has become hopelessly unrealistic in its attitude toward the prevention and detection of crime. We put illusory fears about the impairment of liberty before the promotion of justice.[30]

Among the reforms being urged in England are major modifications of the privilege against self-incrimination, broadened discovery rights by the state, and the adoption of a requirement that accused persons must advise the prosecution in advance of trial of all special defenses, such as alibi, self-defense, or mistaken identity. Another change suggested would allow the admission in evidence of previous convictions of similar offenses, although convictions of dissimilar crimes still would not be admissible.[31]

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[24] See Traynor, *supra* at 677: "I find no inconsistency in remaining of the opinion that a judge or prosecutor might fairly comment upon the silence of a defendant at the trial itself to the extent of noting that a jury could draw unfavorable inferences from the defendant's failure to explain or refute evidence when he could reasonably be expected to do so. Such comment would not be evidence and would do no more than make clear to the jury the extent of its freedom in drawing inferences."

[25] Schaefer, *supra* at 520.

[26] Schaefer, *supra* at 518–20.

[27] The Commission's report emphasizes the need for broader pretrial discovery by both the prosecution and the defense.

[28] Address of the Rt. Hon. Roy Jenkins, M.P., Secretary of State for the Home Department, National Press Club, Washington, D.C., Sept. 19, 1966. Mr. Jenkins, in emphasizing the deterrent effect of swiftness and certainty in justice, also said: "Detection and conviction are therefore necessarily prior deterrents to that of punishment, and I attach the greatest possible importance to trying to increase the chances that they will follow a criminal act."

[29] The rule in Scotland long has been that a simple majority vote suffices to convict.

[30] Address by Lord Shawcross, Q.C., Attorney General of Great Britain, 1945–51, before the Crime Commission of Chicago, Oct. 11, 1965, reprinted in U.S. News & World Report, Nov. 1, 1965, pp. 80–82. See also Shawcross, *Police and Public in Great Britain*, 51 A.B.A.J. 225 (1965).

[31] See statements of Viscount Dilhorne (Q.C. and Lord Chancellor, 1962–64 and Attorney General, 1954–62), and Lord Shawcross, as reported in The Listner, Aug. 11, 1966, pp. 190, et seq.

THE FIRST DUTY OF GOVERNMENT

In the first chapter of the Commission's report the seriousness of the crime situation is described as follows:

Every American is, in a sense, a victim of crime. Violence and theft have not only injured, often irreparably, hundreds of thousands of citizens, but have directly affected everyone. Some people have been impelled to uproot themselves and find new homes. Some have been made afraid to use public streets and parks. Some have come to doubt the worth of a society in which so many people behave so badly.[32]

The underlying causes of these conditions are far more fundamental than the limitations discussed in this statement. Yet, prevention and control of crime—until it is "uprooted" by long-range reforms—depends in major part upon effective law enforcement. To be effective, and particularly to deter criminal conduct, the courts must convict the guilty with promptness and certainty just as they must acquit the innocent. Society is not well served by limitations which frustrate reasonable attainment of this goal.

We are passing through a phase in our history of understandable, yet unprecedented, concern with the rights of accused persons. This has been welcomed as long overdue in many areas. But the time has come for a like concern for the rights of citizens to be free from criminal molestation of their persons and property. In many respects, the victims of crime have been the forgotten men of our society—inadequately protected, generally uncompensated, and the object of relatively little attention by the public at large.

Mr. Justice White has said: "The most basic function of any government is to provide for the security of the individual and of his property." [33] Unless this function is adequately discharged, society itself may well become so disordered that all rights and liberties will be endangered.

RIGHTING THE IMBALANCE

This statement has reviewed, necessarily without attempting completeness or detailed analysis, some of the respects in which law enforcement and the courts have been handicapped by the law itself in seeking to apprehend and convict persons guilty of crime.

The question which we raise is whether, even with the support of a deeply concerned President [34] and the implementation of the Commission's national strategy against crime, law enforcement can effectively discharge its vital role in "controlling crime and violence" without changes in existing constitutional limitations.

There is no more sacred part of our history or our constitutional structure than the Bill of Rights. One approaches the thought of the most limited amendment with reticence and a full awareness both of the political obstacles and the inherent delicacy of drafting changes which preserve all relevant values. But it must be remembered that the Constitution contemplates amendment, and no part of it should be so sacred that it remains beyond review.

Whatever can be done to right the present imbalance through legislation or rule of court should have high priority. The promising criminal justice programs of the American Bar Association and the American Law Institute should be helpful in this respect. But reform and clarification will fall short unless they achieve these ends:

An adequate opportunity must be provided the police for interrogation at the scene of the crime, during investigations and at the station house, with appropriate safeguards to prevent abuse.

The legitimate place of voluntary confessions in law enforcement must be reestablished and their use made dependent upon meeting due process standards of voluntariness.

Provision must be made for comment on the failure of an accused to take the stand, and also for reciprocal discovery in criminal cases.

If, as now appears likely, a constitutional amendment is required to strengthen law enforcement in these respects, the American people should face up to the need and undertake necessary action without delay.

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[32] Commission's General Report, ch. 1.

[33] *Miranda* v. *Arizona*, *supra* at 539 (dissenting opinion).

[34] In his recent State of the Union Address, President Johnson said: "Our country's laws must be respected, order must be maintained. I will support—with all the constitutional powers I possess—our Nation's law enforcement officials in their attempt to control the crime and violence that tear the fabric of our communities." State of the Union Address, Jan. 10, 1967.

CONCLUSION

We emphasize in concluding that while we differ in varying degrees from some of the decisions discussed, we unanimously recognize them as expressions of legally tenable points of view. We support all decisions of the Court as the law of the land, to be respected and enforced unless and until changed by the processes available under our form of government.

In considering any change, the people of the United States must have an adequate understanding of the adverse effect upon law enforcement agencies of the constitutional limitations discussed in this statement. They must also ever be mindful that concern with crime and apprehension for the safety of their persons and property, as understandable as these are today, must be weighed carefully against the necessity—as demonstrated by history—of retaining appropriate and effective safeguards against oppressive governmental action against the individual, whether guilty or innocent of crime.

The determination of how to strike this balance, with wisdom and restraint, is a decision which in final analysis the people of this country must make. It has been the purpose of this statement to alert the public generally to the dimensions of the problem, to record our conviction that an imbalance exists, and to express a viewpoint as to possible lines of remedial action. In going somewhat beyond the scope of the Commission's report, we reiterate our support and our judgment that implementation of its recommendations will have far reaching and salutary effects.

Mr. BYRNE, Chief CAHILL, and Mr. LYNCH concur in this statement.

ORGANIZED CRIME AND ELECTRONIC SURVEILLANCE—IN VIRGINIA?

The Virginia Crime Commission, created in 1966 and since continued, was authorized to conduct a number of studies. One of these was to determine the activities of organized crime in Virginia, and ways and means to reduce or prevent it.

ORGANIZED CRIME IN VIRGINIA

On March 16, 1971, Delegate Stanley C. Walker, Chairman of the Virginia Crime Commission, stated:

> Our preliminary work so far has found that there is some organized crime in Virginia. * * * We have been told (for example) by responsible authorities that about a quarter of a million capsules of heroin are put up every week in the Richmond metropolitan area. Such large scale illegal activities could not occur without large financial support and a framework for the transportation and distribution of such narcotics.

The Commission is continuing its study, and will report by November of this year. In view of this study, it may be of interest to take a look—necessarily a superficial one—at the organized crime problem in our country, and at the use of electronic surveillance as the most effective means of attacking it.

THE NATIONAL SITUATION

As the Virginia study is in process, I will speak generally about the national situation. While the problem is most acute in the great metropolitan areas, it is sufficiently national in scope to encompass the heavily urbanized centers in Virginia.

Most of us think we know a good deal about organized crime—especially since "The Godfather" became the book everyone hides under his mattress. Yet, the truth is that the public generally has little conception of its scope or of the extent to which it preys upon the weakest elements of society.

What is "Organized Crime?"

The National Crime Commission [1] appointed by President Johnson (and on which I served) made an extensive study of this subject. In its 1967 Report, the Commission described organized crime as follows:

> An organized society that operates outside of the control of the American people and their government, it involves thousands of criminals, working within structures as complex as those of any large corporation, subject to private laws more rigidly enforced than those of legitimate governments. Its

[1] President's Commission on Law Enforcement and the Administration of Justice, 1965–67.

actions are not impulsive, but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activities in order to amass huge profits.

The objectives are power and money. The base of activity is the supplying of illegal goods and services—gambling, narcotics, loan sharking, prostitution and other forms of vice. Of these gambling is the most pervasive and the most profitable. It ranges from lotteries (numbers rackets), off-track betting and sports betting to illegal gambling casinos.

The importation and distribution of narcotics, chiefly heroin, is the second most important activity. This enterprise is organized much like a legitimate importing, wholesaling and retail business. The heroin, originating chiefly in Turkey, is moved through several levels between the importer and the street peddler. The markup in this process is fantastic. Ten kilos of opium, purchased from a Turkish farmer at $350, will be processed into herion and retailed in this country for perhaps a quarter of a million dollars or more.

An addict must have his heroin. He is usually unemployed, which means that he must steal regularly to support his addiction. The disastrous effect of drugs on those who become addicted is well understood. There is far less understanding of the extent to which the drug traffic directly causes other serious crimes.

The third major activity of organized crime is loan sharking. Operating through an elaborate structure, large sums of cash are filtered down to street level loan sharks who deal directly with ignorant borrowers. Interest rates would make our banker friends green with envy. A charge of 20% per week is not at all unusual. The loan sharker is more interested in perpetuating interest payments than in collecting principal. Threats and the actual use of the most brutal force are employed both to collect interest and to prevent borrowers from reporting to the police.

No one knows the total take of organized crime. The President's Crime Commission estimated an annual profit of perhaps $6 to $7 billion per year. This illegal, nontaxed income, is greater than the combined net profits of AT&T, General Motors and Standard Oil of New Jersey.

The Victims—Those Least Able

In all of these illicit operations the "customers"—in reality the victims—are che people least able to afford criminal exploitation. They are the poor, the unedutated and the culturally deprived. In the great cities, where organized crime flourishes, the victims come largely from the ghettos. Their number is legion.

But organized crime's activities are not limited to illicit goods and services. To an increasing extent, and with the profits from these activities, organized crime is infiltrating legitimate businesses and unions. In some cities, it dominates jukebox and vending machine operations. Its ventures range from laundries, restaurants and bars to funeral homes and cemeteries. Again, the use of force and intimidation is standard procedure.

The La Cosa Nostra "Families"

The basic core of this criminal conspiracy consists of 24 groups or families, operating as criminal cartels. Known originally as the Mafia, they are now called La Cosa Nostra. The 24 groups are loosely controlled at the top by a national body of overseers. The family members are relatively small—varying from as many as 700 to as few as 25. But their payrolls number in the thousands.

There are several aspects of organized crime which distinguish it from other crime. First, it is institutionalized as an ongoing system for making enormous profits. It protects itself, not casually or episodically but systematically, by bribery of selected police and public officials.

It also protects itself by ruthless discipline, maintained through "enforcers." It is their indelicate duty to maintain undeviating loyalty by the maiming and killing of recalcitrant or disloyal members. Those of you who admit to reading "The Godfather" will remember the fate of Paulie Gatto and Carlo Rizzi.

The efficiency of these professional enforcers is such that even the Federal Government, in organized crime prosecutions, often can protect witnesses only by total confinement. Indeed, it has been necessary on occasions to change their physical appearances, change their names and even to remove them from the country.

Why Has Society Been So Helpless?

At this point, you are probably asking—as I did—why have the American people, our government and our law enforcement agencies permitted these obscene

conspiracies to exist and to prosper. Indeed, why have we seemed to be so helpless in the face of such arrogance and organized criminality?

There are a number of reasons, which I mention only in passing:

1. *Lack of resources.* The necessary commitment of resources simply has not been made—either by the federal or local governments.

2. *Lack of coordination.* Our system of law enforcement is essentially local. The FBI, despite its valiant efforts, cannot command the necessary cooperation and coordination, and the local response is often uninformed and sometimes already corrupted.

3. *Absence of strategic intelligence.* Fighting organized crime is a form of warfare against an enormously rich and well-disciplined enemy. Police intelligence is usually tactical, directed toward a specific prosecution. The greater need is for true strategic intelligence on the capabilities, long-range plans, and the vulnerability of the leadership of the La Cosa Nostra groups.

4. *Inadequate sanctions.* The penalties imposed by law and the courts have been inadequate to deter this type of crime where the profits are so enormous. Until recently, the leaders have seldom been brought to court. This has caused judges to be reluctant to impose stiff sentences on the underlings. Moreover, the rights now afforded persons accused of crime—plus the delays in criminal justice—are exploited to the fullest by the resources available to La Cosa Nostra defendants.

5. *Lack of public and political commitment.* The truth is that the services provided by organized crime are wanted by many people. This tends to blunt the sort of demand by an outraged public which would assure more effective law enforcement. There is also a pervasive ignorance and indifference as to the nature and extent of the problem.

6. *Difficulty in obtaining evidence.* Perhaps the single most crippling limitation on law enforcement has been the difficulty of obtaining evidence adequate to convict the leaders. There is no secret as to the identity of many of these leaders. Their names are known to the police, the press and often to the public. They live in luxury, are often influential in their communities, and even become the subject of admiration—especially by some of the young and witless. They are living proof that crime does pay in America.

The simple truth is that these robber barons of our time rarely are brought to justice because our system of law handicaps itself. These handicaps take many forms. Those rooted in our Bill of Rights must, of course, be preserved for the other values which they protect.

Yet, much can be done within the framework of these rights that will inhibit the growth—if not indeed destroy—these criminal cartels.[2]

ELECTRONIC SURVEILLANCE

I will speak today only of one major law enforcement weapon which, until recently, we have deliberately denied ourselves. I refer to the most modern scientific method of detection, namely, electronic surveillance.

Organized crime operates by word of mouth and the telephone. Records familiar to legitimate business are never maintained. Massive gambling operations, in particular, are conducted nationwide through telephonic communications.

The Law Until 1968

Until 1968, the law with respect to wiretapping was chaotic. The Supreme Court had ruled in 1928 (*Olmstead* v. *U.S.*) that the Fourth Amendment did not apply to wiretapping, as there was no unlawful entry and no seizure of tangible things. But the Federal Communications Act of 1934 prohibited the use of wiretap evidence in federal trials. The net effect was to permit wiretapping without limitation, but the fruits thereof could not be used in court.

There was no federal law with respect to bugging, and state laws—where they existed—often drew no distinction between private and law enforcement surveillance. In sum, the situation was intolerable, and the President's Crime Commission in 1967 strongly urged federal action.

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[2] We could, for example, relax some of the artificial rules engrafted upon the Fourth, Fifth and Sixth Amendments by divided votes of the Court in cases like *Miranda* and *Escobedo*. See *The Challenge of Crime in a Free Society*, Report of President's Crime Commission, 1967, Additional Views, p. 303 *et seq.* The English Courts, famous for their concern for human rights, have few such rigid, artificial rules.

Since 1968

Congress responded in 1968 by adopting Title III of the Omnibus Crime Control Act.[3] Meanwhile, the Supreme Court—in the landmark *Burger* and *Katz* decisions [4] had overruled *Olmstead,* and held that wiretapping and other forms of electronic surveillance are subject to the search and seizures requirements of the Fourth Amendment.

Guided by these decisions, Congress—in Title III—outlawed all private surveillance, but authorized its court-controlled use in the crimes most frequently associated with organized syndicates—such as murders, kidnapping, extortion, bribery and narcotics offenses.

National and Internal Security

Congress did not legislate affirmatively as to national security cases. Title III does provide that its provisions shall not be construed to limit the inherent power of the President to obtain evidence without a prior court order in cases involving national defense or internal security. As these issues are beyond the scope of this talk, I mention them only in the interest of completeness and to avoid any misunderstanding of the recommendation I will make for Virginia.

I will say in passing that there is little question—at least there should be none—as to the power of the President to take all appropriate measures to protect the nation against hostile acts of a foreign power. But the President's authority with respect to internal security is less clear. There is an obvious potential for grave abuse, and an equally obvious need where there is a clear and present danger of a serious internal threat. The distinction between external and internal threats to the security of our country is far less meaningful now that radical organizations openly advocate violence. Freedom can be as irrevocably lost from revolution as from foreign attack. This perplexing issue is now pending in several cases.[5] In the end, there may be a need for clarifying legislation.

Title III and Organized Crime

Returning now to the provisions of Title III directed against major criminal activity, a specific legislative finding was made as follows:

> Organized criminals make extensive use of wire and oral communications. The interception of such communications * * * is an indispensable aid to law enforcement and the administration of justice.

The interception authorized by Title III requires a prior court order. The safeguards prescribed with respect to such an order include: (i) showing probable cause; (ii) describing the crime and types of conversations; (iii) limiting the time period of the surveillance (not to exceed 30 days); (iv) terminating the wiretap or bugging once the stated object is achieved; (v) renewing it only by a *de novo* showing of continued probable cause; (vi) showing that normal investigative procedures have been tried and failed; and (vii) finally, reporting to the court on the results of each wiretap.

In light of these safeguards, there is no substance to the fears of some that these provisions of Title III have police state characteristics.

Experience under 1968 Act

The experience under the 1968 Act is interesting. The Johnson Administration had opposed Title III, and although it became law on June 19, 1968, the surveillance authority was not used by Attorney General Clark.

The present Administration has undertaken a massive campaign against organized crime. Task forces, organized for long-term operations, have been established in 17 cities. They use a "systems" approach to organized crime investigations—examining into all possible violations of federal laws, including racketeering, extortion, drug trafficking and income tax evasion. As Attorney General Mitchell has said, by the use of electronic surveillance, these task forces now have the capability of reaching "the whole criminal organization," including—almost for the first time—top members in the "families."

During 1969 and 1970, the Justice Department employed court-authorized surveillance on 309 occasions. Roughly 60% of these involved illegal gambling,

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[3] Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90–351, 90th Cong., H.R. 5037, June 1968.

[4] *Burger* v. *New York*, 388 U.S. 41 (1967) and *Katz* v. *U.S.*, 388 U S. 347 (1967). See also *U.S.* v. *White*, decided by Supreme Court April 5, 1971, which clarifies the scope of *Katz*.

[5] See *United States* v. *Smith*, Criminal Case No. 4277–CD, U.S. District Court, Central District of California, Jan. 8, 1971; *United States* v. *Sinclair*, Criminal Case No. 44375, U S District Court, Eastern District of Michigan, Jan. 26, 1971; see also recent Sixth Circuit Court of Appeals case (Times Dispatch, April 9, 1971), in which a Circuit Court for the first time held that the President lacks inherent power with respect to internal subversion.

and about 20% narcotics traffic. A total of more than 900 arrests have resulted, some 500 persons have been indicted, and over 100 convictions already have been obtained. Most of those indicted have not yet been tried.[6]

Several top leaders of organized crime already have been convicted or have pled guilty. These include two leading members of New York families, and the acknowledged syndicate boss in New Jersey, Samuel DeCavalcante.

NEED FOR STATE LAWS

Despite the success under Title III, there is still need for comparable state laws. Most of the crimes committed violate state laws. The fight against organized crime has the greatest chance of success where both state and federal authorities can cooperate in the employment of the same weapons. The Congress recognized this need by providing in Title III for parallel state action.[7] The American Bar Association also recommends the adoption of carefully safeguarded state electronic surveillance statutes.[8]

The situation in most states is still unsatisfactory—ranging from no law at all to inadequate or unconstitutional provisions. As of October 1970, 17 states had legislative authority for court-controlled surveillance. A model statute is now available, embodying the substance of the ABA Standards and complying with Title III of the Federal Act. New Jersey has recently adopted this model statute.[9]

The state with the greatest experience with wiretapping is New York. Its statute, held unconstitutional in the *Burger* case, has since been revised to meet the *Burger* and Title III standards. Frank Hogan, famed District Attorney in New York City, has testified before a Congressional Committee that electronic surveillance is "the single most valuable weapon in law enforcement's fight against organized crime". He further testified that without wiretap evidence his office could never have convicted Luciano, Jimmy Hines, Shapiro and a long list of other notorious racketeers.

THE NEED FOR LEGISLATION IN VIRGINIA

If the preliminary findings of the Virginia Crime Commission are substantiated, the General Assembly should consider the enactment in 1972 of an appropriate surveillance statute.

Indeed, even if the evidence as to organized crime's activities in Virginia is inconclusive, there are strong resaons for enacting a carefully drawn law which prohibits all private surveillance but authorizes court-controlled wiretapping and bugging compatible with the federal legislation and the ABA Standards.

Organized crime is not longer confined to a few major cities. Its criminal activities are being diversified in scope and extended geographically. As Virginia increasingly becomes a part of the eastern urbanized corridor, the criminal syndicates are certain to operate here.[10]

I am not unaware of the strong feelings of many that a free society should not tolerate this intrusion upon privacy. They argue that, despite all safeguards, the conversations of some innocent people will be intercepted.

The answer, it seems to me, on this issue—as indeed on many others—is that there must be a rational balancing of the interests involved. Uncontrolled government surveillance would indeed be intolerable. But it is not equally intolerable for society so to shackle itself that cartels of organized criminals are free to prey upon millions of decent citizens and to make a mockery of the rule of law?

Happily the choice need not be between these two extremes. The sound answer lies in the middle course charted by the Federal Act and by the ABA Standards. It is to be hoped that this is the course Virginia will follow.

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[6] See interview with Attorney General Mitchell, U.S. News & World Report, March 22, 1971, p. 36 *et seq*

[7] Public Law 90-351, § 2516(2). Congress was careful to provide that state statutes must contain at least the procedural safeguards, protections and restrictions imposed by the federal statute.

[8] This was one of the subjects studied by the ABA project on Criminal Justice, and the Minimum Standards to be incorporated in state statutes were approved by the House of Delegates at its February 1971 meeting These ABA Standards were cited with approval by the Supreme Court in the recent case of *U S. v. White*, decided April 5, 1971.

[9] See article in 43 Notre Dame L. Rev. 657 (1968), discussing an earlier form of the model statute.

[10] The President's Crime Commission found that "organized criminal groups are known to operate in all sections of the nation." *Supra*, p 191.

NOVEMBER 3, 1971.

MEMORANDUM

To: Senator John L. McClellan
From: G. Robert Blakey, Chief Counsel, Subcommittee on Criminal Laws and Procedures
Subject: Wiretapping

You asked for a background memorandum on wiretapping.

SUMMARY

The development of national policy in this area has been slow and often inconsistent. Nevertheless, every Attorney General since 1931, including the present, but excluding his predecessor, has supported its use in major criminal investigations. Every Attorney General, without exception, however, has supported its use in the national security area, even without judicial supervision. The courts at first refused to intervene to regulate it at all, then attempted to eliminate it, but have now seemingly recognized the legitimacy of its use under certain safeguards. Congress, as you are aware, seemed unable to resolve the issue from 1928 until 1968, when it finally enacted comprehensive legislation.

DEFINITION OF KEY TERMS

1. *Wiretapping:* interception of communication transmitted over wire from phone *without* consent of participant.
2. *Bugging:* interception of communication transmitted orally *without* consent of participant.
3. *Recording:* electronic recording of wire or oral communication *with* the consent of a participant.
4. *Transmitting:* radio transmission of oral communication *with* the consent of a participant.
5. *Electronic surveillance:* generic term loosely used to cover all of the avove, but often confined to "wiretapping" or "bugging."
6. *National security:* generic term loosely used to refer to wiretapping or bugging aimed at either "foreign" or "domestic" threats to the national security.

a. *Foreign security:* usually meant to cover "wiretapping" or "bugging" to obtain coverage of foreign diplomats, spies, and their American contacts; also directed at Communist party and Communist front activities in the United States; sometimes used to obtain coverage of those involved in foreign intrigue, e.g., gun running to Latin American countries, etc.; primarily useful to prevent damage (theft of documents, etc.), not "solve crimes."

b. *Domestic security:* usually meant to cover "wiretapping" or "bugging" to obtain coverage of extremist groups in the United States, e.g., the Black Panthers, groups within the K.K.K., and La Cosa Nostra; sometimes used to determine the influence of extremist groups in other legitimate organizations (civil rights or peace); primarily useful to prevent damage (assaults, bombings, kidnapping, homicides, riots, etc.).

Note that the "foreign" and "domestic" security distinction is sharper in theory than in practice. Often it is difficult without "wiretapping" or "bugging" to determine the "foreign" or "domestic" character of the threat.

Note, too, that since the emphasis is on the prevention of harmful activity rather than the punishment of those who have already caused harm, police action in these areas tends to cover more people for longer periods of time under less precise standards than conventional criminal investigations.

Caveat: Newspaper reporters, in particular, but all of us sometimes use "wiretapping," "bugging" and "national security" to refer to some or all of these techniques or areas of activity without carefully discriminating between them. This fact alone leads to most of the controversy; people often are not talking about the same things, even though they are using the same words.

CHRONOLOGY OF SIGNIFICANT EVENTS

1. *Olmstead* v. *United States*, 277 U.S. 438 (1928), held: (1) that wiretapping without a warrant did not violate the Fourth Amendment's ban on unreasonable searches and seizures because without a trespass there was no "search" and

without a tangible taking there was no "seizure;" (2) that wiretapping did not violate the Fifth Amendment's ban on compulsory self-incrimination because no compulsion was placed on the speaker to speak; and (3) that the product of wiretapping illegal under state law may be used in Federal courts, since the suppression sanction applied only to violations of constitutional rules.

2. Section 605 of the Federal Communications Act of 1934, 48 Stat. 1103 (1934), 47 U.S.C. §605 (1968), prohibited the "interception" and "divulgence" or "use" of the contents of a wire communication. At passage of the Act, managers of the bill observed, "[I]t does not change existing law." 78 Cong. Rec. 1013 (1934).

3. *Nardone* v. *United States*, 302 U.S. 379 (1937), held that the "divulgence" of a wiretap made by a Federal officer in a Federal court violated Section 605 of the 1934 Act.

4. N.Y. Const., Art. I, §12 (1938), authorized wiretaps.

5. President Franklin D. Roosevelt on May 21, 1940, instructed Attorney General Robert H. Jackson to use wiretapping and bugging against subversive activities against the government of the United States. (A copy of this memo is attached.)

6. Attorney General Robert H. Jackson informed Congress in March 1941 that Section 605 could only be violated by both "interception" and "divulgence" or *private* "use." Hearings before Subcommittee No. 1 of House Judiciary Committee on H.R. 2266 and H.R. 3099, 77th Cong., 1st Sess. 18 (1971).

7. N.Y. Code of Crim. Proc. §813a (1942) implemented state constitution to authorize court-ordered wiretaps.

8. *Goldman* v. *United States*, 316 U.S. 129 (1942), held that bugging without a warrant did not violate the Fourth Amendment's ban on unreasonable searches and seizures if there was no trespass.

9. President Harry S. Truman on July 17, 1947, concurred in the recommendation of Attorney General Tom C. Clark that the F.D.R. authorization of 1940 be extended to cases of domestic security or where human life was in jeopardy. (A copy of this memo is attached.)

10. *On Lee* v. *United States*, 343 U.S. 747 (1952, held that the use of a transmitter by police officers without a warrant to overhear conversations between an informant and a suspect did not violate the Fourth Amendment's ban on unreasonable searches and seizures where the informant consented to its use.

11. *Irvine* v. *California*, 347 U.S. 128 (1954), held that bugging without a court order accomplished by a trespass violated the Fourth Amendment's ban on unreasonable searches and seizures, but that since the suppression sanction did not operate in state courts, no evidentiary consequences attached to the violation.

12. *Benanti* v. *United States*, 355 U.S. 96 (1957), held that a wiretap under a court order under New York law violated Section 605 of the 1934 Act and its product could not be used in a Federal court.

13. *Rathbun* v. *United States*, 355 U.S. 107 (1957), held electronic recording of a wire communication withthe consent of a participant was not an "interception" under Section 605 of the 1934 Act.

14. *English Privy Councillors Report on Wiretapping* (1957) concluded that wiretapping under the Home Secretary's authorization was effective in crimina investigations, necessary to protect the security of the State, carried with it no harmful social consequences, and should be permitted to continue.

15. N.Y. Code of Crim. Proc. §813a extended to authorize court-ordered bugging in 1959.

16. *Lopez* v. *United States*, 373 U.S. 427 (1963), held that electronic recording of an oral communication with the consent of a participant was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

17. *Massiah* v. *United States*, 377 U.S. 201 (1964), held that electronic recording of an oral communication with the consent of a participant after the indictment of the suspect violated the suspect's Sixth Amendment right to counsel.

18. President Lyndon B. Johnson on June 30, 1965, prohibited the use of wiretapping or bugging by Federal agencies except to collect intelligence affecting the national security and on the approval of the Attorney General. (A copy of this memo is attached.)

19. *Osborn* v. *United States*, 385 U.S. 323 (1966), held that electronic recording of an oral communication with the consent of a participant and pursuant to a court order was not a violation of the Fourth Amendment's ban on unreasonable searches and seizures.

20. Prime Minister Harold Wilson in 1966 re-affirmed the conclusions of the 1957 Privy Councillors Report but indicated that the Report's recommendations

would not be followed to the extent that they would permit the interception of the wire communications of members of Parliament. (Rept. C&P Pro. pp. 634–42 (17 Nov. 1966).)

21. The President's Commission on Law Enforcement and the Administration of Justice in 1967 recommended that a carefully drawn statute be enacted to authorize court ordered wiretapping and bugging.

22. *Berger* v. *New York*, 388 U.S. 41 (1967), held that Section 813a of N.Y. Code of Crim. Proc. authorized unreasonable searches and seizures contrary to the Fourth Amendment, but the Court observed that where there was provision for judicial supervision based on adequate showing of probable cause, particularization of the offense under investigation and the type of conversations to be overheard, limitations on the time period of the surveillance, a requirement of termination once the stated objective was achieved, lose supervision of the right to renew and a return to be filed with the court, such surveillance could be reasonable.

23. Attorney General Ramsey Clark, on June 16, 1967, issued regulations that prohibited wiretapping and bugging except in national security matters and required that his approval be obtained prior to recording with or without a court order or transmitting.

24. *Katz* v. *United States*, 389 U.S. 347 (1967), held that bugging without a warrant violated the Fourth Amendment's ban on unreasonable searches and seizures, even though there was no trespass, where the communication was uttered under a reasonable expectation of privacy; *Olmstead* and *Goldman* were overruled, and the Court repeated that a carefully drawn court order statute would be sustained and expressly left open the question of national security wiretaps or bugging without a warrant.

25. Title III of Public Law 90–351 (June 19, 1968) provided as follows:

a. Prohibited all private wiretapping and bugging (18 U.S.C. § 2511(1)).

b. Permitted private recording only where not done to commit a tort or crime (18 U.S.C. § 2511(2)(d)).

c. Prohibited State or Federal law enforcement wiretapping and bugging except under court order system (18 U.S.C. § 2511).

d. Permitted State or Federal law enforcement recording (18 U.S.C. § 2511(2)(c)).

e. Expressly disclaimed any intent to regulate Federal, foreign, or domestic security wiretapping or bugging (18 U.S.C. § 2511(3)).

f. Set up a Federal court order system for wiretapping or bugging (18 U.S.C. §§ 2516(1), 2518).

g. Set standards for optional State court order systems for wire tapping or bugging (18 U.S.C. §§ 2516(2), 2518).

h. Made unauthorized wiretapping or bugging a Federal civil tort (18 U.S.C. § 2529).

i. Required annual reports for Federal and State wiretapping and bugging (18 U.S.C. § 2519).

j. Set up a commission to review the operation of the first seven years of the statute in its seventh year (82 Stat. 223). (Note: P.L. 91–644 advanced this date from 1974 to 1973.)

Note: As of October 1970, the following 18 States had legislation for court ordered wiretapping or bugging:

Arizona (Post *Berger*, pre Title III).
Colorado.
Florida.
Kansas.
Georgia (Post *Berger*, pre Title III).
Maryland (Pre *Berger*).
Massachusetts (Revised after *Berger* and Title III).
Minnesota.
Nebraska.
Nevada (Pre *Berger*).
New Hampshire.
New Jersey.
New York (Revised after *Berger* and Title III).
Oregon (Pre *Berger*).
Rhode Island.
South Dakota.
Washington.
Wisconsin.

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26. The first Annual Surveillance Report for 1968 was issued. It indicated that 174 applications had been made and orders issued for wiretaps or bugs, which resulted in 263 arrests.

27. *Alderman* v. *United States*, 394 U.S. 165 (1969) held that illegally obtained evidence must be disclosed to suspects with an *in camera* review so that an opportunity can be afforded them to suppress evidence against them at trial.

28. The second Annual Surveillance Report for 1969 was issued. It indicated that 304 applications had been made and 302 orders issued for wiretaps or bugs, which resulted in 625 arrests.

29. Title VIII of Public Law 91-452 (October 15, 1970) set aside the result of Alderman for wiretapping and bugging occurring prior to June 19, 1968, and set up an *in camera* disclosure procedure.

Note: 18 U.S.C. § 2518(8)(d) and (10)(a) govern disclosure of wiretapping or bugging after June 19, 1968 and provides for an *in camera* disclosure procedure.

30. *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. 1970), held that wiretapping under the direction of the Attorney General without a warrant to obtain foreign security intelligence did not violate the Fourth Amendment's ban on unreasonable search and seizure. (*Cert.* has been denied as to this issue.)

31. The American Bar Association on February 8, 1971, approved electronic surveillance standards for recording, wiretapping and bugging under court order and the use of such techniques in the foreign security field.

32. *White* v. *United States*, 401 U.S. 745 (1971), sustained against Fourth Amendment objections the use of a transmittor by police officers without a warrant to overhear conversations between an informant and a suspect where the suspect consented to its use.

33. *United States* v. *Keith*, No. 71-1105, United States Court of Appeals for the Sixth Circuit, decided April 8, 1971, held that an authorization of a wiretap in a domestic security matter by the Attorney General without judicial sanction violated the Fourth Amendment's ban on unreasonable searches and seizures. *Cert.* has been granted in the case.

ADDENDUM

Following is the text of the foreign and domestic surveillance exclusion of 18 U.S.C. § 2511(3):

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything continued in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Attached also is the portion of the Senate debate on the 1968 Act relevant to Section 2511(3):

[114 Cong. Rec. S 6245-46 (daily ed. May 23, 1968)]

AMENDMENT NO. 715

Mr. DIRKSEN. Mr. President, I call up my amendment No. 715.

Mr. HART. Mr. President, would the Senator from Illinois before calling up his amendment—which would control our time—permit me a couple of minutes to engage in colloquy on one section of the wiretapping title with the Senator from Arkansas?

Mr. DIRKSEN. Mr. President, I ask unanimous consent, without losing my right to the floor, that the distinguished Senator from Michigan [Mr. HART] may have 5 minutes in which to explain the matter he wishes to discuss and not impair my time.

The PRESIDING OFFICER. The Senator will not lose the floor. The Senator from Michigan has yielded to him the right to speak.

Mr. HART. Mr. President, I thank the Senator from Illinois very much.

Mr. President, I invite attention to page 56 of the bill. I refer to section 2511 (3). As I read it, this is an exemption to insure that nothing in the restriction on wiretapping shall limit the President in certain areas and under certain conditions. What does it say?

It says that nothing in this chapter or in the bill shall limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means.

It then goes on to say that nothing in the bill shall limit the power of the President to take such measures as he deems necessary to protect the United States—and this is what bothers me—"against any other clear and present danger to the structure or existence of the Government."

What is it that would constitute a clear and present danger to the structure or existence of the Government? As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government.

If that is the case, section 2511(3) grants unlimited tapping and bugging authority to the President. And that means there will be bugging in areas that do not come within our traditional notions of national security.

Is my reading of that a fair one? Is my concern a valid one? If it is, why do we not agree to knock out the last clause?

Mr. MCCLELLAN. Mr. President, this language is language that was approved and, in fact, drafted by the administration, the Justice Department. I have not challenged it. I was perfectly willing to recognize the power of the President in this area. If he felt there was an organization—whether black, white, or mixed, whatever the name and under whatever auspices—that was plotting to overthrow the Government, I would think we would want him to have this right.

What such an amendment would do would be to circumscribe the powers we think the President has under the Constitution. As far as I am concerned, I would like to see it remain in here. I do not want to undertake to detract from any power the President already has. I do not think we could do so by legislation anyway. In fact, I know we could not. However, what we have done here is in keeping with the spirit of permitting the President to take such action as he deems necessary where the Government is threatened. I cannot find any bugger in the woodpile from looking at it, myself.

Mr. HART. Mr. President, some people can take comfort, I think, in the language of section 2511(3), and especially the statement that the President is indeed limited by the Constitution in his exercise of the national security power. This is why I think it might be useful to have this exchange.

We notice that the recital runs this way:

Nothing contained in this chapter . . . shall be deemed to limit the constitutional power of the President to do whatever he wants in the area of bugging against any other clear and present danger to the structure or existence of the Government.

If we agree that the President does not have constitutional power to put a tap on an organization that is advocating the withholding of income tax payments—to cite a current, though as yet a small movement—I would feel more at ease. But if, in fact, we are here saying that so long as the President thinks it is an activity that constitutes a clear and present danger to the structure or existence of the Government, he can put a bug on without restraint, then clearly I think we are going too far.

The PRESIDING OFFICER. The time allotted to the Senator from Michigan has expired.

Mr. MCCLELLAN. Mr. President, I ask unanimous consent that the Senator from Michigan have an additional 5 minutes without being charged any time.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HOLLAND. Will the Senator yield?

Mr. HART. I yield.

Mr. HOLLAND. Mr. President, I think that the distinguished Senator is unduly concerned about this matter.

The section from which the Senator has read does not affirmatively give any power. It simply says, and I will not read the first part of it because that certainly says that nothing shall limit the President's constitutional power, but the part from which the Senator has read continues in the same spirit. It reads:

Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against.

And so forth. We are not affirmatively conferring any power upon the President. We are simply saying that nothing herein shall limit such power as the President has under the Constitution. If he does not have the power to do any specific thing, we need not be concerned. We certainly do not grant him a thing.

There is nothing affirmative in this statement.

Mr. McCLELLAN. Mr. President, we make it understood that we are not trying to take anything away from him.

Mr. HOLLAND. The Senator is correct.

Mr. HART. Mr. President, there is no intention here to expand by this language a constitutional power. Clearly we could not do so.

Mr. McCLELLAN. Even though intended, we could not do so.

Mr. HART. A few days ago I wondered whether we thought that we nonetheless could do something about the Constitution. However, we are agreed that this language should not be regarded as intending to grant any authority, including authority to put a bug on, that the President does not have now.

In addition, Mr. President, as I think our exchange makes clear, nothing in section 2511(3) even attempts to define the limits of the President's national security power under present law, which I have always found extremely vague, especially in domestic security threats, as opposed to threats from foreign powers. As I recall, in the recent Katz case, some of the Justices of the Supreme Court doubted that the President has any power at all under the Constitution to engage in tapping and bugging in national security cases without a court order. Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by title III. As a result of this exchange, I am now sure no President thinks that just because some political movement in this country is giving him fits, he could read this as an agreement from us that, by his own motion, he could put a tap on.

Mr. PASTORE. Mr. President, will the Senator yield?

Mr. HART. I yield.

Mr. PASTORE. Mr. President, I think the only mistake is in the use of the word "deems." That word indicates someone else's interpretation. The word should be "intends." When we say "Nor shall anything in this chapter be deemed to limit," that is an interpretation that someone makes. I think the word ought to be "intended."

Mr. HOLLAND. Mr. President, I still reiterate my position. I do not think there is a single indication here that anything affirmative is being done.

We are simply negating any intention to take away anything that the President has by way of constitutional power. We could not do it if we wanted, and we are making clear that we are not attempting any such foolish course.

Mr. PASTORE. That is the point I make. No matter what is "deemed," you just cannot take powers away from the President that he constitutionally has. All we are saying is that we do not intend to do it because of anything that is in the bill.

THE WHITE HOUSE,
Washington, D.C., May 21, 1940.

MEMORANDUM FOR THE ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including sus-

pected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

(S) F. D. R.

OFFICE OF THE ATTORNEY GENERAL,
*Washington, D.C., July 17, 1946.**

The PRESIDENT,
The White House.

MY DEAR MR. PRESIDENT: Under date of May 21, 1940, President Franklin D. Roosevelt, in a memorandum addressed to Attorney General Jackson, stated:

"You are therefore authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."

This directive was followed by Attorneys General Jackson and Biddle, and is being followed currently in this Department. I consider it appropriate, however, to bring the subject to your attention at this time.

It seems to me that in the present troubled period in international affairs, accompanied as it is by an increase in subversive activity here at home, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt's memorandum. At the same time, the country is threatened by a very substantial increase in crime. While I am reluctant to suggest any use whatever of these special investigative measures in domestic cases, it seems to me imperative to use them in cases vitally affecting the domestic security, or where human life is in jeopardy.

As so modified, I believe the outstanding directive should be continued in force. If you concur in this policy, I should appreciate it if you would so indicate at the foot of this letter.

In my opinion, the measures proposed are within the authority of law, and I have in the files of the Department materials indicating to me that my two most recent predecessors as Attorney Genreal would concur in this view.

Respectfully yours,

(S) TOM C. CLARK,
Attorney General.

July 17, 1947*
I concur.

(S) HARRY S. TRUMAN.

THE WHITE HOUSE,
Washington, D.C., June 30, 1965.

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

I am strongly opposed to the interception of telephone conversations as a general investigative technique. I recognize that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that indiscriminate use of these investigative devices to overhear telephone conversations, without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy. In my view, the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at stake. To avoid any misunderstanding on this subject in the Federal Government, I am establishing the following basic guidelines to be followed by all government agencies:

(1) No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved. (except in connection with investigations related to the national security).

(2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.

(3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.

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*The possibly conflicting dates are quoted as set forth in the original document.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem. which raises substantial and unresolved questions of Constitutional interpretation. I desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telephone conversations. In addition, such reports shall contain a list of any interceptions currently authorized and the reasons for them.

(S) LYNDON B. JOHNSON.

Senator ERVIN. I would just like to make some observations, since some of the questions have been asked.

I think the Supreme Court in the *Escobido* case only held that the confession there was inadmissible as an involuntary confession. When I worked in this field, they said if a confession was induced by hope or extorted by fear, it was involuntary. The law enforcement officer in the *Escobido* case had the man in custody; he wanted to see his lawyer, and they said, in effect, "We won't let you see your lawyer unless you confess." We won't let you see your lawyer unless you confess—it was both a promise and a threat, and I don't believe the majority ought to sail out on an unknown sea and make some new law there because it was so unnecessary.

Now, with reference to *Miranda*, Dr. Oliver Wendell Holmes said, "Life and language are alike sacred. Homicide and verbicide—that is, violent treatment of a word with fatal results to its legitimate meaning—are alike forbidden." I think in the *Miranda* case, the Supreme Court majority committed verbicide in the self-incrimination clause. The self-incrimination clause says no person shall be compelled in any criminal case to be a witness against himself. There is nothing compelled about a voluntary confession. The man is not even a witness there. So they committed verbicide on the plain words of the Constitution, with fatal consequence by 60 percent of the majority of the Court.

Just one other observation: I say I agree with Senator Fong, if the self-incrimination clause does not prohibit comments by a prosecutor on the failure of the accused to testify, we might as well do away with the presumption of innocence. The prosecution has to prove beyond a reasonable doubt. We might as well repeal the self-incrimination clause because its purpose would be destroyed. I just don't think that the Constitution can possibly permit a prosecutor to make a comment on the failure of a man to go up and incriminate himself.

Senator McCLELLAN. Senator Hart?

Senator HART. I take it, Mr. Chairman, that we are coming back?

Senator McCLELLAN. Yes, sir; the Chair intended to recess until 2:30.

Senator HART. Perhaps just to help the record, Mr. Powell, it was my understanding that when you discussed the *Escobido* case, you indicated an appreciation of the reasoning of the majority, but your conclusion was that you were rather more persuaded by the minority. Is that correct?

Mr. POWELL. I think I said or I intended to say——

Senator HART. Let me explain why I ask. Subsequently a direct question was asked, and you responded that the majority opinion seemed more persuasive, and I am just trying to get the record straight.

Mr. POWELL. No. I agree with Senator Ervin, if I had had to decide *Escobido*, I would have set his conviction aside on the facts. In other words, I think it was a clear case, as the Senator has said, of the man being denied the right to counsel, when the counsel was sitting outside the room where he was being interrogated.

I said with respect to the philosophy of those two majority opinions where they went in terms of prescribing, as it seemed to me, rather fixed standards of procedure without regard ultimately to whether or not a confession was in fact voluntary, went further than I would have gone.

So I would have agreed as of that date with the minority opinion in those two cases.

Senator HART. Thank you.

Senator McCLELLAN. The committee will stand in recess until 2:30.

(Whereupon, at 1 p.m., the hearing was recessed, to reconvene at 2:30 p.m. this date.)

AFTERNOON SESSION

The CHAIRMAN. Senator Hart, you may proceed.

Senator HART. Thank you, Mr. Chairman.

Mr. Powell, may I add a welcome and congratulations which have already been voiced.

TESTIMONY OF LEWIS F. POWELL, JR.—Resumed

Mr. POWELL. Thank you, sir.

Senator HART. There is no doubt, I think, in the minds of any of us that you are a very distinguished member of the American bar. There is every mark of excellence, and while I listened, I am not sure I understand whether there is any problem at all in connection with your holdings, but in any event, as far as I am concerned, there is no problem in the sense of any alleged conflict of interest, so in the true traditional rules of thumb, the nominee's professional skill and conflict of interest, I would anticipate voting with the others favorably on the nomination.

But there is, rightly or wrongly, this varied, less tangible item of so-called judicial philosophy. We spent much of last week wrestling with the other nominee. It is difficult to get a handle on it.

I sense from your answers that you do, as does Mr. Rehnquist, believe there is an appropriate role and, indeed, a responsibility of the Senate to attempt to identify and to understand the philosophy of the nominee. Am I right on that?

Mr. POWELL. I have no doubt on that.

Senator HART. As far as I am concerned, we have yet to come up with a method of doing this satisfactorily, either from our standpoint or yours.

This morning you quite properly said you could not put yourself into the mind of the President, but see what comment you feel able to make, first, on this broad question, and then on a more narrow, and, perhaps, a more manageable question.

The President who nominates you says that he believes that the Warren court—and I paraphrase—that the Warren court had moved in the directions which he would like to see reversed; that he has selected men whose philosophy indicates to him that they would

share that feeling about the Warren court and would, to the extent they would be able as Members of the Court, reverse the trend.

As one who has felt that the Warren court was good medicine for this country, I find myself sort of presented with a miserable dilemma. You have all the marks of excellence and in your answers this morning suggested that you regarded much of the Warren court as landmark advances.

How would you counsel me on this: if, indeed, I thought the Warren court made sense and that you were nominated, in order to reverse that, shouldn't I vote against you?

Mr. POWELL. Well, that does pose an awkward question for me, Senator Hart. I quite understand though what concerns you.

I think it is clear from the testimony I gave this morning that there are some decisions of the Warren court that trouble me, certainly at the time I studied them carefully, and this was the occasion of my service on the President's Crime Commission. I also said that there were many other decisions which seemed to me to be decisions long overdue in our law. I tried to find, and have found, a paragraph in one of the talks that I gave—this was from an address I made to the Fourth Circuit Judicial Conference in 1965—and, if I may, I would like to read just one brief paragraph, which may shed some light.

Before I do that, let me say this: As a lawyer, I never had any trouble with the Warren Court. I do not think many lawyers did. I do not have any trouble, I never have had trouble with the Supreme Court as an institution. I have disagreed with a good many decisions of various courts, and in decisions that are very, very close as to the issues involved, but respect for that tribunal and its role in our system has been one of the guiding lights in my professional career. I would never criticize the Court.

But this paragraph that may be relevant to what is in your mind reads as follows:

> The right to a fair trial, with all this term implies, is one of our most cherished rights. We have, therefore, welcomed the increased concern by law enforcement agencies and the courts alike in safeguarding a fair trail. Many of the decisions of the Supreme Court which are criticized today are likely in the perspective of history to be viewed as significant milestones in the ageless struggle to protect the individual from arbitrary and oppressive government.

Senator HART. When did you give that speech, Mr. Powell?

Mr. POWELL. It was in 1965. I would place the month at June or July. This was after most of them—perhaps it was before, it was before *Miranda*—but I had in mind, for example, cases like *Gideon* and *Mapp*.

Senator HART. I would welcome, Mr. Chairman, the statement to which Mr. Powell referred being made part of the record at this point.

The CHAIRMAN. It is in the record.

(The address referred to follows.)

ADDRESS BY LEWIS F. POWELL, FOURTH CIRCUIT JUDICIAL CONFERENCE JUNE 26, 1965, WHITE SULPHER SPRINGS, W. VA.

STATE OF CRIMINAL JUSTICE

My talk today is on the state of criminal justice—a problem of special concern both to the bench and the bar. This is a vast and complex subject. There are few absolutes in this field, and no simple answers. In a brief talk, I can only be suggestive; certainly not be definitive.

It is now generally recognized that we have an increasingly serious crime problem. Indeed, this may be our number one domestic problem.

The facts as to crime are generally familiar to each of you. Unfortunately, they are growing worse every year.

Serious crime was up 13% in 1964 over 1963.

There were increases in all major categories, with crimes of violence causing special concern.[1]

Organized crime—despite heroic efforts by the Department of Justice—still operates largely beyond the reach of the law.

Juvenile crime is a national disgrace, with more than 40% of all arrests involving teenagers, 18 years of age and under.

More than two and one half million serious crimes were committed in 1964—a staggering total.

The single most depressing statistic is that since 1958 major crime has increased five times faster than the population growth.

Indeed, it is not too much to say that we have reached the point—in certain areas in this country—of a partial breakdown of law and order. In his message to Congress of March 8, President Johnson said:

"Crime has become a malignant enemy in America's midst."

So much for a brief and oversimplified summary of the crime situation. The question is what can the legal profession do to assist in meeting this problem.

The most direct area of action relates to our criminal laws, and the enforcement thereof by police and in the courts. The strengthening and clarifying of criminal laws and the improvement in the administration of criminal justice, especially in its certainty and swiftness, will help restore the state of law and order which is so urgently needed.[2]

Historic decisions of the Supreme Court in recent years have strengthened significantly the rights of accused persons. Most notably, these decisions have extended standards from the Bill of Rights Amendments to the state courts. This has been accomplished in a series of far-reaching cases reinterpreting the due process clause of the Fourteenth Amendment to include specific safeguards of the Fourth, Fifth and Sixth Amendments.[3]

There is, of course, room for considerable difference of opinion with respect to some of these decisions—and lawyers differ widely as do members of the Court on occasions. Yet, it must be remembered that in all of these cases the Court was confronted with the difficult question of protecting the constitutional rights of the individual against alleged unlawful acts of government.

Unfortunately, the Court itself has been unfairly criticized for some of these decisions. Lawyers, as the guardians of our system of freedom under law, have a special responsibility to defend the Supreme Court and our judicial system when they come under unfair attack. We have too often failed to draw the line—essential to the safeguarding of our institutions—between the right to disagree with particular decisions and the duty to sustain and defend the judiciary. Unfortunately, many have failed to appreciate that the surest way to undermine the very foundations of our system is to destroy public confidence in the honor and integrity of our courts.

The right to a fair trial, with all that this term implies, is one of our most cherished rights. We have therefore welcomed the increased concern by law enforcement agencies and the courts alike in safeguarding fair trial. Many of the decisions of the Supreme Court which are criticized today are likely, in the perspective of history, to be viewed as important milestones in the ageless struggle to protect the individual from oppressive government.

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[1] For the year 1964 as compared with 1963: murder was up 9%, robbery up 12%, aggravated assault up 18%, and rape up 19%.

[2] This talk is not concerned with the underlying causes of crime. The criminalogists and sociologists are deeply concerned—and often divided as to the causes and prevention of crime. These are questions of first importance, and merit continued and intensive study. Appropriate and determined action, both by government and private agencies, to remedy conditions which promote crime is imperative. In the long run improved education and job opportunities afford the most hope.

[3] For example, *Mapp* v. *Ohio*, 367 U.S. 643 (1961), applies the Fourth Amendment to the states through the Fourteenth so as to render inadmissible evidence seized in violation of the federal rule. *Aguilar* v. *Texas*, 378 U.S. 108 (1964) similarly holds federal arrest warrant standards applicable to the states [For a subsequent application see *U.S.* v. *Ventresca* (March 1, 1965), U.S Sup Ct. Bulletin 888]. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) holds the Sixth Amendment right to counsel applicable to the states through the Fourteenth. And *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) significantly expands the right to counsel by holding that it attaches as soon as the investigation by the police reaches the "accusatory stage". See also *Ker* v. *California*, 374 U.S. 23 (1963); *Malloy* v. *Hogan*, 378 U.S. 1 (1964), and *Beck* v. *Ohio*, 379 U.S. 89 (1964).

As in earlier milestone cases of due process, some of these recent decisions have significantly complicated the task of law enforcement by changing the applicable standards. In addition, while erasing old guidelines, these cases have not substituted precise new lines. Some have left a twilight zone of considerable uncertainty and confusion.

These consequences are not surprising to lawyers, familiar as we are with our case by case system of developing the law. But it is important to recognize that we are in a period of transition, and that the limits of many of the recent cases remain for future determination.

Let us take a look at the implications of several of these historic decisions.

As this audience is familiar with these cases, I will not burden you with detailed discussion:

Let us start with *Mapp* v. *Ohio*,[4] as it has so recently been in the news. As you know, that case applied the Fourth Amendment restriction on illegal search and seizure to the states and thus forbade State use of any evidence obtained in violation of the amendment.

Happily, in *Linkletter* v. *Walker*[5] the question as to Mapp's retroactivity was settled negatively. A different decision would have imposed a tremendous strain on state and federal courts and on state prosecutors and police in having to retry a great number of cases.

But perplexing questions remain.

How far will Mapp's doctrine be extended? What constitutes illegal search and seizure?

Will some or all types of wire-tapping be so classified?

What about other means of police investigation and surveillance which intrude upon the privacy of citizens?

Gideon v. *Wainwright*[6] is another landmark case—leaving many unanswered questions.

Few decisions have been more widely applauded by the bench and bar.

This could well be one of the great decisions in promoting improvement of the administration of justice. The very presence in court of competent counsel will ameliorate many of the problems now plaguing the courts.

Yet, questions as to Gideon's limits are already being pressed. Does it, for example, apply to "*misdemeanors*" and so called "*petty offenses*"?[7]

The Fifth Circuit Court of Appeals in *Harvey* v. *Mississippi* (decided January 12, 1965) applied *Gideon* in a misdemeanor case where a justice of the peace had fined a Mississippi defendant $500 and sentenced him to 90 days in jail for "illegal possession of whiskey". This was the maximum offense for this misdemeanor.[8]

A New York Court has recently held that the constitutional right to counsel applies to trials of certain traffic violations.[9]

It is also being seriously urged that the right of an indigent to counsel means the right to counsel of his own choice—not merely the public defender or a court assigned counsel.

If the outer limits of *Gideon* should be stretched to include all misdemeanors—including minor traffic offenses—and to require counsel chosen personally by the indigent defendant, earlier judgments as to the unqualified wholesome effect of this decision might well undergo some re-examination. The burden on the bar and the public treasury might become intolerable.

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[4] 367 U.S. 643 (1961).

[5] U.S. (June 7, 1965), 14 L. ed 2d 601, 85 S.Ct. —.

[6] 372 U.S. 335 (1963).

[7] The House of Delegates of the American Bar Association, at its August 1964 meeting, recommended that: "Counsel should be provided at least in all cases where any serious penalty may be imposed and since, in fact, the advice and assistance of counsel would be desirable in all cases, the objective should be to extend rather than limit the right to counsel." Like the Court's opinion, this resolution leaves much to be decided in the future.

[8] The Criminal Justice Act of 1964 provides for the appointment of counsel where the defendant is charged "with a felony or a misdemeanor, other than a petty offense". A "petty" offense is defined as any misdemeanor, the penalty for which does not exceed imprisonment of six months or a fine of not more than $500, or both. Thus, the *Harvey* case goes well beyond the implications of the Criminal Justice Act. Cf. *Evans* v. *Rives*, 126 F.2d 633 (D.C.Cir. 1942).

[9] See April 1, 1965 N.Y. Times, reporting on the reversal of conviction of John W. Kohler, Jr., by the Appellate Term, Supreme Court. The offense charged was "speeding", which a majority of the court said could "result in revocation of a license to operate an automobile, which could be the only mainstay for a defendant's living."

It is the *Escabedo* [10] case, however, that raises perhaps the most difficult unanswered questions. There a principal suspect while being questioned at length by the police repeatedly asked to see his lawyer. The lawyer was at the station house asking to see his client. There was no evidence that the defendant was advised of his right not to incriminate himself and there is an allegation that he was tricked into doing so. Under these circumstances the Supreme Court held he was denied "due process" when the incriminating statement obtained during the interrogation was admitted in evidence. A holding based strictly on these facts would have raised few questions. But much uncertainty has resulted from the citation of *Gideon*, and particularly from the following sentence:

"We hold only that when the process [questioning a witness] shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and under the circumstances here, the accused must be permitted to consult his lawyer." [11]

Four dissenting members of the Court thought that the majority opinion overruled prior decisions [12] and extended the Sixth Amendment right to counsel to the point where "the task [of law enforcement will be] made a great deal more difficult." [13]

Since the *Escobedo* decision in June 1964, opinions have differed widely as to what it actually requires. Some have asserted that it may have the effect of prohibiting all police questioning of potential suspects. If a lawyer is present, his advice obviously will be to answer no questions. It is further pointed out that where the suspect is indigent the state may have to furnish him counsel.[14]

Still others believe that *Escobedo* may only require that the suspect be advised of his right to consult a lawyer prior to interrogation.[15] Yet another view is that *Escobedo* merely requires that the suspect be warned of his constitutional right to remain silent, prior to police interrogation.[16] Others suggest that perhaps it requires affirmative advice as to both the right to counsel *and* to remain silent.[17] Finally, some believe *Escobedo* is limited to the situation where the witness asks for counsel and his request is denied.[18]

But whatever may be its ultimate interpretation, *Escobedo* strikingly illustrates that key decisions often leave many questions unanswered. The result is that law enforcement officers and trial courts must then operate without dependable guidelines.

There are other landmark decisions which come to mind.

Among these, *Mallory* v. *U.S.* [19] has provoked much discussion—as well as consternation among law enforcement officials. Congress is now wrestling with legislation trying to define the difficult and delicate issue of what constitutes "unreasonable delay" in presenting a suspect to a magistrate for arraignment.

And, in terms of actual impact on the courts, perhaps most important of all to Federal judges, are the decisions which opened the flood gates of habeas corpus—particularly *Fay* v. *Noia*,[20] *Townsen* v. *Sain*,[21] and *Sanders* v. *U.S.*[22]

As Professor Meador of the University of Virginia has said:

"The writ of habeas corpus now has a built-in expansion factor, since every new 14th Amendment right judicially formulated for a defendant—furnishes a new ground for habeas corpus" [23]

An example of Professor Meador's "built-in expansion" doctrine is *Jackson* v. *Denno* [24]—holding invalid the New York rule which permitted the jury to determine whether a confession is voluntary.

It now appears—especially from the dicta in *Linkletter*—that *Denno* must be applied retroactively.

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[10] *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).
[11] *Id.* at p 492.
[12] Cf. *Cicenia* v. *Logay*, 357 U.S. 504.
[13] Dissenting opinion of Mr. Justice White, 378 U.S. at pp 493, 499.
[14] See Kaufman, "The Uncertain Criminal Law," *Atlantic Monthly*, January 1965.
[15] *State* v. *Hill*, 397 P.2d 261 (1964).
[16] E.g., *People* v. *Nuly*, 395 P.2d 557 (Ore. 1964).
[17] See *People* v *Dorado* (Cal. Crim. 7468, Jan. 29, 1965); *Carson* v. *Commonwealth*, 382 S W.2d 85 (Ky 1964); *State* v. *Dufour*, 206 A.2d 82 (R.I. 1965).
[18] Cf *State* v. *Fox*, 131 N.W. 2d 604 (Iowa 1964); *Anderson* v. *State*, 205 A 2d 281 (Md 1964); *Beau* v. *State*, (Nev. 1965); *Browne* v *State*, 131 N W.2d 169 (Wis. 1964); *People* v *Sanchez*, 33 L Week 2571 (N.Y. April 22, 1965).
[19] 354 U S. 449 (1957).
[20] 372 U.S. 391 (1963).
[21] 372 U.S. 293 (1963).
[22] 373 U.S. 1 (1963).
[23] ABAJ, Vol. 50 (Oct. 1964), p. 928.
[24] 372 U.S. 391 (1963).

Griffin v. *California*[25] is another recent example of this escalation (prosecutor may not comment on failure of defendant to testify).

Whatever may be the ultimate interpretation or resolution of these and similar cases, I have mentioned them to illustrate the truism that great landmark cass in this area usually leave many unanswered questions.

And the most immediate result is that law enforcement officers and trial courts must then operate without dependable guidelines.

In time, much of this uncertainty will be removed by future court decisions. But the present need for clarification of criminal law is far too urgent to leave this to the slow and necessarily uneven process of judicial decision. There must also be action—where this is appropriate—by legislation and rules of court, as well as by clarifying police procedure.

The key problem, in providing workable solutions, is one of balance. While the safeguards of fair trial must surely be preserved, the right of society in general, and of each individual in particular, to be protected from crime must never be subordinated to other rights.

When we talk of "individual rights" it is well to remember that the right of citizens to be free from criminal molestation is perhaps the most basic individual right. Unless this is adequately safeguarded, society itself may become so disordered that in the end all rights are endangered.

There is a growing body of opinion that an imbalance does exist, and that the rights of law abiding citizens have in effect been subordinated.[26]

Lord Shawcross, former Labour Party Attorney General of Great Britain, in writing recently about a comparable condition there, said:

"The truth is, I believe, that the law has become hopelessly unrealistic in its attitude toward the prevention and detection of crime. We cling to a sentimental and sporting attitude in dealing with the criminal. We put illusory fears about the impairment of liberty before the promotion of justice . . ." [27]

One need not go all the way with Lord Shawcross to agree that the pendulum in criminal justice may indeed have swung too far.[28]

But recently, there have been some distinctly encouraging signs.

President Johnson, in his message of March 8, placed his administration behind a broadly conceived program to combat crime and the conditions under which it flourished. A new unit, designated the Office of Criminal Justice, was created last year within the Department of Justice, and is ably headed by James Vorenberg of Harvard Law School.[29]

As recently as March 18, the Law Enforcement Assistance Act of 1965 was introduced in the Congress with Presidential approval. This is intended to provide financial and other assistance to state and local law enforcement agencies with the view to improving techniques of crime control and prevention.[30]

A number of states are also re-examining their criminal codes, many of which are out-dated and inadequate under modern conditions and in light of recent court decisions.[31]

The ABA welcomes this recognition of the need for modernizing and strengthening criminal laws and for improved enforcement methods and techniques. Indeed, the Association itself has initiated in this area one of the most significant projects ever undertaken by the organized bar.

Under the Chairmanship of Chief Judge J. Edward Lumbard, of the United States Court of Appeals for the Second Circuit, a distinguished national committee has been authorized to formulate and recommend standards with the view to "improving the fairness, efficiency and effectiveness of criminal justice

[25] 380 U.S 609 (1965).

[26] As Judge J. Edward Lumbard put it: "The average citizen's impression is that the public interest is not receiving fair treatment and that undue emphasis has been placed on safeguarding individual rights . . ." Address, Section of Judicial Administration, Aug. 10, 1964. See also Lumbard, *The Administration of Criminal Justice,* 48 ABAJ 840 (1963).

[27] Volume 51 ABAJ, p. 225, 227 (March 1965).

[28] Walter Lippmann, commenting on the crime problem and this imbalance, recently said: "The balance of power within our society has turned dangerously against the peace forces, against governors and mayors and legislators, against the police and the courts" Herald Tribune, March 11, 1965.

[29] The American Law Institute has in process a model code dealing with many of the difficult pre-arraignment problems.

[30] H.R. 6508, 89th Cong. See address by Attorney General Katzenbach before National League of Cities, Washington, D C., April 1, 1965.

[31] Message of Gov. Rockefeller to legislature, reported in New York Times, Jan. 7, 1965. New York State has already set an interesting example by the enactment of its "stop and frisk" and "no knock" laws. These laws, presently being tested in the courts, seek to clarify and increase the power of police to question on the scene persons suspected of crime and delineate the right of police, pursuant to court order, to enter and search for evidence.

in state and federal courts". The entire spectrum of the administration of criminal law is being examined.

Six advisory committees—composed of highly qualified judges, lawyers, law teachers and public officials—have been formed to work on particular areas of criminal justice. Each advisory committee has engaged a recognized authority on criminal law to serve as its "reported". The project, expected to require three years and to cost $750,000 is being financed by the American Bar Endowment, and by grants from the Avalon and Vincent Astor Foundations. The Institute of Judicial Administration, affiliated with the Law School of New York, is providing staff assistance.

The remedies for the present unsatisfactory situation include, of course, far more effective enforcement of existing laws. In addition, there are undoubtedly areas in which the need is for legislative action, both state and federal, which strengthens and clarifies our criminal laws. There is also a need for appropriate changes in court rules, and in procedures and standards followed by law enforcement officials.

In short, our criminal justice is in a state of considerable disarray, and broadly based reforms are indicated.

In accomplishing these needed remedies, care must, of course, be exercised to avoid another pendulum swing too far in the opposite direction.

We must certainly have a system which preserves law and order, and this today is the most urgent need. But if our system is to deserve and receive public support, it must also be fair to the accused and compatible with constitutional rights. At times, the striking of a just and workable balance is very difficult indeed. But this must ever be our objective.

There are, unfortunately, some who frame this problem as an inevitable and irreconcilable conflict between the "law enforcement view" and the "individual rights" view. As James Vorenberg has said, this is a "false conflict which obscures and obstructs" rather than contributes to sound and sensible solutions.

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Perhaps I have said enough to indicate the timeliness of the American Bar Association project—as well as the magnitude and complexity of the task of formulating national standards for consideration by legislative bodies, courts and police authorities. Since these standards will merely be recommendations, their authority and influence will depend upon the wisdom with which the Committee and the Advisory Committees function. Their acceptance will depend in major part upon the extent to which the bench and the bar support them.

Senator HART. All right.

The Senator from California and you discussed the extent to which a black American today could be said to enjoy equal protection and equal opportunity. As I recall it, you said you felt that so far as formal treatment under the law, so far as the statutes could achieve it, one could say that there was equality, both of opportunity and freedom, but that in the implementation of some of these laws, and in the attitudes which are personal to a man, we have yet a way to go. Is that a fair statement?

Mr. POWELL. I think that is a correct summary of what I said.

Senator HART. Would you agree that many of the decisions of the Warren Court most sharply criticized might fairly be said to be an effort, and a constitutionally sound effort, to reduce some of the disability which attaches to an American merely because he is poor or black or unpopular?

Mr. POWELL. I would agree with that.

Senator HART. The unpopularity of the decisions ought never confuse us as to the soundness of them nor lessen our willingness, either as a judge or as a public commentator to defend them, if indeed, we think, that which is unpopular nonetheless is right.

Mr. POWELL. Of course.

Senator HART. This morning there was discussion about the degree to which there is a chilling effect on the exercise of first amendment rights because of Government threat or presence.

The question in the minds of some of us has been the extent to which the court has an obligation to prevent, as an example, the presence of a photographer or a number of photographers and several observers in attendance at a meeting—whether the crowd is large or small—which is assembled to protest a policy of the Government.

You said that clearly it is necessary and right that a citizen have the opportunity freely to protest, freely to advance an idea. Do you believe that that right could be thwarted by Government action of the sort I have described, and, if so, would you feel that it would be appropriate for a court to intervene between the Government and the individuals assembled?

Mr. POWELL. I would certainly think it conceivable that free expression could be thwarted in that way, given certain facts and circumstances, and if it were I would assume the first amendment would be applicable.

Senator HART. It is not a matter merely of adversion to publicity as you, with understandable humor, described your own situation in the last two and a half weeks; it is the problem of most citizens who have to have a job in order to survive, who feel a deep resentment about some injustice in the society, some unwise Government policy; they want to do more than just write their Senator; they want to stand up in broad daylight and say, "you are wrong" and try to change it.

Yet, if they know there is the camera there, the likelihood is great there will be a dossier file and, as we have learned in this committee, once the file is opened on you, you have one awful time finding out what goes into it, and you are never sure why you are dismissed from employment or find new employment difficult to get. You always have the nagging feeling that, "I had better not go to that meeting because who knows what happens when they take my picture."

This describes a very real fear and not a very schizophrenic or even hypersensitive citizen, isn't that so? Isn't this something where we should not just dismiss it by saying, "Well, the Executive is trying to protect freedom."

Mr. POWELL. I have not had any experience with this problem. If it is as serious as you would describe it, it would certainly seem to me a problem that needs attention. I assume, Senator Hart, you are not talking about the presence in a public meeting of photographers from the news media, are you? You are talking about Government photographers.

Senator HART. The Government.

Mr. POWELL. I would assume also that you are talking about peaceful assembly rather than situations in which it has already broken into violence.

Senator HART. Yes.

Mr. POWELL. Right.

Senator HART. I am talking about the prospect——

Mr. POWELL. Right.

Senator HART. And how it affects a citizen's ability to exercise his first amendment rights.

If increasingly our practice as a Government is to send out photographers and have the hall well secured, lots of people will find very sound reasons why they won't show up for that meeting, and it is this very suppression of ideas that was intended to be avoided by the first amendment; isn't that right?

Mr. POWELL. If that were widespread, I would have no hesitation in saying that it would seem to me to have chilling consequences. I would be surprised——

Senator HART. Even if it applied only to one citizen it would have a chilling consequence on him?

Mr. POWELL. I would have to say in answer that I think it would have to depend somewhat on the citizen. I think I have known people who like publicity. But the facts you state exclude publicity. They include only surveillance by some governmental agency.

Senator HART. That is right.

There has been much discussion about your article that was originally in the Times-Dispatch, and then in the New York Times. As I understand it, your general theme was that most of the fears about repressive actions by the Government were exaggerated or unfounded.

You stated that whatever past validity there may have been in distinguishing between external threats of subversion and internal threats, that distinction now is largely meaningless because "the radical left is plotting a revolution and is collaborating with foreign Communist enemies."

What was your concept of the radical left when you used that? Are you defining it as those groups who are conspiring with foreign enemies in this country and no others, or does it include those whom you referred to later on in that article as sympathizers with radical organizations?

Mr. POWELL. It includes, Senator, groups that would like to destroy our democratic form of government.

Senator HART. Well, let us assume I want to destroy the democratic form of government and substitute a vegetarian government?

Mr. POWELL. Substitute a what? What type of government?

Senator HART. Vegetarian, as distinguished from a Communist or Socialist. Does that desire, without an assumption that vegetarians will bomb, warrant the labeling of that vegetarian domestic group as the same as a foreign group and, therefore, to be put under surveillance without any court approval?

Mr. POWELL. I think the example you put is very far-removed from anything that I had in mind. The basic concept that I had in this regard, with regard to change, is that our system provides within its structure the means for peaceful change and any change that the people wish to impose or to achieve within the system is change which would be lawfully accomplished.

The change that I would oppose, and there are organizations and individuals in this country who quite openly advocate this kind of change, is change without the system. They say the system no longer accommodates itself properly enough to the need for change, and I honestly disagree with those people.

I believe that any change by coercion or force will in the long run be as harmful to the people who initiate it as to those who, in the beginning, may seem to be the victims. This is my basic philosophy on this

particular subject. I think you will see it running through a good many of the talks that I have made.

Senator HART. The Government must then be sensitive, first, to the identification and observation of those who seek to destroy us, not by change within the form but through the introduction of action not permitted by the form of the system.

Mr. POWELL. Force, violence primarily.

Senator HART. And, secondly, while the Government properly is concerned to protect society against those elements, in a public meeting place and a public assembly, to what extent do you believe that this justifies the Government, through its police power, to short-circuit the right peacefully to be assembled of those who do not share the methods that this minority group would use, and were in danger, therefore, of being guilty by association with this group advocating violence although they are in no way sympathetic to its program?

Mr. POWELL. You are describing a group which may include some who would wish to use force and others who would not wish to use force? Obviously, that presents a problem. I do not know what the clear answer would be unless I know the facts precisely, and then I would try to know.

Senator HART. I may be doing an unkindness to even the most extreme of those who were here on May Day, but isn't it somewhat descriptive of the situation we had here on May Day where the vast majority, and the vast majority of those who were arrested, were being stuck with association with a handful who were upsetting automobiles? Do you think the Government is justified in making the kind of mass arrests, and subsequent acknowledgement that they were wrong, simply because there were a handful doing violence?

Mr. POWELL. I was not here. I, of course, read the press accounts. I would assume, Senator Hart, that—and I had no responsibility so this is an assumption—that those in authority had to make a decision whether to allow the bridges across the river to be closed in pursuance of what was announced as a plan to close down Washington, D.C.

Now, I agree with you from what I have heard from my own young that there were masses of innocent people who were there just to watch the fun, who were swept up in procedures that certainly no lawyer would recommend normally.

Now, what happens involves questions of degree. I myself do not know how serious the problem was, whether there were other alternatives to prevent the city from being closed in the sense that the bridges were closed.

I would say, in all candor, that I think the public authorities had a responsibility to keep the bridges and streets open. I think they had a responsibility to accomplish that with a minimum of force. I think they had a responsibility to try to accomplish it without injury to or arrest of innocent people. But in large groups of people it does appear to me that sometimes it may be difficult, particularly with large numbers of police involved, to attain all of those rather obvious objectives.

Senator HART. As you remind us, you were not here, but speaking again as a lawyer, and following each step of your explanation down to the point where you say that it should be done with a minimum of restraint on innocent people or however you phrased it——

Mr. POWELL. I said a minimum of force and every effort not to implicate innocent people.

Senator HART (continuing). Wouldn't just commonsense suggest with equal force that once a government discovered that it had on its hands people whom they could not prove to have been involved in any illegal conduct, that it should on its own initiative have released those people? Isn't that the mark of just a basically sensitive Department of Justice to release them rather than waiting until court orders were obtained to release them? If you were responsible for the cage in which 200 people were being contained or detained, and you discovered that there is no charge and there was no basis for a charge, not even an ability to identify, wouldn't a sensitive government unlock the cage?

Mr. POWELL. Certainly the way you put it, there is only one answer, Senator.

Senator HART. I think that is not an inaccurate description of a situation that did exist with respect to a cage, with a larger number than 200. I do not ask you to agree that this is so.

Mr. POWELL. I will say—I think I won't proceed. I was going to volunteer something that may be slightly irrelevant. I have told witnesses not to volunteer and here I find myself about to do it. [Laughter.]

Senator HART. I intruded in your exchange with Senator Tunney when he read the paragraph from President Nixon's acceptance speech in Miami where the then nominee and now President said that he would seek judges, who have the responsibility to interpret our laws, to be men dedicated to the great principles of civil rights.

You described your concerns, and actions which you thought might suggest that this kind of concern on your part, and I made the point that in the last 10 years, in any event, you have never argued that public accommodation laws should be kept off the books. I think I should also add for the record a communication which was brought to the attention of the Senate through its introduction in the record on November 2, by Senator Byrd, who was sitting here with you, of a letter from a member of the Virginia House of Delegates representing Richmond and Henrico County, Dr. William Ferguson Reed. Doctor Reed is the first Negro elected to the Virginia General Assembly during this century, and that letter, written by Doctor Reed to Senator Byrd, strongly recommends your confirmation and makes reference to the fact that all regard you as a fair-minded man. I think it is well that you be aware of that comment by Doctor Reed.

Mr. POWELL. Thank you, Senator.

Senator HART. I have no further, questions Mr. Chairman.

The CHAIRMAN. Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

I, too, want to join my colleagues, Mr. Powell, in congratulating you for winning this nomination.

I have had a number of friends and colleagues who have been involved in Government work in the Justice Department while you were serving as the President of the American Bar Association and who have been tremendously impressed not only with your skill as a lawyer and your objectivity and craftsmanship in the law but also with your sense of fairness and equity.

An incident which I thought was quite revealing was related to me by Mr. Burke Marshall, who was serving in the Justice Department in the early part of 1960 and had a very difficult case involving a defendant

in Virginia. It was a very controversial situation and he called you and you responded affirmatively, immediately, and fulfilled the responsibility with great concern and judgment. I have had communication with former Attorney General Katzenbach as well, urging favorable consideration, from the former head of the Massachusetts Bar Association, and many of the lawyers in whom I have a great deal of confidence in my own State who worked with you in a number of different matters and who are all extremely kind and generous in their comments about you.

Mr. POWELL. Senator Kennedy, excuse me, sir, but I think the episode or event to which Burke Marshall referred involved representing a defendant in an unpopular cause and I have heard that he gives me credit for having done it. The fact is, I did not do it. I was perfectly willing to do it. I was not in position to act. I think I was out of town at the time and one of my partners referred him to a very competent lawyer in Richmond, named George Allen, who actually represented the individual and, I think, got him off. But he did a whole lot better than I would have done because I never practiced criminal law.

Senator KENNEDY. You got great credit from Burke Marshall and I am sure you would have done it had you been in town.

You have gone over a number of my different areas of interest. I would like to review some aspects of these with you.

You have commented on some of them, but I know it will be very helpful to me if you felt that you could make some further response in these areas of inquiry.

A point has been made that many of your general views on social and political and constitutional questions have changed in the last 5 or 6 years, and I am wondering whether you have noticed any consistent pattern in whatever changes there have been.

The view has been expressed, in light of your comments in "Civil Liberties Repression; Fact or Fiction?" that there may have been a hardening of your viewpoint, and a certain hardness creeping into some of your writings in the last few years. At the time you were president of the American Bar Association, your style was observed as being extremely balanced and measured, and then the recent publication used the phrases "standard leftist propaganda," "sheer nonsense," "predictable voices cried repression and brutality." You suggest that many persons generally concerned with civil liberties have joined "in promoting or accepting the propaganda of the radical left." Would you care to comment?

Is this an unfair characterization of a change of view, or how would you respond to that suggestion?

Mr. POWELL. I would like to respond, Senator Kennedy. I do not know that I would say it is unfair, because one can never judge himself. I do not think my views have changed. I would say that a good deal depends, certainly in my own instance, and perhaps that of others, in terms of writing style as to what one is doing. When I write for a law review article, for example, or if I am making an address to lawyers, I will do more work in preparation, and I will be more careful in the articulation of my views than if I am asked to make a speech, say, to a lay group at a civic club luncheon or a businessmen's organization.

I think the quotations that you read into the record came from my one newspaper article. I ought to know better than to write any newspaper articles from now on. I wrote that primarily on the issue of repression and I dealt in a shorthand way with some very complex issues and, as a lawyer, that is a dangerous thing for one to do.

My thesis was that America, if viewed fairly, overall, is certainly not a repressive society, and I cited four or five examples. You mentioned some of them.

But coming back to your point of departure, while I suppose there may be subtle changes in one's views of which one is not altogether aware, I am not conscious of any philosophical change in my own judgments from those that I have expressed when I was president of the American Bar Association, and I was very careful about what I said.

Senator KENNEDY. In this article, again on the question of repression, you talk about the charges of repression as no more than "standard leftist propaganda." and I must say many of us see in a good many of the recent events, not necessarily a consipiracy, but a pattern that has been directed against dissenters on the left. Of course we do, as you point out quite rightfully, retain many of our cherished freedoms. But when we observe a series of events like the Kent State and Jackson State shootings, with no indictments afterwards; and the large number of wiretap listening not approved by the courts; the FBI trying to make dissenters feel there is an agent behind every mailbox—and I have a copy of an FBI memo here; the spying on Earth Day rallies; the effort to suppress the Pentagon Papers during the debate on the end-the-war amendments; the efforts to revive and strengthen the Subversive Activities Control Board; the indiscriminate arrests and other law enforcement excesses of May Day—that, taken as a series of events all of which have taken place relatively recently—and I could go on—may very well be a legitimate concern to rational and moderate men. This series of events that has taken place, the ones which I have just indicated—May Day; spying at various peace rallies and Earth Day rallies, those being in attendance having absolutely no idea of participating in violence or disturbance; the increase in non-court-authorized wiretapping and the different defininition that is being used in wiretapping for national security cases, for example, which is different from the definition that was used back in 1968; you can take at least these examples, and I think there are others as well, and draw from them—or at least reasonable men, rational men, may draw from them—the conclusion that there has been increased repression, lessened respect for constitutional rights and civil liberties. And whether you agree or not with the characterization, at least it could be understood why rational men are interested about the threat of repression as well as those making as you point out, "standard leftist propaganda."

Mr. POWELL. I would like to agree with you without qualification, and yet, Senator, I must say that it seems to me that one of the major contributing causes to what concerns you is a problem which has concerned me and has been the subject of several speeches that I have made since my ABA days, and this is a problem that has developed since then, and that has been the escalation of the use of coercion, force, and violence by certain groups and individuals, and this always

provokes a response, and the response tends to attain the level and sometimes to exceed the level of the provocation.

I became concerned about what, for lack of a more precise term, has been called the New Left movement in this country primarily, initially in my role as a trustee. At that time I was a trustee of two colleges. The impact became very visible at the college level, as we all know, and millions of innocent people got caught up in all this, and when a few people resort to force and coercion, innocent people are not able to exercise their rights, the government responds and we have these problems which you mention. We have some of the problems which I mentioned in some of the things I wrote. I do not know whether that response is helpful but that is basically the way I look at it.

Senator KENNEDY. Well, to give a few examples, we have been through spying on Earth Day demonstrations, war demonstrations, and the chilling effect that this has on innocent people. And I have in front of me a bulletin that is used by the Federal Bureau of Investigation, entitled "FBI Instructions for Agents in Pennsylvania." In this particular document it talks about how "There was a pretty general concensus that more interviews with these subjects and hangers-on are in order for plenty of reasons, chief of which are it will enhance the paranoia endemic in these circles and will further serve to get the point across there is an FBI agent behind every mailbox."

I would like to ask that the bulletin—it is an unclassified bulletin—be put in the record.

The CHAIRMAN. It may be.

(Document given to Judiciary Committee staff.)

Senator KENNEDY. You know, I suppose, that one could be rightfully concerned about the FBI as a matter of policy conducting interviews with either subjects or hangers-on or whatever they define as hangers-on, whoever they define as subjects, to try to get the point across that there is an FBI agent behind every mailbox. Does this sort of thing concern you at all?

Mr. POWELL. It certainly does.

Senator KENNEDY. Well, if you could just talk about that concern in terms of the impact of this sort of police activity on liberties of individuals, I would be interested in hearing that.

Mr. POWELL. Well, the brief excerpt you read from the bulletin, which I have not seen, suggests policemen behind every bush. That would be an intolerable situation, and I do not think anybody would support that type of society.

Senator KENNEDY. I suppose many of us who are very much concerned about the procedures that were followed on May Day, which you talked about with Senator Hart, feel that other steps could have been taken, other procedures followed.

Do you think it would not have been unreasonable to expect a greater sense of flexibility by the Government in planning for things like May Day, so that there would not have to be such a reliance on the kind of sweeping dragnet that was used in attempting to meet the threat or apparent threat of May Day? Do you think there is a responsibility on the Government for that?

Mr. POWELL. I would certainly think there is a responsibility on Government to try to plan to meet situations such as the one you described.

Senator KENNEDY. One of the things that was mentioned, I believe, earlier today, in terms of your expressing concern about rights and liberties, was the work you did to develop legal services for the needy people in our society. I understand that you did a magnificent job in establishing a system for delivering legal counsel to the poor, and you have spoken time and time again, eloquently, indeed, to make sure that the adversary systems worked fairly by making sure justice was not denied because of poverty, and, as I understand, you were troubled by a survey showing what large numbers of laymen and lawyers felt about the nature of legal justice given to these people. Yet you were quoted, from remarks before the Richmond Bar Association last April, as saying that we could cut back on some of the "artificial rules" engrafted in such cases like *Miranda* and *Escobedo* which solved some of the problems that troubled you.

Would you care to comment on the apparent tension that would exist between these different approaches?

Mr. POWELL. I do not recall the specific reference you make to the Richmond Bar Association talk, and yet, if I understand the thrust of your question, it relates to whether I would feel that some of the decisions which are designed to assure protection to the rights of persons accused of a crime are incompatible with the view I took requiring or emphasizing the desirability of having counsel in all cases involving the poor. I would see no inconsistency in that if you are talking about the views I have expressed, for example, with respect to *Miranda*.

Senator KENNEDY. Wasn't that pretty much the case in *Miranda*, the *Miranda* situation?

Mr. POWELL. The issue there was not whether counsel would be provided; it was whether, so far as I was concerned, all interrogation at the scene of a crime, for example, or the station house prior to arraignment, had to be conducted in the presence of counsel or such presence be waived consciously by the individual.

Now, here we have a judgment as to conflicting interests, society's interest on the one hand, to try to get at the facts of crime, and an accused person's interest, on the other hand, to have counsel at a fairly early stage.

We wrestled with this balancing of interests on the Crime Commission at great length. I forget the exact recommendation we made, but I think it was that gradually counsel should be made available at an early stage. I say gradually because there may not be enough lawyers to meet the demand. Certainly, as a minimum, there should be counsel if desired from arraignment through appeal and postconviction remedies. But again the facts and circumstances become relevant, such as in the *Escobedo* case where they had the man in the station house and the lawyer was sitting outside and they would not let him interview him, which as I stated, was quite outrageous.

Senator KENNEDY. In the U.S. News & World Report of October 30, 1967, there was an article on "Civil Disobedience: Prelude to Revolution?" I do not know who gave the title, but in any event during the early part of it you talk about the disquieting trend so evident in our country "toward organized lawlessness and even rebellion. One of the contributing causes is the doctrine of civil disobedience. This heresy was dramatically associated with the civil rights movement by the famous letter of Martin Luther King from a Birmingham jail."

You say, "As rationalized by Dr. King, some laws are 'just' and others 'unjust'."

Now, in the letter from Dr. King—I have excerpts of it here and I am quoting from it—he wrote:

> The answer lies in the fact that there are two types of laws: just and unjust. . . . I would agree with St. Augustine that "an unjust law is no law at all".
>
> Now, what is the difference between the two? How does one determine when a law is just or unjust? A just law is a manmade code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality.

And he continues:

> I hope you are able to see the distinction I am trying to point out. In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its unjustice, is in reality expressing the highest respect for law.

What is so distressing to you about that comment?

Mr. POWELL. Senator, I wrote an article published in the Washington and Lee Law Review. Actually it was the Tucker Lecture that I gave to the Washington and Lee Law School in the Spring of 1966, I think, on the subject of civil disobedience and I think that article reflects accurately the views that I had at that time and still have.

It is important to understand that when I use the term "civil disobedience" in a critical sense—and this is clear from the article to which I referred—I am not talking about the testing in good faith, usually on a lawyer's advice, of specific laws deemed to be both unjust and invalid, and this was the way the civil rights movement started. The early cases, all of which were sustained in the United States Supreme Court, involved broadly speaking two types of situations, tests as to the validity of segregation laws, such as against occupying any seat you wished in a bus, and tests involving the validity of badly drawn breach of the peace or disorderly conduct laws. I have never criticized the type of civil disobedience action that brings a law of that character into the courts for testing.

The type of civil disobedience that seems to me to be destructive of the very fundamentals of our society was perhaps best expressed by the man who was most often cited as the father of it in this country, and that is Thoreau. He said, in substance, that he thought the best society was one with no laws at all.

Now we can sympathize with that point of view, particularly in the age in which we live where there are so many laws. And yet it is basically contrary to our system which is predicated on the rule of law, and what happened to the civil rights movement was that, with respect to civil disobedience, that concept was picked up and expanded and extended, and instead of disobedience being confined to specific laws which were sought to be tested as to their constitutionality, civil disobedience was extended to any ill or grievance against society that particular individuals might have. For example, there were people who withheld their payment of certain percentages of their

income taxes because they did not wish any part of their taxes to be used in the Vietnam war. While I can understand that and understand and sympathize with their motive, it is perfectly obvious we would have total chaos if each of us undertakes to decide which appropriation acts of Congress were just or unjust and pays our taxes accordingly.

So that broadly, in response to your question, I would say that it does seem to me that the doctrine of civil disobedience, as I have defined it and used it in the two or three occasions to which I have alluded, the definitive statement being in the Washington and Lee Law Review, is quite contrary to the rule of law in that it would allow each man to decide for himself which laws are unjust and then disobey those he regarded as unjust.

Senator KENNEDY. Your article at that time was directed towards the particular quotations from Dr. King which I have read here this afternoon. Your article also states:

"As rationalized by Dr. King, some laws are 'just' and others 'unjust'; each person may determine for himself which laws are 'unjust'; and each is free—indeed even morally bound—to violate the 'unjust' laws."

And then you say:

"Coming at a time when discriminatory State and local laws still existed in the South, civil disobedience was quickly enthroned as a worthy doctrine."

You referred on another occasion to Gandhi's civil disobedience campaign, in an article in the University of Florida Review, where you talk about Gandhi's historic struggle for independence. And yet this technique was used in India not as a means of recognizing constitutional rights, but to attain independence. You said that there were no courts, no established political institutions in India to which the issue of independence could be referred or contested. You said that there was no parallel situation in America where wrongs may be addressed in the courts and where we have established political institutions.

I am just wondering whether Mr. King thought there were remedies in courts or political institutions in the South as they related to the civil rights laws and existing statutes at that time.

Mr. POWELL. Well, I intended to make it clear that certainly in the early stages of what has been called the Civil Rights or Civil Disobedience Movement, I thought Dr. King was entirely within his rights to bring those cases, and it hardly need be said that he will be recognized as one of the great leaders of his people.

Senator Kennedy, I have thought a good deal about the subject of civil disobedience because it concerned me. At the time I wrote, the only article I could find when I was doing my research on it that was at all applicable to the modern situation was one by Burke Marshall published in the Virginia Law Review. There have been a number of discussions of it since. One that I brought with me here today and that, I think, is of interest is an essay by Archibald Cox which, I think, was published by the Harvard Press and I have no difference from former Solicitor General Cox as to his views with respect to civil disobedience. I have re-read the article. I think he expressed his views far better than I did, but in terms of the philosophic content and approach I would agree with him.

Senator KENNEDY. Is that the speech he made up at—he made a marvelous speech on this which was just off the cuff at a time when they had a demonstration up at Harvard, and was later reprinted in its entirety.

Mr. POWELL. No. This was an earlier one. This was published in 1967 by the Harvard Press. It has an essay in it by Professor Howe, and one by J. R. Wiggins who used to be managing editor of the Washington Post.

Senator KENNEDY. If I could just, finally, Mr. Powell, get back again into an area that we have gone over to some extent—this is the wiretapping which is taking place. I know you have commented on a number of observations which have been made by my colleagues here. I just raise the point of the concern that the Congress has shown on this, as expressed during the comments of Senator McClellan earlier today, and set out certain criteria, and that is obviously the expression of Congress. Ultimately, you are going to be making the decisions as to whether the actions of Congress are consistent with the rights and liberties declared by the Constitution.

The area which I think a number of us are very much concerned with is the expansion of wiretapping in national security cases.

As you can well understand, although the statute permits national security wiretapping to be done, the question is who sets out what is national security, and who makes the decision in individual cases? Quite clearly, there has been an expansion of the concept of "national security" certainly from 1968 to now. And there is considerable unauthorized wiretapping which is based upon foreign and internal security precepts. You developed to some extent this morning your own views about the legitimate concerns over the indiscriminate use of wiretapping in domestic situations.

We have seen, at least in my exchange of correspondence with the Justice Department, that there is three times as much listening as a result of taps and bugs not approved by the courts as they have been doing with court approval. So with the more expanded national security definition, there is an increase in the amount that is being done by taps and bugs without court approval. This raised some question in at least my mind about your statements when you were writing the article on civil liberties and repression, when you made the point about the chorus of unsubstantiated charges about the extent of Government wiretapping activity. And the outcry against wiretapping, you said, "is a tempest in a teapot."

Don't you think we have a legitimate, very legitimate, right to be concerned about the general expansion of wiretapping, even under the existing laws which were passed by Congress?

Mr. POWELL. I think the subject obviously is one of great concern to the American people.

I indicated before the luncheon break that I thought Congress was very wise in putting a 7-year limitation on the title III provisions of the Omnibus Crime Act. I was also glad to see that Senator McClellan has proposed an examination or investigation of this entire problem in terms of public concern.

One point that I was trying to make in the article you mentioned is that there is confusion for a number of reasons, one of which is that the public generally does not understand the distinction between the

wiretapping authorized by the Omnibus Crime Act and that which has been exercised up to this point by Presidential prerogative, nor do many members of the public understand that in the latter category there are two subdivisions, one involving foreign activities and the other involving domestic activities, although the two sometimes blend together.

It is a very difficult thing to analyze even if one is a lawyer and has studied it, and you have studied it far more than I have. I have not had access to the statistics you mentioned.

Senator KENNEDY. Well, can I just gather some degree of concern that you would have over the indiscriminate use of wiretapping? Do you see this as a ——

Mr. POWELL. If I may interrupt you——

Senator KENNEDY. Yes.

Mr. POWELL (continuing). You should have no concern about my opposing indiscriminate use of wiretapping. I remember very well Mr. Justice Holmes' shorthand way of disposing of it. He said: "Wiretapping is dirty business." Of course, it is dirty business. The public interest, on the other hand, is to try to protect the innocent people from business that is equally dirty and in many instances dirtier.

Rationalizing and balancing those interests in the best way for total public interest is an extremely difficult and delicate problem, but I am quite mindful of the concerns which you have expressed.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. Any further questions?

Senator BAYH. Yes, Mr. Chairman.

Mr. Powell, if I might explore another area that has been a matter of some concern to me, specifically as far as you are concerned: I believe that if we do have an obligation to explore a prospective nominee's philosophy, the one area that is of most immediate concern to me, and would have the most dramatic effect on future generations, is the philosophic position of prospective nominees in the area of human rights, equal rights, equal opportunities for all of our citizens.

Permit me, if I may, to explore that with you a bit. You have had the opportunity to serve your State and your home on various boards of education, I understand; is that not correct?

Mr. POWELL. I have, sir.

Senator BAYH. Could you give us just a capsule of that experience, please; what these specific offices were that you held?

Mr. POWELL. I sat on the Richmond Public School Board for about 10 years; served on the State Board of Education of Virginia for 8 years.

Senator BAYH. What were the general time frames?

Mr. POWELL. 1950 to 1959, as I recall, January 1959. I meant 1969.

Senator BAYH. It is fair to say that those were rather tumultuous years so far as the school system of Virginia was concerned?

Mr. POWELL. One could hardly have picked a less peaceful time to serve on a school board.

Senator BAYH. Because of the experience you have had—and I think several members of this committee would vouch for the fact that the tumultuous character of the times seem to be increasing rather than decreasing, at least in the past several months, with reference to education—you will be called upon to put your philosophy

to work in deciding cases in the field of education. Being mindful you do not want to prejudge any cases that may come before you, could you give us your general philosophy relative to the importance of quality education, the importance of equal education and opportunities, how the constitutionality of this right comes into play?

Mr. POWELL. I suppose every man who ever served on a school board pays lip service to quality education. I think most of them, certainly those with whom I worked, want to improve the overall quality of education. I have talked about it a great deal in my life. I have tried to do something about it, with what success I cannot say.

I think also most people, certainly those with whom I worked, were anxious that the quality of education would be equal for all students, and this has been a goal, perhaps not yet attained in many States. It is a goal to which the State of Virginia is striving. I think we still have a ways to go and yet I believe in my own city, although I have not been on the local board in a long time, that a great deal has been accomplished in that respect.

I will add this, if I may, we had occasion to adopt a new Constitution in Virginia—I guess it was last year, wasn't it, Senator Spong? I served on the commission which recommended that Constitution to the legislature and we added to the bill of rights of Virginia a provision which, I think, is unique enough that I would like to read it into the record, if I may. It is not long.

Senator BAYH. Please.

Mr. POWELL. I may say that our Bill of Rights was drawn basically by George Mason, although the Statute on Religious Freedom was drawn by Thomas Jefferson, and until we wrote the new Constitution the Jefferson statute was not incorporated directly into the Bill of Rights; it was in a separate place in the Constitution. But in any event, the provision I now wish to read relates to education, and it may be unique; we thought it was. This is in the same article that deals with the necessity to preserve free government:

> That free government rests, as does all progress, upon the broadest possible diffusion of knowledge and that the Commonwealth shall avail itself of those talents which nature has sown so liberally among its people by assuring the opportunities for their fullest development by an effective system of education throughout the Commonwealth.

There is an education article in this new Constitution which imposes far greater authority in the State board of education than it had before. The prime authority for what happened in the public school systems, until this Constitution was adopted, lay on the local boards which were provided for by the Constitution itself; in other words, school board members were, in effect, constitutional officers. But now under the newly adopted constitution of Virginia, the State itself, the State board of education, has a far higher degree of responsibility, the view being that perhaps only in this way could we raise the general quality of education for whites and blacks throughout the State to a satisfactory level.

In other words, we had the problem of some of the counties being very poor compared to counties that were more affluent, with the quality of schools in one county varying widely as compared to those in another county, and with different standards being applied with respect to meeting the Supreme Court tests for unitary school systems. So, perhaps, one answer to your question is that I have had some part,

although a modest part, in moving Virginia forward to what I believe today is a progressive and fair policy and posture with respect to public education.

Senator BAYH. You did support the provisions to which you refer when they were being debated?

Mr. POWELL. I had a hand in drafting both of them, although the principal architect of both of those was former Governor Colgate Darden, who was a colleague on the Commission. He was chairman of the Education Subcommittee but he and I had served 8 years together on the State board of education and our views had been substantially identical throughout that entire period.

Senator BAYH. And after they had been drafted, you supported them?

Mr. POWELL. Oh, yes; yes, indeed.

Senator BAYH. May I ask you, please, to just give your thoughts relative to how some of the following programs or strategies fit into or should be excluded from the provisions of the Constitution, which seem to be laudatory, very similar to the doctrine put down in *Brown* v. *Board of Education*. You were serving in an official capacity in the educational system at the time that *Brown* v. *Board* came down?

Mr. POWELL. Yes.

Senator BAYH. Perhaps you could give us the benefit of your opinion at the time and, if this opinion was changed, I would personally like to know it. When *Brown* v. *Board of Education* came down, it is fair to say a number of the school districts resorted to certain types of activities to avoid having to meet the criterion of *Brown* v. *Board of Education*. Could you give your opinion at the time as to what you did, what you felt should be done in the Virginia school system on which you served and if this is the same feeling we would like to know it, or if you have different thoughts now, I would like to have those thoughts, too.

Mr. POWELL. Senator Bayh, that would open up a very long story, obviously. I will try to telescope it and if there is anything I say you would like to follow up on, of course, please do so.

Senator BAYH. Well, let me say I think most of us have been apprised of your record, the fact that you did serve for a number of years in the two specific capacities. If I might just deal with specifics so that the different questions won't be repetitive——

Mr. POWELL. All right.

Senator BAYH. The items of the Gray Commission report, what your thoughts were then, what they are now; the whole matter of whether a school should be closed or not closed to avoid meeting *Brown* v. *Board of Education;* the fee system, busing, the dual attendance system, did those have relevance in this experience, and if they did, I would like for you to emphasize your feelings on them now, as well as what your position was at the time you served in this official capacity.

Mr. POWELL. Well, at the time of *Brown* v. *Board of Education*, Virginia, as was true, I think, of every other Southern State, by its Constitution and statutes and long practice, followed the doctrine of *Plessy* v. *Ferguson*. We had segregated schools, completely so.

When the *Brown* case came down, our board—there were five people on the board, four whites and one black—resolved that we would comply with the law and we issued a little statement to that effect.

We also made another decision that resulted in the record, the printed record, being fairly sparse, and that is in view of the emotional situation that began to develop, no member of the school board, white or black, would make any public speeches, and we would direct and concentrate our attention on trying to keep the public schools open until the conflict between the Federal and State law was resolved.

If you will look back on it now, the situation may be hard to understand. But if one lived through those days, as Senator Spong and I did, he may have a different perspective.

As you know, we had the great misfortune in Virginia for the schools to be closed in Norfolk, then the second city in the Commonwealth; the schools were also closed in Front Royal, Charlottesville, and Prince Edward County. There were strong voices in our State that wished to close the schools if there was any integration.

So the task of my board, and my task as I conceived it, was to keep the schools open, and that we did. Finally they were integrated and we ran into all sorts of criticism, primarily from the whites.

Senator BAYH. The Gray Commission proposal of November 11, 1955—may I read from a portion of that and then ask you to put the Gray Commission in proper perspective as to what it was designed to do, and then give us your thoughts on that, please.

> Commission further proposes legislation to provide that no child be required to attend that school wherein both white and colored children are taught and that the parents of those children who object to integrated schools or who live in communities where no public schools are operating be given tuition grants for educational purpose.

Mr. POWELL. I was not a member of that commission. I did not support its provisions.

Senator BAYH. You did not support its provisions?

Mr. POWELL. No, I did not.

Senator BAYH. Did you believe that the vehicle of tuition grants had or has a proper place, a proper role to play in educational systems of the country?

Mr. POWELL. Let me come back to the preceding answer, Senator, and then I will come to the question you just asked.

The Gray Commission recommendation resulted in certain laws being enacted in Virginia, and there was a long period of time when school boards were literally caught in the middle. The *Brown* decision had said: "Integrate these schools with all deliberate speed." The State legislature said, in effect: "All deliberate speed doesn't mean now; it means next year, or some time off in the future," so our school board did continue to operate segregated schools, as I indicated earlier, until we were finally forced by a court to integrate. I think that is the sequence—Senator Spong may be sharper in his recollection than I was—but I remember very painfully the dilemma we were in, and the critical test in Richmond came in an oblique and indirect way when we wished to build two new high schools.

It was perfectly obvious if we built them in the locations recommended by the school board, that they would become integrated in a fairly short period of time, and this is not the place to go into all the details as to the long weeks and months the board spent trying to work it out so we could obtain the necessary funds to build those schools. There were many in the community who did not want to build them.

We finally obtained authorization from council at sort of a crisis meeting, at which this issue was thrashed out, and when we walked into the city council that night, I had no idea what the outcome would be. It was that close.

Senator BAYH. What was the final resolution of it?

Mr. POWELL. The final resolution was that we were authorized by resolution of council to build the schools, although there was a subsequent attempt that never reached fruition to cut off funds, even within the city of Richmond, for any school which was integrated.

Our school board had full responsibility for running the schools, but money had to be raised by the city council as we did not have the jurisdiction that some school boards have in other States of being able to make a levy in order to support public education. So we had to sell our program to city council.

Senator BAYH. Well, there has been some confusion reading the news dispatches relative to what the result of this decision was. Did the decision result in going ahead and building two high schools that were all white, or did it result in the building of two high schools that became integrated or were in the process of being integrated?

Mr. POWELL. It resulted in building two high schools, one is the George Wythe High School and the other the John Marshall—two pretty good names—and I could not say because I do not remember when they became integrated. It was obvious in view of the locations, anyone familiar with my city would know, that they would be integrated, and they were integrated.

Senator BAYH. Could you give us your thoughts relative to the busing question without prejudging any case that may come before you.

Let me be just a bit more specific because I realize the breadth of the question. If we believe, as you believe, in the Virginia Constitution, in accordance with making the educational institution available for all of our citizens, does busing fit in this picture?

Mr. POWELL. I think it is fairly obvious that there will be cases going to the Supreme Court involving busing.

Senator BAYH. I realize that.

Mr. POWELL. So I am quite conscious of the restraint that I think would be appropriate for me to exercise with respect to this subject.

I would say this, though, it is fairly obvious but I will say it nevertheless, that busing has been used in public education for many years, and I am sure it will continue to be used in public education for many years. In many instances it is a necessity.

A particular case as to whether busing is or is not in the best interest of the children and of education, I think would have to be resolved on the facts and in light of the Supreme Court decisions.

Senator BAYH. Do you feel that we have a problem in education in the disparity in the ability to finance schools? We are talking about making educational experience meaningful—is that something that should be considered in the overall picture?

Mr. POWELL. You are thinking about the problem addressed by the California court?

Senator BAYH. Yes, sir. I am not asking you to overrule or affirm the California decision, but is this something that you would consider in the light of your past experience in educational matters in Virginia?

Mr. POWELL. It is a problem which worried us a great deal when I was on the State board of education primarily because we were more or less powerless to deal with it.

Senator BAYH. Without prejudging it, is this matter we are talking about of quality education, and the accessibility of it, one we need to consider insofar as looking at the plans from the judicial standpoint?

Mr. POWELL. It certainly is.

Senator BAYH. Mr. Chairman, I would like to put in the record, if I may, a letter from Jean Camper Cahn of the Urban Law Institute of Antioch College, and inasmuch as our witness has been very patient, and I appreciate his patience, I would like to say, if I might just make it a bit more concise, it is an 18-page recitation, double-spaced, Mr. Chairman, of the contribution that our nominee has made in the legal service program. I might just read brief excerpts from it:

> My letter is limited to those matters known to me personally in my capacity as the official charged with operational responsibility for bringing the legal service program into being and for representing the OEO through months of intense discussions.

Mrs. Cahn goes on to emphasize she has had continuing opportunity to observe both Mr. Powell's statesmanship in broadening the organized bar's commitment to legal services and equally the effect of his fierce insistence on preserving the professional integrity of the program and insulating the program from any improper political pressures.

She continues by saying:

> The extraordinary impact that Mr. Powell's efforts had then, and the imprimatur they have left on the Legal Service Program—still clearly evident some seven years later—have direct bearing upon the matter presently before your Committee.

She goes on to document in some degree the contribution that Mr. Powell made at the early stages of the implementation of the Legal Services program in OEO, and she points out and specifically, I quote again:

> In deciding to respond affirmatively, Lewis Powell knew that the leadership was ahead of "the troops" and yet he decided to take the gamble.
>
> There can be no doubt about the fact that Lewis Powell placed his credibility and leadership on the line with full awareness of the risks and dangers but impelled nonetheless by his own deeply held sense of the profession's public trust.

One concluding remark that I think is particularly important to some of us who must make this judgment ultimately on philosophy is where you draw the line with someone you have worked with, as I have worked with you, and while we do not agree on all issues, I certainly respected the contribution you made and I would just like to read this final quote from this letter in which she says, Mrs. Cahn says:

> By way of a final observation I would note that while I support Lewis Powell's nomination—and have limited the scope of my remarks to those facts which I know at first hand—I do not base that support on the fact that Mr. Powell is a supporter of the Legal Services Program. My support is more fundamental because I would expect that while we agree on some things, we would disagree on others. I would not want to rest my support solely on agreement or disagreement on some particular subject.
>
> My support is based upon the fact that I am drawn inescapably to the sense that Lewis Powell is, above all, humane; that he has a capacity to empathize, to respond to the plight of a single human being to a degree that transcends ideologies of fixed positions. And it is that ultimate capacity to respond with humanity to individualized instances of injustice and hurt that is the best and only guarantee

I would take that his conscience and his very soul will wrestle with every case until he can live in peace with a decision that embodies a sense of decency and fair play and common sense.

That is quite a testimonial, I would say, Mr. Powell, and I want to compliment you on the confidence that this lady has in you.

Mr. POWELL. It is far more than any man deserves and I appreciate your reading it.

(The letter referred to follows:)

URBAN LAW INSTITUTE OF ANTIOCH COLLEGE,
Washington, D.C., November 3, 1971.

Senator JAMES O. EASTLAND,
Chairman, the Judiciary Committee,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: It is a matter of general knowledge and public record that the American Bar Association endorsed the Office of Economic Opportunity legal services program during Lewis F. Powell, Jr.'s tenure as ABA President. There are, however, few who stand in a position to speak on the basis of first hand knowledge of the extensiveness of Mr. Powell's role, the depth of his involvement, or the extent to which he played not only an initiating but also a continuing role both in securing the support of the organized bar and in moving to insure that the OEO Legal Service program remained true to its mission.

My letter is limited to those matters known to me personally in my capacity as the official charged with operational responsibility for bringing the Legal Service Program into being and for representing the OEO through months of intense discussions. These negotiations culminated in the February 8 resolution of the American Bar Association, and subsequently in the public reaffirmation of the understanding on the occasion of the first personal contact between Mr. Shriver and Mr. Powell at the February 17 meeting of the Planning Committee for Legal Services.* Subsequent to February 17, my husband (who was Sargent Shriver's Special Assistant) and I served as a continuing liaison between the OEO and the organized bar (and Mr. Powell more specifically) in order to insure that those basic understandings were in fact honored in the process of implementation. From August of 1965 up to the present date I have served as a member of the National Advisory Committee ot the OEO Legal Services Program. In that capacity, I have had continuing opportunity to observe both Mr. Powell's statesmanship in broadening the organized bar's commitment to legal services and equally the effect of his fierce insistence on preserving the professional integrity of the program and insulating the program from any improper political pressures. The extraordinary impact that Mr. Powell's efforts had then, and the imprimatur they have left on the Legal Service Program—still clearly evident some seven years later—have direct bearing upon the matter presently before your committee.

Today almost 7 years later, it is difficult to communicate the atmosphere of of suspicion, caution and outright distrust which surrounded those first exploratory talks. The legal profession was suspicious of the OEO, and OEO was suspicious of the organized bar.

The distance to be bridged could hardly have been cast more symbolically than to ask a white lawyer from the ranks of Southern aristocracy leading the then lily-white AVA and a black woman lawyer representing the "feds" to hammer out a relationship of trust and cooperation.

I approached the negotiations with some misgivings despite direct personal assurances of support from Mr. Powell on January 12 and 22. It was not until the beginning of the 1st week in February of 1965 after Mr. Powell and his staff (Lowell Beck and Bertran Early) initiated daily rounds of consultations and briefings for myself and my staff did I begin to believe that Mr. Powell was prepared to use all the prestige and power of his position as President of the ABA to gain the formal and continuing support of the organized bar to make the goal of the fledgling legal service program—equal access to justice—a reality.

Within OEO, the memory of AMA's resistance to Medicare was still vivid, and negotiations with the bar were *a priori* assumed to be the equivalent of consorting with the enemy. OEO's bias was reinforced by the suspicion and distrust with which the poor looked upon law and the legal profession.

*(See Attachment I, letter from Sargent Shriver to Jean Camper Cahn, and Attachment II, article by Sargent Shriver, *ABA Journal*, June 1970.)

Lewis Powell had at least as difficult an obstacle to cope with, flanked on one side by the so-called "old line" legal aid agencies that demanded monopoly control of any government funds for legal aid, and on the other side by lawyers fundamentally distrustful of any governmental involvement. Orison Marden, who was later to succeed Powell as President of the ABA, recalled the dilemma in these words in an address at Notre Dame in 1966:

"Yet, when the Office of Economic Opportunity announced its willingness to assist in financing legal services for the poor, many lawyers were skeptical and suspicious. Here are some fairly typical reactions:

"What is big brother up to now?

"Are we going to be 'socialized' by snooping 'Feds' from Washington?

"Will the Federal program help or hurt our legal aid society?

"Will the Federal program compete with the bar, especially with the struggling neighborhood lawyer?"

These and similar questions were the natural concern of many lawyers and bar associations throughout the land.

Such was the situation which confronted the national leadership of our profession in late 1964. Lewis F. Powell of Richmond, Virginia was then President of the American Bar Association. In my opinion, he will go down in history as a great statesman of our profession. Conservative by nature and environment, President Powell saw the opportunities as well as the dangers in the new program.

In deciding to respond affirmatively, Lewis Powell knew that the leadership was ahead of "the troops", and yet he decided to take the gamble.

On February 17 at the Planning Committee meeting in Washington, nine days after the historic resolution, Lewis Powell bluntly told Sargent Shriver and those assembled:

"The success we had at New Orleans in bringing the House of Delegates of the American Bar Association along with the concept of cooperating with the OEO, I think, should not mislead us into thinking that the bar of the United States is prepared for this yet.

"I think the truth is that most of the lawyers know as little about what the OEO is planning to do as I knew two months ago. . . ."

There can be no doubt about the fact that Lewis Powell placed his credibility and leadership on the line, with full awareness of the risks and dangers, but impelled nonetheless by his own deeply held sense of the profession's public trust.

Mr. Powell knew that nominal endorsement was not enough. The organized bar had to support and implement its decision. That support could not be half-hearted or extracted at the cost of bitter and lasting schisms. And this had to be accomplished in nine weeks time.

The events that followed speak for themselves.

The historic endorsement was passed not once but three times: first, by a conference of 60 representatives of concerned ABA committees and sections; second, by unanimous vote of the Board of Governors in an even stronger form; and finally, by unanimous vote of the House of Delegates.

Within the next 24 hours, Sargent Shriver dispatched a telegram of congratulations particularly saluting the bar for its flexibility in holding "no brief for any one solution" and for its "willingness to concentrate on the need, to shape your response to fit the need, and to innovate where needs calls for innovation."

By return mail Lewis Powell thanked Sargent Shriver for the telegram which was received in time to be read to the entire House of Delegates prior to adjournment.

Yet that resolution was only the most visible and symbolic of many actions which Powell felt were needed to give substance to that resolution.

Although Mr. Powell believed that the Canons of Ethics would not inhibit legal service lawyers in providing full service to their client, he agreed to seek a clarification of the matters that troubled legal service lawyers in the then contemplated revision of the Canons. Under the direction of William Gossett the Canons and the Code of Ethical Responsibility has brought clarity to the role of the legal service lawyer.

It was under Mr. Powell's leaderhsip that some eleven odd committees and sections of the ABA dealing with matters relating to legal representation for the poor were reorganized, consolidated and strengthened.

Mr. Powell also played a key role in shaping the National Advisory Committee to the Legal Service Program. On February 16, 1968, the Law and Poverty Planning Committee which was to evolve into the powerful National Advisory

Committee met for the first time in Washington. As Sargent Shriver has stated officially for the redord:

"The composition of that committee was the subject of intensive review by both the OEO and the Association. The principles that guided the selection of this initial group also governed the subsequent selection process that determined the composition of the National Advisory Committee."

For the legal Service Program to fluourish it was necessary that lawyers of all races work together. Thus, Lewis Powell reaffirmed the American Bar Association's desire for affiliation with the National Bar Association (the association of black lawyers); the National Bar Association responded affirmatively and provision for the NBA's involvement was, of course, made in determining the composition of the Planning Committee and its successor, the National Advisory Committee. Today, because of that breakthrough in establishing a working relationship, the National Bar Association and the American Bar Association have pursued a course of cooperation in many areas.

Symbolically, the Chairmanship of the planning committee meeting on February 16 was shared by Sargent Shriver and Lewis Powell. In the course of that meeting Mr. Powell articulated several cardinal principles which were to become firmly embedded in the official policy of the Legal Service Program of the Office of Economic Opportunity.

1. The poor should receive "across-the-board leagl services"; past coverage has been inadequate. Herein lies the genesis of the policy that the poor were entitled to representation in every forum and in every way in which the non-poor now receive legal representation.

2. Indigency standards must be flexible and be shaped locally in response to real need.

3. The new OEO program should not be used in the criminal field to the extent possible in order not to discourage State legislatures from going ahead on their own responsibility. Mr. Powell said:

"To put it differently, I don't want a State legislature to get the idea that the OEO and organized bar will relieve it of responsibility for providing appropriately for the defense of indigents in criminal cases."

4. The program for rendering of legal services to the poor had to maintain the highest standards of professional integrity and that coordination of this program with other services could not be permitted to erode that integrity.

5. A national campaign to educate the profession as to the legal needs of the poor had to be launched. Discussion centered around a national conference—which had been agreed to and was, in fact held. But Mr. Powell, personally, undertook to use the status and prestige of his office and of the ABA nationally to allay the fears, clear up the misunderstandings and win the cooperation and support of county and state bars which, in some sense were violently opposed to the program. In this connection, Mr. Powell relied heavily on moral suasion and the credibility of his position and background. I admit I grew frustrated sometimes at his deference to local sensibilities when it seemed unduly solicitious of obstructionists. Yet his own personal credibility used unsparingly, paid off handsomely in generating a broadly based sentiment of support within the bar for legal services.

6. Subsequently, Powell took a lead role in supporting the proposition that the client community to be served should be represented on the board of directors of local legal service programs while at the same time refusing to accept any inflexible, mechanical formula.

The meeting ended with a resolution that a steering committee would undertake responsibility, both for planning the national conference and for providing guidance in the development of policies and guidelines for legal service grants, a role that was to become a central prerogative.

In short, the cornerstone of the legal services program—in terms of mission, constituency, non-partisan support, shared decision-making by the profession and officials, all these had been articulated and established by Lewis Powell at the outset—not to secure control as an end in itself—but, rather to insure that the highest professional standards obtained and that the professional integrity of the program was preserved against improper pressure.

Yet, even beyond these contributions, Powell was to embark on one other course of action that perhaps in the long run has meant as much to the survival of the Legal Services Program as the intense team effort that culminated in the ABA resolution of February 8. Between the February 16th meeting—and the next meeting of the ABA in August (which marked the end of Lewis Powell's term of office), there was a grave and nearly fatal interregnum in the legal services program.

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Policy remained unformulated; conflicting instructions, rumors and draft guidelines circulated; grantmaking ground to a halt—and whatever precarious relationship of trust and good will that had been built so painstakingly was stretched to the breaking point. In fact, there was every sign of a major revolt by a reactionary element within the bar—emerging at the state and local level—which threatened to lead to a total severance of all relationships and withdrawal of endorsement. The bar had made good on all its promises—and more. The federal government was in default. And it took a singular combination of firmness, tact, diplomacy, and political maneuvering to set up a special plenary session to which Sargent Shriver was invited as keynote speaker—with commentary by two moderately critical and well known figures in the bar. Powell was quite appropriately designated as moderator for this session. Once again the negotiations began; but the crux of them was that Powell was once again prepared to put his own prestige on the line and utilize the full weight of his position if Sargent Shriver was prepared to reaffirm unequivocally OEO's commitment to a legal service program consonant with the highest traditions of the profession and to deal with each of the old controversial issues that had flared up. Sargent Shriver did so in a major statement characterized by bluntness, candor, and specificity that was no accident. In the March issue of the 1971 ABA Journal Sargent Shriver recalls that period:

"After February there was a hiatus and lull in communications. During that time misunderstandings arose, and it became important to reaffirm the commitments made earlier by my staff and by me and to spell out publicly what form the relationship of the organized bar would take. In August of 1965 at the annual meeting of the American Bar Association in Miami Beach, I spoke extensively concerning the understanding which the agency had regarding the legal services program generally and its relationship to the organized bar in particular. It was at that time that I publicly announced the formation of the National Advisory Committee:

"We will shortly establish a National Advisory Committee on Law and Poverty to the community action program, a committee which will play a key policy making role. We have extended twenty-one invitations. Among those who have accepted membership on that committee are Lewis Powell, Orison Marden, Edward Kuhn, Theodore Voorhees, John Cummiskey and William McCalpin.

"That group can be just a paper group—a sop thrown out to quiet the bar. But that is not our intention. We mean business. We want—we need—this group to assume a leadership role in determining how we ought to proceed cooperatively, what procedures and internal organization we need and what kinds of guidelines we ought to establish. The bar—and I should add we also have representation from the National Bar Association—has heavy representation some would charge over heavy representation) on this committee. But we believe in you—and you have more than justified that faith last February. If any one has slacked off or defaulted, it has been us! So I say to you today, it will be your job as well as ours—the job of your representatives and leaders to see to it that that committee is no paper organization but a powerful and vital force."

Once again Mr. Powell energized all his resources to see that an agreement entered into in good faith could be reconstituted. Mr. Powell's willingness to do everything within his power to see that OEO created a National Advisory Committee to serve as the agency's official internal vehicle for consultation was the organized bar and the profession has to my mind been crucial in securing a strong and vital program for rendering legal service to the poor.

As the House Committee report on the 1967 amendments to the Economic Opportunity Act H. Rep. No. 866, 90th Cong. 1st Sess. 24–25 1967)) indicated expressly, Congress relied upon the National Advisory Committee to serve as guarantor of the maintenance of professional standards and attributed the success of the program in large part to the unique role the National Advisory Committee had played in guiding and policing the program.

As Sargent Shriver commented:

"The factor that to my mind made the NAC so effective was that it was brought into being, shaped and expanded by a process of mutual consultation with the whole spectrum of the organized bar; its composition and its areas of concern were the result of joint deliberations as to the kind of body which could best insure the maintenance of the professional integrity of the program. Once those underlying agreements were reached neither party felt free to tamper with them unilaterally or to break the underlying relationship of good faith and mutuality."

It is typical of Lewis Powell that his role in this entire sequence should have remained so obscure and that he was prepared publicly to accept an invitation to

serve on the National Advisory Committee. That was Lewis Powell's way of assuring that the integrity of the Legal Service Program would be maintained.

But nowhere will you find it recorded that, prior to Sargent Shriver's public reaffirmation in Miami, the summer of 1965 was a long hot summer for Lewis Powell. In this commentary I cannot forbear to mention that I know Mr. Powell to have been the moving figure behind an invitation extended to me by the President of the Junior Bar to address a plenary session. And so far as I have been able to ascertain, I was the first black lawyer, male or female to address a plenary session at the ABA's annual meeting.

Since that time, I have had the pleasure of personal chats with Lewis Powell—and have, in my capacity as Director of the Urban Law Institute referred to him indigent clients who needed a lawyer in Richmond and who received representation from his firm.

Those are, in sum, the facts known to me personally, They reveal Powell's involvement in the launching of Legal Service—the nurturing of it through the most critical ten months—to be far more extensive than has been generally known or assumed.

But for me they say more than that about the man. They are the pretty nearly the sum total of what I know about him. Yet within this context, they permit me to say that this is a man of principle—who when he pledged his word kept it—and who has a peculiar and most tenacious notion that when a government official pledges his word, he too should honor it.

As a black person who has seen many promises made and not kept, it has been all too rare an expereince to find a man who not only holds to such a belief—but who is prepared to back that belief with all the resources and stature and skill at his command.

In the context in which I have known him he has come to symbolize the best that the profession has to offer—a man imbued, even driven, by a sense of duty, with a passion for the law as the embodiment of man's ordered quest for dignity. Yet he is a man so curiously shy, so deeply sensitive to the hurt or embarrassment of another, so self-effacing that it is difficult to reconcile the public and the private man—the honors and the acclaim with the gentle, courteous, sensitive spirit that one senses in every conversation, no matter how casual. And it is an unceasing source of wonder to me that so much seems to get done without any sense that the man is ever burdened, hurried, under strain or unable to give you his full and undivided attention.

By way of final observation, I would note that while I support Lewis Powell's nomination—and have limited the scope of my remarks to those facts which I know at first hand—I do not base that support on the fact that Mr. Powell is a supporter of the Legal Services Program. My support is more fundamental—because I would expect that while we agree on some things, we would disagree on others. I would not want to rest my support solely on agreement or disagreement on some particular subject.

My support is based upon the fact that I am drawn inescapably to the sense that Lewis Powell is, above all, humane; that he has a capacity to empathize, to respond to the plight of a single human being to a degree that transcends ideologies or fixed positions. And it is that ultimate capacity to respond with humanity to individualized instances of injustice and hurt that is the best and only guarantee I would take that his consicence and his very soul will wrestle with every case until he can live in peace with a decision that embodies a sense of decency and fair play and common sense. In that court of last resort to which I and my people so frequently must turn as the sole forum in which to petition our government for a redress of grievances, it is that quality of humanity on which we must ultimately pin our hopes in the belief that it is never too much to trust that humanity can be the informing spirit of the law.

Sincerely yours,

JEAN CAMPER CAHN, *Director*.

The CHAIRMAN. Senator Scott?

Senator SCOTT. Mr. Chairman, I really will not take the time of the committee at any length at all and perhaps for a different reason.

I confess to a certain modesty, Mr. Powell, in attempting to develop any legal knowledge of mine that would even thrust itself in a cross-examination of you, because you are an eminent lawyer with the highest qualifications I have known for many years, and were I to

engage in any attempt at learned discourse it would appear for me to be an unequal colloquy, if not unequal contest, and I know precisely what I am going to do when these hearings are closed.

I will have a statement, as will other Senators.

I commend you on your legal ability, your acumen, your reputation for personal integrity, and your vast knowledge of the law, which has been put to good, compassionate, civic usage, as well as to the pursuit of those occupations which are commonly associated with a good trial lawyer. So I will not take the time of the committee, because by yielding back my time perhaps I can expedite these proceedings and I have already missed the p.m. deadlines and I may have missed the a.m. deadlines, too.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Tunney?

Senator TUNNEY. Mr. Chairman, I have just one last question.

Mr. Powell, I noticed in some of your writings that you addressed yourself to expediting criminal law procedures, and I was wondering if you could tell the committee two things: one, a general question, with perhaps a general answer, on what you feel has to be done to expedite criminal procedures in this country; and, second, more specifically, what you feel that a Supreme Court Justice ought to do to help expedite criminal procedures.

Mr. POWELL. I will comment on your second question first. I know from the addresses which I have heard him deliver, as perhaps you do, Chief Justice Burger puts this subject at the top of his list of necessary reforms in the criminal justice system.

I really do not know to what extent other Justices of the Court would take part in an organized effort led by the Chief Justice, but I would hope I would be on that team, if I am confirmed, to assist him in that because unless we find more effective ways of expediting the criminal justice system, in particular, the entire system could collapse. I think it is that serious.

It is fairly easy to make that sort of generalization. It is not so easy to come up with any answers. Some of the problems are quite intractable, because they are rooted in our Constitution. No one would abandon constitutional rights in the interest of speed, and yet to cite one area in which there must be a better system developed to minimize delays in the ending of criminal causes, I refer to the use of habeas corpus to transfer cases which have gone through the State courts into the Federal system for postconviction review. This was necessary, in my judgment, certainly with respect to most States at a time when criminal procedure and practice in those States had not really caught up with the constitutional safeguards that we are all now familiar with.

The American Bar Foundation has initiated a study—there have been a good many, but none yet has produced completely satisfactory results—an empirical study taking a State or two as examples to try to ascertain exactly what is happening with respect to the flood of habeas corpus proceedings. The criminal justice project of the American Bar Association addressed this problem and concluded that the best answer was to try to make the State processes conform to constitutional requirements, and to have records made that these constitutional requirements were, in fact, met, so that once an accused

person had gone through the State system he would have received his constitutional rights; and, second, there would be a record of it so that there would be no occasion for Federal de novo review and starting the whole chain back through the courts.

If you would move to the area of appellate practice, I think any lawyer who has been in the appellate courts will recognize that much can be done to speed appellate practice, particularly with respect to the requirements for records.

My circuit, the fourth circuit, has been a leader in minimizing the requirements for records. I think a great deal more can be done. I think a great deal more can be done, perhaps, in exercising restraint in the writing of opinions by judges. At the moment I am not addressing myself to the Supreme Court; I am thinking perhaps about all courts and when one looks at the flood of cases that come into one's law library, and the feeling apparently that every judge has to write an opinion at the district court level—of course, he must make findings of the fact and conclusions of law, and sometimes a case requires an opinion—but there are many things in this broad area that can and must be done so that the entire system can be expedited.

Senator TUNNEY. Thank you very much, Mr. Powell.

I heard before you came before this committee, after you were nominated by the President, that you were a man of brilliance, compassion, and imagination, and certainly your testimony here today has demonstrated those qualities.

Thank you.

Mr. POWELL. I thank you very much, sir.

The CHAIRMAN. You made a very fine witness.

Senator HART. I want to ask one question that I did not ask Mr. Powell.

Mr. Powell, in your writings or speeches in the past, have you taken a position on capital punishment?

Mr. POWELL. No, sir. I would say this, the Crime Commission did take a position on it in which I concurred in the recommendations.

Senator HART. I have been trying to find out what that recommendation of the Commission was ever since it came out.

Mr. POWELL. I could find it if I had the volume of the report. I have not looked at it for a long while.

Senator HART. Well, thank you. Mr. Chairman, if that question could be addressed for receipt in writing from Mr. Rehnquist, I would appreciate it. I forgot to ask that question: had he spoken or taken a position on capital punishment. Could we address that question to him?

The CHAIRMAN. Why, of course.

(The following letter was subsequently received from Mr. Rehnquist:)

DEPARTMENT OF JUSTICE,
Washington, D.C., November 10, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I understand that during the questioning of Lewis Powell on November 8, Senator Hart asked him whether he had spoken or taken a position on capital punishment. I also understand that Senator Hart requested that, with your acquiescence, I be asked to supply an answer to his question.

A review of my recent speeches and comments, copies of which have been sent to your Committee, indicates that I have not there discussed this subject. Additionally, I cannot recollect that apart from these statements I have ever publicly discussed this question.

In the course of my testimony before your Committee last week, Senator Bayh asked if I would object to compiling a list of my former clients for the Committee. Although I do not recall being asked formally by the Committee to forward such a list, the following are representative clients of my former firm in Phoenix as listed in the 1969 edition of Martindale-Hubbell (which, as I recall, would have appeared in print in January, 1969): American District Telegraph Co.; American Optical Co.; Butler Homes, Inc.; Casa Blanca Construction Co.; Sherrill & LaFollette; Remington Rand Division of Sperry Rand; Transamerica Title Insurance Co.; Arizona Testing Laboratories; National Insurance Underwriters; Town of Paradise Valley; D. N. & E. Walter Co.; Blake, Moffitt & Towne; Cactus Beverage Distributing Company of Arizona; True Childs Distributing Co.; Valley Vendors Corp.; Herb Stevens, Inc., Lincoln-Mercury; Time Realty, Inc.

Sincerely,

WILLIAM H. REHNQUIST,
Assistant Attorney General,
Office of Legal Counsel.

Mr. POWELL. You do not wish any further response from me?

The CHAIRMAN. Sir?

Mr. POWELL. I was asking Senator Hart whether he wished any response from me.

Senator HART. No. Thank you, Mr. Powell.

The CHAIRMAN. You are excused.

Thank you, sir.

Mr. POWELL. I wish to thank the chairman and the members of the committee for this very generous opportunity to appear before you in what to me, at least, has been a very stimulating discussion. I thought all of the questions were relevant and fair, and it has been a great pleasure and privilege to be here.

The CHAIRMAN. Thank you, sir.

Now, the committee will recess until 10:30 tomorrow morning. We are going to meet in the Judiciary Committee hearing room. We are going to hear the witnesses against the two nominees and also some other witnesses for them.

Senator SCOTT. Is that room 2300, Mr. Chairman, for the benefit—is that the room number?

The CHAIRMAN. It is the Judiciary Committee hearing room.

Senator SCOTT. Room 2228. I just say it for the benefit of those who might wish to be there.

(Whereupon, at 4:20 p.m., the committee adjourned to reconvene Tuesday, November 9, 1971, at 10:30 a.m.)