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

TUESDAY, NOVEMBER 9, 1971

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

The committee met, pursuant to recess, at 10:05 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Hart, Kennedy, Bayh, Burdick, Tunney, Hruska, Fong, Cook, Mathias and Gurney.

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

The CHAIRMAN. Congressman Corman. Is he present?

[No response.]

The CHAIRMAN. Congressman Conyers. Is he present?

[No response.]

The CHAIRMAN. Mr. Biemiller. Is Mr. Biemiller present?

Mr. MITCHELL. He said he would be here, Mr. Chairman.

The CHAIRMAN. Do you want to testify? Come on.

Mr. MITCHELL. If it is all right with you. [Laughter.]

Senator Hart (presiding). The committee will be in order.

Our first witnesses, and I am delighted to welcome them, are two men who have appeared on a number of occasions in connection with judicial nominations and always have made a constructive—and to many of us persuasive—contribution.

I would suggest that they proceed in such order as seems most appropriate for them.

Mr. Rauh and Mr. Mitchell, speaking for the civil rights leadership.

TESTIMONY OF CLARENCE MITCHELL, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND LEGISLATIVE CHAIRMAN, LEADERSHIP CONFERENCE ON CIVIL RIGHTS; ACCOMPANIED BY JOSEPH L. RAUH, JR., COUNSEL

Mr. MITCHELL. Thank you very much, Senator Hart and other members of the committee who are here.

I am Clarence Mitchell, director of the Washington Bureau of the National Association for the Advancement of Colored People, and legislative chairman of the Leadership Conference on Civil Rights. I am accompanied by Mr. Joseph L. Rauh, Jr., who is the counsel for the Leadership Conference on Civil Rights.

We appear in opposition to the nomination of Mr. William H. Rehnquist to the U.S. Supreme Court.

In making this appearance, we are speaking for the Leadership Conference, and that is an organization of 126 national groups, some in the labor groups, some in religious groups and some in other persuasions who meet together for the purpose of trying to promote civil rights; and we were authorized to speak for the organization.

In addition, I am speaking for the National Association for the Advancement of Colored People, and Mr. Rauh is also speaking for the Americans for Democratic Action.

We are not taking any position on the nomination of Mr. Lewis F. Powell.

The Arizona-Southwest Area of NAACP Conference passed a resolution opposing the nomination of Mr. Rehnquist. The sense of this resolution is set forth in the following four points:

(1) In 1964 Mr. Rehnquist appeared as a witness in opposition to a public accommodations ordinance being considered by the Phoenix City Council. His written statement said:

> The ordinance summarily does away with the historic rights of the owner of a drug store, lunchcounter or theater to choose his own customers. By a wave of the legislative hand, hitherto private businesses are made public facilities which are open to all persons regardless of the owner's wishes. It is, I believe, impossible to justify the sacrifice or even a portion of our historic individual freedom for a purpose such as this.

The second point in the NAACP Bill of Particulars is: In 1964, Mr. Rehnquist personally denounced persons who had gathered at the Arizona State Capitol in the interest of civil rights legislation.

The third point is when school officials in Phoenix made proposals to end de facto segregation in the high schools, an Arizona newspaper published a letter from Mr. Rehnquist opposing the move. His letter said that those seeking to end de facto segregation in the public schools, and I quote:

> Assert a claim for special privileges for this minority, the members of which in many cases do not even want the privileges which the social theorists urge be extended to them.

The fourth point is that during some of the elections in Phoenix, Mr. Rehnquist was a part of a group of citizens who engaged in campaigns to challenge voters and thereby prevent them from casting their ballots. Most of such voters were the poor and black citizens of Phoenix.

In matters of this kind, it is important to look at the total picture of a nominee's past record.

During the historic fight against another nominee who was accused of having racist views, there were many who said that he had repudiated such philosophies. However, a distinguished member of this committee made what to me was an unforgettable speech on the floor of the United States Senate in which he said:

> Do we wish to put on the Court a man to whom we must say to 20 million black Americans. "Take our word for it; he really does not believe it anymore."

In that instance, the Senate rejected the nominee. Later activities of that nominee in a political campaign revealed that the fears of Negroes about his racial views were justified. He had not really changed.

Although I had not intended to do this, I think the world should know that the distinguished Senator to whom I have reference is the Honorable Philip Hart of the State of Michigan and I feel eternally grateful to you, Senator, for standing up at the important time and making a declaration which, in my judgment, gave heart to millions of people who love you for what you did.

As we look at the record of Mr. Rehnquist, there is a consistent pattern of opposition to the rights of black Americans in areas of public accommodations, freedom of expression, education and voting These, taken singly or together, raise grave doubts about whether he could mete out to the black America equal justice under the law.

The first point of the NAACP resolution deals with Mr. Rehnquist's opposition to a public accommodations ordinance. It must be remembered that he came forward as a volunteer and indicated that he was speaking for himself. It is also somewhat startling to note that his opposition to the ordinance was not based solely on the fact that it would give Negroes the opportunity to eat at lunchcounters.

The plain language of his testimony states that drug store owners have historic rights "to choose their customers." By including drug stores, it would appear that Mr. Rehnquist did not stop simply at denying Negroes the right to eat at lunch counters or to buy a cup of coffee. Apparently he believed that even the purchase of an aspirin in a drug store depended on the pleasure of the owner; and I might say I have never, in all the years I have been traveling around the country, encountered in even the worst parts of the country, where prejudice is rampant, a drug store owner who wouldn't want to sell somebody an aspirin because he was not white. But Mr. Rehnquist apparently feels that you don't have to sell it to them even if they have got a king-sized headache if they are black.

Mr. Rehnquist apparently was the only person who testified against that ordinance. It is interesting to note that the ordinance passed which means he was part of a very small minority of those opposing it, possibly a minority of one.

I have talked by long distance with State Senator Cloves Campbell of the 28th Senatorial District in the State of Arizona. Mr. Campbell advised me that he had talked with Mr. Rehnquist about his opposition to the public accommodations ordinance. Senator Campbell said, and I quote, "After the meeting I approached Mr. Rehnquist and asked him why he was opposed to the public accommodations ordinance. He replied, 'I am opposed to all civil rights laws.' "

I offer for the record an affidavit from Senator Campbell on his official State Senate stationery dated November 4, 1971, in which he asserts that Mr. Rehnquist made that statement. Senator Campbell's affidavit was notarized on November 4, 1971, in the City of Phoenix, Maricopa County, Arizona. With your permission, Mr. Chairman, I would like to offer it.

Senator HART. Without objection, it will be received.

Senator BAYH. Mr. Chairman, could I ask our witness if he would yield long enough to provide one initial bit of pertinent information?

Have you documented the date of the statement to the State senator? What was the date of Mr. Rehnquist's statement to the State senator?

Mr. MITCHELL. The Rehnquist statement was in 1964, and the reason I did not mention the date, Senator Bayh, is because it is

my understanding that his letter or rather his statement has been submitted to the committee with the specific date on it, that is, June 15, 1964, at a public hearing before the city council in the city of Phoenix. It is interesting—you gentlemen who were Members of the Senate at that time will remember—that this was the very year when the U.S. Senate, speaking for all the people of this country, was going on record overwhelmingly in favor of public accommodation.

We were casting aside our geographic differences and traditions and mores and trying to come to the relief of American citizens who wanted to buy a ham sandwich and a cup of coffee at a place of public accommodation.

So Mr. Rehnquist was out of step with the Senate.

Senator BAYH. I thought that should be dated and if we could, Mr. Chairman, I think it would be appropriate to have that statement. Perhaps it has been put in the record, but it it hasn't, I believe it should be made a part of the record.

Senator HART. I anticipate that statement will be offered for the record by Mr. Rauh. He signals that he will.

Mr. MITCHELL. Mr. Rauh says that he will offer it.

The second point of the NAACP resolution asserts that Mr. Rehnquist attempted to oppose those persons who staged a civil rights march to the capital of the State of Arizona in the spring of 1964.

I have talked with some of the participants in that march and they insist that Mr. Rehnquist was abusive in his approach to them. Here, again, Mr. Rehnquist seemed to be acting as a volunteer. I invite the committee's attention to the fact that in all of these appearances and activities of Mr. Rehnquist he seems to be more or less of a self-propelled segregationist; he doesn't attempt to speak for any organization but apparently he is so deeply moved in his desire to deny people their rights that he volunteers to come forward and interfere with those who are in need of redress.

Unfortunately, some of those who were present on that occasion are unwilling to come forward to describe what happened. I am advised that they believe their appearances would subject them to economic reprisals. However, I do have the statement of one individual who was present. He is Mr. Moses Campbell, Jr., who is not related to Senator Campbell. Mr. Campbell lives at 2741 West Adams Street in Phoenix, Ariz., and I have put in here his telephone area code so he is a real flesh-and-blood person.

He sent a letter dated November 3, 1971, on the official stationery of the Phoenix branch of the National Association for the Advancement of Colored People. He states that he was present with the branch's president at that time, the Rev. George Brooks, and Mr. William Rehnquist engaged in what Mr. Campbell describes as "bitter recriminations concerning the group's purpose for marching, and intimating that the march was communistically inspired."

Mr. Campbell further asserts that Mr. Rehnquist's conduct "brought irreparable harm and insult to the blacks of Phoenix, Ariz." and for that reason he asks to be listed as one of those opposing the nomination. And with your permission, Mr. Chairman, I would like to offer Mr. Moses Campbell's letter for the record.

Senator HART. Without objection, it will be received.

(Letter from Moses Campbell dated Nov. 3, 1971, follows:)

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
Phoenix, Ariz. November 3, 1971.

I, Moses Campbell, do hereby attest to the following:

II. That I was a member of the Civil Rights march on the Capitol Building of the State of Arizona in the Spring of 1964.

II. That I was present at the time our Past President, Rev. George Brooks, of the NAACP and Mr. William Rhenquist exchanged bitter recriminations concerning the groups purpose for marching, intimating that the march was communistically inspired.

III. I believe that owing to the conduct of Mr. Rhenquist in his desire to disrupt and intimidate the Blacks in their peaceful presentation of what they considered just grievances to the State of Arizona's officials, that he has brought irreparable harm and insult to the Blacks of Phoenix, Arizona, and should not be considered for the lofty position as United States Supreme Court Justice.

(Signed) MOSES CAMPBELL.

Mr. MITCHELL. On the matter of school desegregation, which is point three of the NAACP's resolutions, I would like to call the committee's attention to the intemperate language used by Mr. Rehnquist in his published letter. Here again he was acting on his own initiative as a private citizen. I think most of the members of this committee who heard the rhetoric associated with these matters know that it is customary for those who attack efforts to achieve interracial justice in our country to brand the advocates of brotherhood as starry-eyed dreamers, bleeding hearts and social theorists. This is the rhetoric that has led to confrontations between whites and blacks in America. This is the rhetoric which has encouraged public officials to station themselves in school doorways to prevent the entrance of black children. This is the kind of appeal to emotions that has caused burning of buses in Pontiac, Mich.

In our country, there is room enough for all kinds of views and, fortunately, no one would deny Mr. Rehnquist the right to say whatever he believes, either as a representative of a group of citizens or as an individual. However, we ask this question: Is a man who believes that honest attempts to desegregate public schools are the works of social theorists worthy of sitting as an impartial justice on the U.S. Supreme Court? We believe that no black man and perhaps very few members of any other minority group could believe that Mr. Rehnquist would give fair and impartial consideration to any legal question involving race that would come before him as a Justice.

The fourth point of the NAACP's resolution sounds like an echo from the year of 1957. For the convenience of the members of the Senate, I offer a page from the record of the subcommittee, or hearings of the Subcommittee on Constitutional Rights in 1957. That page, 238, describes how the white citizens of Ouachita Parish, La., organized for the purpose of denying Negroes the right to vote even though they were already registered.

These citizens succeeded in eliminating more than 3,300 Negro voters from the rolls in violation of the laws of Louisiana as well as those of the United States.

This information was presented to the subcommittee during the administration of President Eisenhower. It was gathered by a distinguished lawyer, Mr. Warren Olney III, who was then Assistant

Attorney General in charge of the Criminal Division of the U.S. Department of Justice.

As I said, for the convenience of the members of the committee, I just lifted that page out of a committee hearings, and with your permission, Mr. Chairman, I will offer it. I assume you have the hearings, but just for the convenience of the members I submit it.

Senator HART. Without objection, it will be received in the record.

(Page 238, 1957 Civil Rights hearings follows:)

CIVIL RIGHTS—1957

HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-FIFTH CONGRESS, FIRST SESSION ON S. 83, AN AMENDMENT TO S. 83, S. 427, S. 428, S. 429, S. 468, S. 500, S. 501, S. 502, S. 504, S. 505, S. 508, S. 509, S. 510, S. CON. RES. 5

PROPOSALS TO SECURE, PROTECT AND STRENGTHEN CIVIL RIGHTS OF PERSONS UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES

FEBRUARY 14, 15, 16, 18, 19, 20, 21, 26, 27, 28, MARCH 1, 4, AND 5, 1957

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On January 17, 1956, there were approximately 4,000 persons of the Negro race whose names appeared on the list of registered voters of Ouachita Parish as residing within wards 3 and 10 in that parish. It would appear that these persons were and are citizens of the United States, possessing all of the qualifications requisite for electors under the Constitution and the laws of Louisiana and of the United States, because a system of permanent voter registration, provided for under the laws of the State of Louisiana, was in effect in Ouachita Parish, and all of these persons had registered and qualified for permanent registration and had been allowed to vote in previous elections.

As of October 4, 1956, the names of only 694 Negro voters remained on the rolls of registered voters for wards 3 and 10 of Ouachita Parish, the names of more than 3,300 Negro voters having been eliminated from the rolls in violation of the laws of Louisiana, as well as those of the United States. This mass disfranchisement was accomplished by a scheme and device to which a number of white citizens and certain local officials were parties.

The scheme appears to have taken form as early as January of 1956, and its principal purpose was to eliminate from the list of registered voters of Ouachita Parish the names of all persons of the Negro race residing in wards 3 and 10, and thereby deprive them of their right to vote.

On March 2, 1956, a nonprofit corporation, organized under the laws of the State of Louisiana, and called the Citizens Council of Ouachita Parish, La., was incorporated. Among its ostensible objects and purposes, as stated in its articles of incorporation, are the following:

"1. To protect and preserve by all legal means, our historical southern social institutions in all their aspects;

"2. To marshal the economic resources of the good citizens of this community and surrounding area in combating any attack upon these social institutions.

Notwithstanding these stated objects, subsequent developments have demonstrated that one of the principal objects and purposes of the Ouachita Citizens Council was and is to prevent and discourage persons of the Negro race from participating in elections in the parish.

The names of the officers, directors, and members of the Ouachita Citizens Council will be made available to the subcommittee if the subcommittee wishes them.

During the month of March 1956, the officers and members of the citizens council began to carry out their plan to eliminate the names of Negro persons from the roll of registered voters. This scheme consisted of filing purported affidavits with the registrar of voters challenging the qualifications of all voters of the Negro race within wards 3 and 10, and of inducing the registrar to send notices to the Negro voters requiring them within 10 days to appear and prove their qualifications by affidavit of 3 witnesses. The scheme further consisted of inducing the registrar to refuse to accept as witnesses bona fide registered voters of the parish who resided in a precinct other than the precinct of the challenged

voters, or who had themselves been challenged or who had already acted as witnesses for any other challenged voter. Of course it was a part of this scheme that none of the registered Negro voters would be able to meet these illegal requirements and upon the basis of such pretext, that the registrar would strike their names from the roll of registered voters.

These people in the Ouachita Citizens Council appear to have succeeded either by persuasion or intimidation in procuring the help and cooperation of the election officials of Ouachita Parish.

In April and May of 1956, the registrar and her deputy permitted the officers and members of the citizens council to use the facilities of the office of the registrar to examine the record and to prepare therefrom lists of registered voters of the Negro race. The citizens council was given free run of the registrar's office and was permitted to occupy the office and work therein during periods when the office of the registrar was not officially open to the public.

Between April 16, 1956, and May 22, 1956, the members and officers of the Ouachita Citizens Council filed with the registrar approximately 3,420 documents purporting to be affidavits, but which were not sworn to either before the registrar or deputy registrar of Ouachita Parish as required by law. In each purported affidavit it was alleged that the purported affiant had examined the records on file with the registrar of voters of Ouachita Parish, that the registrant named therein was believed to be illegally registered, and that the purported affidavit was made for the purpose of challenging the right of the registrant to remain on the roll of registered voters, and to vote in any elections. These purported affidavits were not prepared and filed in good faith, but were prepared and filed * * *

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Mr. MITCHELL. At that time the country was indignant because of such attempts to deny Negroes the right to vote. This information gathered by Mr. Olney was one of the persuasive factors that resulted in the enactment of the 1957 Voting Rights Act. It is ironic that now, 14 years later, the White House is offering for consideration as a Justice of the U.S. Supreme Court a man who is charged with using the same tactics to deprive Negroes of the right to vote in the State of Arizona.

As I understand it, Mr. Rehnquist in his appearance before the committee indicated that he was a part of this operation, and I have from one of our witnesses down in the State of Arizona a statement about how this worked. It didn't come in until last night by telephone conversation and therefore it appears at the end of my testimony. But this was given to me on November 8, 1971, by Mr. Leonard Walker, of 4841 South 22d Street, Phoenix, Ariz., by long distance.

He said the practice of challenging voters had caused a large number of complaints in 1960, 1964, and 1968; and it is my recollection that Mr. Rehnquist testified that he was identified with that effort during all of those years.

Mr. Walker said that to his knowledge the challengers were concentrated in the precincts with heavy black registrations. According to his statement, two white persons would station themselves between the line of voters and at a table where voting numbers were issued. The whites would then ask whether the blacks could read parts of the Arizona constitution and whether they had "reregistered." Mr. Walker said that the challengers seemed to pick on the older voters who were not likely to make a fuss. "In other words, they didn't just go out and try to knock the Negroes off the books but they took the weak and the humble who probably wouldn't physically defend themselves for the purpose of trying to knock them off of the books."

The whites would then ask whether the blacks could read parts of the constitution, as I said. Mr. Walker said that in 1968 he ran for the legislature in district 28. He said that he observed two white

men who later said that they were lawyers challenging a number of voters. After some discussion with him, these men left. Mr. Walker said he thought he had better check other precincts. He went to the Bethune precinct which he said was predominantly black. There he found two white men challenging voters, the same two who had been at the other precinct. He said he lost the election by less than 100 votes.

Later he told me a number of persons who had promised him support said that they had tried to vote for him but were challenged and prevented from voting. He said to the best of his knowledge those prevented from voting were eligible to vote.

I call to the committee's attention the fact that while Mr. Rehnquist was testifying he did state that he was supposed to be a settler of disputes in these polling places in 1968, and I would like to ask the question: Here is evidence by an individual who was directly involved over an extended persistent and unfair attempt to interfere with the right to vote. Where was Mr. Rehnquist the arbiter in that exchange of difficulties between the people in that area, and did he approve of what was going on in those precincts?

The NAACP in Arizona alleges that Mr. Rehnquist was active in attempts to deprive Negroes of the right to vote over a period of several years, beginning as early as 1958. It is stated that in one election Mr. Rehnquist appeared at what was called the Granada precinct and engaged in extensive questioning of would-be voters. The Arizona NAACP advises that the questions raised by Mr. Rehnquist himself had to do with the provisions of the Arizona constitution. This is strikingly similar to the kind of questions raised by the citizens of Ouachita Parish, La., in 1957, and indeed by those who have sought to deny Negroes the right to vote through the years.

The NAACP states further that after Mr. Rehnquist had questioned a number of would-be voters, officials at the polling place, which was the Granada precinct, insisted that he leave because he was creating considerable delays in voting. The association further states that Mr. Rehnquist then left the Granada precinct and used the same tactics in a precinct known as the Bethune precinct, which I have referred to earlier.

I have carefully considered the testimony of Mr. Rehnquist which appears on page 148 [of the typewritten transcript] of the hearing record in these hearings. It is interesting to note that he has a clear recollection of his activities which he states were jointly carried on with a Democrat. He has a clear recollection of suspicious or so-called tombstone voting, but he does not seem to have a clear recollection of the circumstances surrounding his personal activity in the years preceding 1968.

Because of the seriousness of this charge, I have again called our officials in Arizona after considering the substance of Mr. Rehnquist's testimony before this committee. Our officials insist that a witness is available who can verify that Mr. Rehnquist was present and did personally interrogate voters at the Granada polling place. I have the name of that individual but I am advised that we are confronted with the usual problem of the poor and humble versus the powerful. The witness is unwilling to come forward and to state to us what he observed.

However, it is well known that the reluctance of witnesses to testify in circumstances of this kind does not release the Government of the United States from its duty to ascertain the facts in other ways. I might say, gentlemen of the committee, if we had been required as a condition of proving that there was discrimination against would-be voters in the South, I am afraid in many instances we would not have been able to prove it because all too often the witnesses were so intimidated that they didn't appear; and in many cases some of them were killed before they had an opportunity to testify.

Accordingly, we recommend that Mr. Rehnquist be recalled and asked these specific questions of whether he was at the Granada and Bethune precincts prior to 1968 and whether he personally asked voters questions about their knowledge of the Arizona constitution or any other matter bearing on their fitness to vote in that State.

The Bethune precinct is mostly black, as I have said before. We respectfully urge that this committee take into consideration the fact that Mr. Rehnquist offers a general assertion that he was involved in disputes over voting qualifications because of reports of tombstone voting. He also states that he was working in company with a member of the Democratic Party. We urge the committee to ask him to name this Democrat and we respectfully urge that this person be questioned also for his version of what was happening.

I happen to know that the individual to whom Mr. Rehnquist referred is now a judge in the State courts of Arizona, and if Mr. Rehnquist is going to make a full disclosure of what happened, it would seem to me he ought to tell this committee the name of that man; and it seems to me it would be wise to have that gentleman come before the committee to give his version because, as I understand it, his version is different from the version that Mr. Rehnquist offers.

According to our NAACP officials in Arizona, a gentleman who is now a U.S. judge in Arizona was instrumental in seeking an FBI investigation of interference with voting during that voting. As I understand it, that is U.S. District Judge Miche. I have not met the gentleman but I understand that he did ask for an FBI investigation because what was going on was so outrageous at that time.

Senator BAYH. What is the name?

Senator HART. Did you say he was a judge from Michigan?

Mr. MITCHELL. No, his name is M-i-c-h-e, but I think it was pronounced Miche to me. In any event, I got this from our Arizona people and he is a U.S. district judge.

Senator BAYH. In Arizona?

Mr. MITCHELL. In Arizona. As I understand it, during the period when all of this interference with voting was going on, he asked for an FBI investigation of it. We respectfully urge that this committee ask the FBI whether it made an investigation and, if so, what were the findings of that investigation.

During the long and dramatic struggle of black citizens for rights and equality of treatment, there have been many frustrations and fears. However, if there has been any fixed star by which they could set a course that would take them to their goal, it has been up until now, and still is, the U.S. Supreme Court.

The Rehnquist nomination raises a grim warning: Through that nomination the foot of racism is placed in the door of the temple of

justice. The Rehnquist record tells us that the hand of the oppressor will be given a chance to write opinions that will seek to turn back the clock of progress. We cannot believe that this is fair to our country in a time when we are trying to build bridges of friendship to other nations of the world.

We hope that the nomination will be rejected because it is an insult to Americans who support civil rights. But if that is not sufficient reason to vote against it, we hope that it will be opposed because this nomination will follow the President and our representatives wherever they go in the civilized world. No matter what they may say about our intentions, the Rehnquist record will speak louder than anything that they can say, and it will be a refutation of any fair words and promises and hopes that may be held out by the President or any other person representing our Government in relationship with other people of the world.

That concludes my statement, Mr. Chairman.

Mr. RAUH. Mr. Chairman.

Senator HART. Mr. RAUH.

Mr. RAUH. May it please the committee, Mr. Mitchell's brilliant testimony just given makes anything I can say an anticlimax, but, nevertheless, there is a volume of things to be said.

I appear this morning, as Mr. Mitchell said, on behalf of and as general counsel of the Leadership Conference on Civil Rights. I also appear on behalf of Americans for Democratic Action.

As Mr. Mitchell has made clear, we strongly oppose the nomination of Mr. Rehnquist. We do not oppose nominations lightly. Although we disagree with Chief Justice Burger on many things, we did not oppose his nomination. Although we disagree with Mr. Justice Blackmun on many things, we did not oppose his nonimation. Although we disagree with Mr. Powell on many things, we have not asked to testify against his nomination.

Before discussing our reasons for opposing Mr. Rehnquist, I should like to take up two preliminary matters to put our opposition in its proper setting.

The first preliminary matter is the standard for Senate review of a Supreme Court nominee. The Constitution provides:

> The President shall nominate, and by and with the advice and consent of the Senate, shall appoint judges of the Supreme Court.

The Senate is not a rubber stamp on appointments. President Nixon's letter to Senator Saxbe during the Carswell debate was in error in so suggesting. "Advice" means something more than simply saying yes, and that advice is more important here than on any other type of nomination. What you do on a Supreme Court nomination is vital, not only because of the importance of the position but also because of the length of time that the person serves. The man whom we oppose today will be on the Court to do his damage to our children and our grandchildren.

Charles L. Black, Jr., the Henry R. Luce Professor of Jurisprudence at Yale Law School, put it best in the March 1970 Yale Law Journal. He concluded a brilliant analysis of the precedents with these words:

> There is no just reason at all for a senator's not voting in regard to confirmation of a Supreme Court nominee on the basis of a full and unrestricted review not embarrassed by and presumption of the nominee's fitness for the office. In a world

that knows a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the senator thinks will make a judge whose service on the bench will hurt the country, then the senator can do right only by treating this judgment of his unencumbered by the deference to the President as a satisfactory basis in itself for a negative vote.

Whether the Chair would like the Yale Law Journal article in the record is a matter entirely for his decision. I am not asking to have it put in the record. I don't know whether you care to have these things introduced at this point, Mr. Chairman.

Senator HART. If there is no objection, let it be printed.

Mr. RAUH. Thank you, sir.

(The Yale Law Journal article follows:)

[From The Yale Law Journal, Volume 79, Number 4, March 1970]

A NOTE ON SENATORIAL CONSIDERATION OF SUPREME COURT NOMINEES

(By Charles L. Black, Jr.)

If a President should desire, and if chance should give him the opportunity, to change entirely the character of the Supreme Court, shaping it after his own political image, nothing would stand in his way except the United States Senate. Few constitutional questions are then of more moment than the question whether a Senator properly may, or even at some times in duty must, vote against a nominee to that Court, on the ground that the nominee holds views which, when transposed into judicial decisions, are likely, in the Senator's judgment, to be very bad for the country. It is the purpose of this piece to open discussion of this question; I shall make no pretense of exhausting that discussion, for my own researches have not proceeded far enough to enable me to make that pretense.[1] I shall, however, open the discussion by taking, strongly, the position that a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by so doing.

I will open with two prefatory observations.

First, it has been a very long time since anybody who thought about the subject to any effect has been possessed by the illusion that a judges' judicial work is not influenced and forned by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great questions of his time. The *loci classici* for this insight, now a platitude, are in such writers as Oliver Wendell Holmes, Jr., Felix Frankfurter, and Learned Hand. It would be hard to find a well-regarded modern thinker who asserted the contrary. The things which I contend are both proper and indispensable for a Senator's consideration, if he would fully discharge his duty, are things that have definitely to do with the performance of the judicial function. The factors I contend are for the Senator's weighing are factors that go into composing the quality of a judge. The contention that they may not properly be considered therefore amounts to the contention that some things which make a good or bad judge may be considered—unless the Senator is to consider nothing—while others may not.

Secondly, a certain paradox would be involved in a negative answer to the question I have put. For those considerations which I contend are proper for the Senator are considerations which certainly, notoriously, play (and always have played) a large, often a crucial, role in the Preisdent's choice of his nominee; the assertion, therefore, that they should play no part in the Senator's decision amounts to an assertion that the authority that must "advise and consent" to a

[1] I shall not provide this discussion with an elaborate footnote apparatus. I am sorry to say that I cannot acknowledge debt, for I am writing from my mind; experience teaches that, when one does this, one unconsciously draws on much reading consciously forgotten, for all such obligations unwittingly incurred I give thanks. I have had the benefit of discussion of many of the points made herein with students at the Yale Law School, of whom I specifically recollect Donald Paulding Irwin. I have also had the benefit of talking to him about the piece after it was written.

HARRIS, THE ADVICE AND CONSENT OF THE SENATE (1953) came to my attention and hands after the present piece had gone to the printer. This excellent and full account of the entire function would doubtless have fleshed out my own thoughts, but I see nothing in the book that would make me alter the position taken here, and I hope a single-shot thesis like the present may be useful.

nomination ought not to be guided by considerations which are hugely important in the making of the nomination. One has to ask, "Why"? I am not suggesting now that there can be no answer; I only say that an answer must be given. In the normal case, he who lies under the obligation of making up his mind whether to advise and consent to a step considers the same things that go into the decision whether to take that step. In the normal case, if he does not do this, he is derelict in his duty.

I have called this a constitutional question, and it is that (though it could never reach a court), for it is a question about the allocation of power and responsibility in government. It is natural, then, for American lawyers to look first at the applicable text, for what light it may cast. What expectation seems to be projected by the words, "The President . . . shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . Judges of the Supreme Court . . . ."? [2] Do these words suggest a rubber-stamp function, confined to screening out proven malefactors? I submit that they do not. I submit that the word "advice," unless its meaning has radically changed since 1787, makes next to impossible that conclusion.

Procedurally, the stage of "advice" has been short-circuited.[3] Nobody could keep the President from doing that, for obvious practical reasons. But why should this procedural short-circuiting have any effect on the *substance* so strongly suggested by the word "advice"? He who merely *consents* might do so perfunctorily, though that is not a necessary but merely a possible gloss. He who *advises* gives or withholds his advice on the basis of *all* the relevant considerations bearing on decision. Am I wrong about this usage? Can you conceive of sound "advice" which is given by an advisor who has deliberately barred himself from considering some of the things that the person he is advising ought to consider, and does consider? If not, then can the Presidents, by their unreviewable short-circuiting of the "advice" stage, magically have caused to vanish the Senate's responsibility to consider what it must surely consider in "advising"? Or is it not more reasonable to say that, in deciding upon his vote at the single point now left him, every Senator ought to consider everything he would have considered if, procedurally, he were "advising"? Does not the word "advice" permanently and inescapably define the *scope* of Senatorial consideration?

It is characteristic of our legal culture both to insist upon the textural reference-point, and to be impatient when much is made of it, so I will leave what I have said about this to the reader's consideration, and pass on to ask whether there is anything else in the Constitution itself which compels or suggests a restriction of Senatorial consideration to a few rather than to all of the factors which go to making a good judge. I say there is not; I do not know what it would be. The President has to concur in legislation, unless his veto be overridden. The Senate has to concur in judicial nominations. That is the simple plan. Nothing anywhere suggests that some duty rests on the Senator to vote for a nomination he thinks unwise, any more than that a duty rests on the President to sign bills he thinks unwise.

Is there something, then, in the whole structure of the situation, something unwritten, that makes it the duty of a Senator to vote for a man whose views on great questions the Senator believes to make him dangerous as a judge? I think there is not, and I believe I can best make my point by a contrast. The Senate has to confirm—advise and consent to—nominations to posts in the executive department, including cabinet posts. Here, I think, there is a clear structural reason for a Senator's letting the President have pretty much anybody he wants, and certainly for letting him have people of any political views that appeal to him. These are his people; they are to work with him. Wisdom and fairness would give him great latitude, if strict constitutional obligation would not.

Just the reverse, just exactly the reverse, is true of the judiciary. The judges are *not* the President's people. God forbid! They are not to work with him or for him. They are to be as independent of him as they are of the Senate, neither more nor less. Insofar as their policy orientations are material—and, as I have said above, these can no longer be regarded as immaterial by anybody who wants to be taken seriously, and are certainly not regarded as immaterial by the President—it is just as important that the Senate think them not harmful as that the President

[2] U.S. CONST. art. II, § 2, cl. 2.

[3] Even this short-circuiting is not complete. First, the President's "appointment," *after* the Senate's action, is still voluntary (Marbury v. Madison, 5 U S. (1 Cranch) 137, 155 (1803)), so that in a sense the action of the Senate even under settled practice may be looked on as only "advisory" with respect to a step from which the President may still withdraw. Secondly, nominations are occasionally withdrawn after public indications of Senate sentiment (and probable action) which may be thought to amount to "advice."

think them not harmful. If this is not true, why is it not? I confess here I cannot so much as anticipate a rational argument to which to address a rebuttal.

I can, however, offer one further argument tending in the same direction. The Supreme Court is a body of great power. Once on the Court, a Justice wields that power without democratic check. This is as it should be. But is it not wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than in the narrowest manner possible, under the Constitution? He is appointed by the President (when the President is acting at his best) because the President believes his world-view will be good for the country, as reflected in his judicial performance. The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President. Is it not wisdom to take that second opinion in all fullness of scope? If not, again, why not? If so, on the other hand, then the Senator's duty is to vote on his whole estimate of the nominee, for that is what constitutes the taking of the second opinion.

Textual considerations, then, and high-political considerations, seem to me strongly to thrust toward the conclusion that a Senator both may and ought to consider the lifeview and philosophy of a nominee, before casting his vote. Is there anything definite in history tending in the contrary direction?

In the Constitutional Convention, there was much support for appointment of judges *by the Senate alone*—a mode which was approved on July 21, 1787,[4] and was carried through into the draft of the Committee of Detail.[5] The change to the present mode came on September 4th, in the report of the Committee of Eleven [6] and was agreed to *nem. con.* on September 7th.[7] This last vote must have meant that those who wanted appointment by the Senate alone—and in some cases by the whole Congress—were satisfied that a compromise had been reached, and did not think the legislative part in the process had been reduced to the minimum. The whole process, to me, suggests the very reverse of the idea that the Senate is to have a confined role.

I have not reread every word of *The Federalist* for this opening-gun piece, but I quote here what seem to be the most apposite passages, from Numbers 76 and 77:

"But might not his nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.

"To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

"It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates

[4] 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83 (M. Farrand ed. 1911).
[5] *Id.* at 132, 146, 155, 169, 185.
[6] *Id.* at 498.
[7] *Id.* at 539.

who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure." [8]

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"If it be said they might sometimes gratify him by an acquiescence in a favorite choice, when public motives might dictate a different conduct, I answer, that the instances in which the President could be personally interested in the result, would be too few to admit of his being materially affected by the compliances of the Senate. The *power* which can *originate* the disposition of honors and emoluments, is more likely to attract than to be attracted by the *power* which can merely obstruct their course. *If by influencing the President be meant restraining him, this is precisely what must have been intended* [emphasis supplied]. And it has been shown that the restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that Magistrate. The right of nomination would produce all the good of that of appointment, and would in a great measure avoid its evils." [9]

I cannot see, in these passages, any hint that the Senators may not or ought not, in voting on a nominee, take into account anything that they, as serious and public-spirited men, think to bear on the wisdom of the appointment. It is predicted, as a mere *probability*, that Presidential nominations will not often be "overruled." But "special and strong reasons," thus generally characterised, are to suffice. Is a Senator's belief that a nominee holds skewed and purblind views on social justice not a "special and strong reason"? Is it not as "special and strong" as a Senator's belief that an appointment has been made "from a view to popularity"—a reason which by clear implication *is* to suffice as support for a negative vote? If there is anything in *The Federalist Papers* neutralizing this inference, I should be glad to see it.

When we turn to history, the record is, as always, confusing and multifarious. One can say with confidence, however, that a good many nominations have been rejected by the Senate for repugnancy of the nominee's views on great issues, or for mediocrity, or for other reasons no more involving moral turpitude than these. Jeremiah Sullivan Black, an eminent lawyer and judge, seems to have been rejected in 1861 because of his views on slavery and secession.[10] John J. Crittenden was refused confirmation in 1829 on strictly partisan grounds.[11] Wolcott was rejected partly on political grounds, and partly on grounds of competence, in 1811.[12] There is the celebrated Parker case of this century.[13] The perusal of Warren [14] will multiply instances.

I am very far from undertaking any defense of each of these actions severally. I am not writing about the wisdom, on the merits, of particular votes, but of the claim to historical authenticity of the supposed "tradition" of the Senators' refraining from taking into account a very wide range of factors, from which the nominees' views on great public questions cannot, except arbitrarily, be excluded. Such a "tradition," if it exists, exists somewhere else than in recorded history. Of course, all these instances may be dismissed as improprieties, but then one must go on and say why it *is* improper for the Senate, and each Senator, to ask himself, before he votes, *every* question which heavily bears on the issue whether the nominee's sitting on the Court will be good for the country.

I submit that this "tradition" is just a part of the twentieth-century mystique about the Presidency. That mystique, having led us into disastrous undeclared war, is surely due for reexamination. I do not suggest that it can be or should be totally rejected. I am writing here only about a little part of its consequences.

To me there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered

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[8] THE FEDERALIST No. 76, at 494–95 (Modern Library 1937) (Alexander Hamilton).
[9] *Id.* No. 77, at 498 (Alexander Hamilton).
[10] 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 364 (rev. ed. 1926).
[11] 1 *id.* at 704.
[12] *Id.* at 413.
[13] L. PFEFFER, THIS HONORABLE COURT, A HISTORY OF THE UNITED STATES SUPREME COURT 288 (1965).
[14] C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1926).

by deference to the President's, as a satisfactory basis in itself for a negative vote I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view. Will someone please enlighten me?

Mr. RAUH. Mr. Rehnquist apparently had a similar view. Mr. Rehnquist said, writing in the Harvard Law Record in 1959:

Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

Then, again he says:

The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

The President seems to have a similar view, too. Apparently shifting his views from the Saxbe letter, the President went on the air to suggest that he was making his appointments on an ideological basis. Certainly if the President is making his decisions on an ideological bent, the Senate of the United States has a right to do likewise.

Let me make this point: One does not have to go as far as Professor Black's statement to reject Mr. Rehnquist. His lack of compassion for human rights and his lack of fidelity to the Bill of Rights of the Constitution is enough. In other words, while I subscribe to Professor Black's statement, I want to make it clear that Professor Black's statement is not a necessary part of our case. A review of the human rights aspects and the constitutional rights aspects of Mr. Rehnquist's career is adequate, as I shall show, to the rejection of Mr. Rehnquist.

But whether one follows the Black theory or Mr. Rehnquist's earlier theory or the President's present position, or the lack of fidelity to the Constitution, ample grounds appear for rejection of Mr. Rehnquist.

The second preliminary matter I want to present is a question raised by President Nixon when he called Mr. Rehnquist a judicial conservative and said he was appointing him for that reason, not because he was a political conservative.

I respectfully submit that President Nixon had it exactly backward. Mr. Rehnquist, if confirmed, and I hope he will not be, will be a judicial activist, not a conservative, and will use his activism to put over his views as a political conservative.

His judicial activist nature is obvious. Just look at the last page of this same Harvard Law Record piece in 1959. I quote:

The Supreme Court in interpreting the Constitution is the highest authority in the land. Nor is the law of the Constitution just there waiting to be applied. In the same sense that an inferior court may bemoan precedents, there are those who bemoan the absence of stare decisis in Constitutional law, but of its absence there can be no doubt.

And then Mr. Rehnquist goes on to talk about the generalities in the Constitution.

The whole life of Mr. Rehnquist is one of jumping in with his own views. You heard Mr. Mitchell explain how on civil rights he volunteered all of these anti-civil-rights positions. Mr. Rehnquist is an advocate with a sharp cutting edge. He is the antithesis of a judicial passivist—I use that word as the opposite of a judicial activist. I would like to spell it: p-a-s-s-i-v-i-s-t—not a pacifist but a passivist.

If you compare Mr. Justice Frankfurter, who Mr. Rehnquist likes to compare himself to, and Mr. Rehnquist, you get exact opposites.

The point I want to make is that they are totally 180 degrees apart. Mr. Rehnquist would be a judicial activist seeking to put over political conservatism. Justice Frankfurter was a judicial passivist who refused to try to put over his political liberalism. They are opposite both on their judicial philosophy and their political philosophy. The idea—and I say this with deep conviction for I was the first Frankfurter law clerk—the idea that Justice Frankfurter was an activist conservative just distorts history. He was a judicial passivist who was a political liberal. What you have got here is the exact opposite; and Mr. Nixon's speech to the contrary cannot wash away this fact.

While on the subject of political liberalism or conservatism, it should be noted at this point that on an absolute basis one would have to go back to President Harding to find a Supreme Court nominee as far to the right as Mr. Rehnquist; and on a relative basis, considering the times, Mr. Rehnquist is probably farther to the right than any appointee to the Supreme Court this century. I make the distinction between absolute and relative because times have changed. I have the list here of the justices and I can find none since Harding—Mr. Hoover's appointments, for example, actually were quite liberal—I find none since then that were on an absolute basis as conservative or reactionary, if you care to use the word, as Mr. Rehnquist; and on a relative basis to the times, I challenge anyone to find a more conservative nominee in this country.

Leaving the general, and turning to the specific, we oppose Mr. Rehnquist for three separate and adequate reasons:

(1) Mr. Rehnquist has opposed, rather than supported, minority rights.

(2) Mr. Rehnquist has opposed, rather than supported, constitutional liberties under the Bill of Rights.

(3) Mr. Rehnquist's testimony before this committee was wholly lacking in candor; and I intend before I am finished to demonstrate to this committee that his testimony was, as I just said, wholly lacking in candor.

Now, I would like to take each of these three grounds separately.

First, Mr. Rehnquist's opposition to civil rights: Mr. Mitchell has spoken of the true facts eloquently and I shall not repeat any of the voting matters on which Mr. Mitchell testified. I do not see how this committee can do anything but ask for an FBI investigation of Mr. Rehnquist's previous activities and seek to get the facts on the voting harassment. I support Mr. Mitchell's position 100 percent, but I certainly don't want to take the committee's time to repeat it.

Second, the Phoenix ordinance on public accommodations: I think it important to set the stage for when this was in issue. That was adverted to in a question to Mr. Mitchell. I would like to go into a little more detail on what the situation was in America on June 15, 1964, when Mr. Rehnquist testified against the Phoenix ordinance. Before doing that, may I offer for the record the statement by William Rehnquist before the city council on June 15, 1964?

Senator HART. It will be received.

(The June 15, 1964, statement follows:)

COMMENTS OF WILLIAM REHNQUIST, MADE JUNE 15, 1964, AT THE PUBLIC HEARING ON THE PUBLIC ACCOMMODATIONS ORDINANCE PROPOSED FOR THE CITY OF PHOENIX

Mr. Mayor, members of the City Council, my name is William Rehnquist. I reside at 1817 Palmcroft Drive, N.W., here in Phoenix. I am a lawyer without a client tonight. I am speaking only for myself. I would like to speak in opposition to the proposed ordinance because I believe that the values that it sacrifices are greater than the values which it gives. I take it that we are no less the land of the free than we are the land of the equal and so far as the equality of all races concerned insofar as public governmental bodies, treatment by the Federal, State or the Local government is concerned, I think there is no question. But it is the right of anyone, whatever his race, creed or color to have that sort of treatment and I don't think there is any serious complaint that here in Phoenix today such a person doesn't receive that sort of treatment from the governmental bodies. When it comes to the use of private property, that is the corner drugstore or the boarding house or what have you. There, I think we—and I think this ordinance departs from the area where you are talking about governmental action which is contributed to by every tax payer, regardless of race, creed or color. Here you are talking about a man's private property and you are saying, in effect, that people shall have access to that man's property whether he wants it or not. Now there have been other restrictions on private property. There have been zoning ordinances and that sort of thing but I venture to say that there has never been this sort of an assault on the institution where you are told, not what you can build on your property, but who can come on your property. This, to me, is a matter for the most serious consideration and, to me, would lead to the conclusion that the ordinance ought to be rejected.

What has brought people to Phoenix and to Arizona? My guess is no better than anyone elses but I would say it's the idea of the last frontier here in America. Free enterprise and by that I mean not just free enterprise in the sense of the right to make a buck but the right to manage your own affairs as free as possible from the interference of government. And I think, perhaps, the City of Phoenix is not the common denominator in that respect but that is over on one side, stressing free enterprise. I have in mind, the state of the Housing Ordinance, last year, which a great number of people—you know, the opinion makers, leaders of opinions, community leaders were entirely for it. I happen to favor it myself and yet it was rejected by the people because they said, in effect, "we don't want another government agency looking over our shoulder while we are running our business". Now, I think what you are contemplating here is much more formidable interference with property rights than the Housing Ordinance would have been and I think it's a case where the thousands of small business proprietors have a right to have their own rights preserved since after all, it is their business.

Now, I would like to make a second point very briefly, if I might, and that is on the mandate existing to this Council and this again, of course, is a matter of one man's opinion against another. As I recall, the position taken by the preceding Council, of which I know you, Dr. Pisano, Mr. Hyde, Mr. Lindner were all on, was that there would be no compulsory public accommodations ordinance and as I recall, when this Council ran against the Act Ticket, which I would have thought would be the logical ticket, if elected, to bring in an ordinance like this, nothing was said about any sort of change that the voters might guide themselves by in voting in this particular matter. I don't think this Council has any mandate at all for the passing of such a far reaching ordinance and I would submit that if the Council, in its wisdom, does determine that it should be passed, it has a moral obligation to refer it for the vote of the people because something as far reaching as this without any mandate or even discussion on the thing at the time of election for City Council was held is certainly something that should be decided by the people as a whole rather than by their agents, honorable as you ladies and gentlemen are. I have heard the criticism made by the groups which have favored this type of ordinance in other cities that we don't want our rights voted on but of course, it is they who are bringing forward this bill. The question isn't whether or not their rights will be voted upon but instead, it's a question of whether their rights will be voted upon by you ladies and gentlemen who are the agents of the people or the people as a whole.

Thank you very much for your time.

Mr. RAUH. What was the situation on June 15, 1964? The House of Representatives had included a public accommodations section in the civil rights bill it had passed two and a half to one in February, 1964. Five days before the Rehnquist statement, the Senate had adopted cloture on its bill; thus over two-thirds of the Senate had already expressed satisfaction with a public accommodations provision. Even more important the only argument made against public accommodations legislation in the Congress was that it was a violation of the interstate commerce clause and the 14th amendment.

You didn't have that argument in Phoenix. The police power of the city was adequate to cover the ordinance. In other words, the only argument that was ever put up in Congress was not applicable there. Here was a man so far removed from his times that he opposed the unopposable and he was alone in doing so.

Mr. Mitchell quoted Cloves Campbell as hearing Mr. Rehnquist say: "I am against all civil rights laws." But you didn't need Cloves Campbell to tell you that. Any man who would oppose a city ordinance on public accommodations would oppose any civil rights legislation. I challenge him to find any civil rights law that he could be for. If one could be against a city ordinance on this point, it is impossible to find a law such a person could be for. This was the least of interferences, the least drastic, the least everything; and yet he opposed it.

Well, if I may move on, why did he oppose the ordinance—Senator Cook has got my copy, but I think I remember the statement.

Senator COOK. You can have it.

Mr. RAUH. You may keep it, sir; it was based on some indescribably high values he places on private property. That was the value, he said, that comes first—the right of the owner of the property against the right of the individual seeking service. Since I cannot state our position as eloquently as Mr. Mitchell, I will simply adopt what he said on this point.

Now, Mr. Rehnquist testified on June 15, 1964, and his was the only substantial testimony against the ordinance. The next day the city council passed it unanimously and you would think Mr. Rehnquist would have dropped the subject then. Oh, no; he had already testified; he had already been licked unanimously. You have got to say that this is a man of his convictions, as wrong as they are. He writes a letter to the Arizona Republic saying it all over again. No humility. When I talk about a judicial activist, I know whereof I speak—no humility that the entire city council had rejected his position—no humility that the House and Senate had rejected his position on a much more drastic proposition. He writes the same thing all over again to the Arizona Republic on what was wrong with what the Phoenix City Council had done.

In this letter, which I would offer for the record at this point, Mr. Chairman, in this letter he says, and I quote:

> The ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers. By a wave of the legislative wand, hitherto private businesses are made public facilities, which are open to all persons regardless of the owner's wishes.

(The letter to the editor of the Arizona Republic referred to follows.)

PUBLIC ACCOMMODATIONS LAW PASSAGE IS CALLED "MISTAKE"

(By William H. Rehnquist)

Editor, The Arizona Republic: I believe that the passage by the Phoenix City Council of the so-called public accommodations ordinance is a mistake.

The ordinance is called a civil rights law, and yet it is quite different from other laws and court decisions which go under the same name. Few would disagree with the principle that federal, state, or local government should treat all of its citizens equally without regard to race or creed. All of us alike pay taxes to support the operation of government, and all should be treated alike by it, whether in the area of voting rights, use of government-owned facilities, or other activities.

The public accommodations ordinance, however, is directed not at the conduct of government, but at the conduct of the proprietors of privately owned businesses. The ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers. By a wave of the legislative wand, hitherto-private businesses are made public facilities, which are open to all persons regardless of the owner's wishes. Such a drastic restriction on the property owner is quite a different matter from orthodox zoning, health, and safety regulations which are also limitations on property rights.

If in fact discrimination against minorities in Phoenix eating-places were well nigh universal, the question would be posed as to whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all. The arguments of the proponents of such a sacrifice are well known; those of the opponents are less well known.

The founders of this nation thought of it as the "land of the free" just as surely as they thought of it as the "land of the equal." Freedom means the right to manage one's own affairs, not only in a manner that is pleasing to all, but in a manner which may displease the majority. To the extent that we substitute, for the decision of each businessman as to how he shall select his customers, the command of the government telling him how he must select them, we give up a measure of our traditional freedom.

Such would be the issues in a city where discrimination was well nigh universal. But statements to the council during its hearings indicated that only a small minority of public facilities in the city did discriminate. The purpose of the ordinance, then, is not to make available a broad range of integrated facilities, but to whip into line the relatively few recalcitrants. The ordanance, of course, does not and cannot remove the basic indignity to the Negro which results from refusing to serve him; that indignity stems from the state of mind of the proprietor who refuses to treat each potential customer on his own merits.

Abraham Lincoln, speaking of his plan for compensated emancipation, said: "In giving freedom to the slave, we assure freedom to the free—honorable alike in what we give and in what we preserve."

Precisely the reverse may be said of the public accommodations ordinance: Unable to correct the source of the indignity to the Negro, it redresses the situation by placing a separate indignity on the proprietor. It is as barren of accomplishment in what it gives to the Negro as in what it takes from the proprietor. The unwanted customer and the disliked proprietor are left glowering at one another across the lunch counter.

It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this.

Mr. RAUH. Mr. Rehnquist calls this a "drastic restriction" on the property owner. He talks about the freedom of the property owner being "sacrificed." He talks about the "indignity" to the proprietor, and ends—

It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this.

What was the purpose? To allow Negroes to enter a drug store.

What does Mr. Rehnquist say in answer when he was asked about this matter? At page 145 [of the typewritten transcript] of the record,

he said that he had changed his mind. When Senator Bayh gave him a chance at page 255 of the record to say whether he changed it before he was appointed to the Supreme Court, he didn't answer.

Senator BAYH. If I might interrupt there, will you recount why he said he changed his mind?

Mr. RAUH. Yes, Senator Bayh. He said two things: First, the ordinance had worked. That is a wonderful reason to change one's mind; apparently Negroes were so well behaved that no problem arose when they exercised their rights. Probably they were not rich enough to go to the places anyway. But the issue was one of principle, not whether the ordinance worked.

Then he said a remarkable thing. He said that he hadn't realized that minorities really cared about this. That is one of the strangest statements—that anybody would not realize in 1964 that minorities cared about their rights. One might have said that 25 years earlier. But how could he say he had not known that minorities cared after the NAACP had been fighting for these things since the early 1900's, after Dr. King had dramatized these things, after people had died for these rights—and he said that he didn't know they cared.

Finally, I would respectfully suggest that Mr. Rehnquist should be cast with King Henry IV of France who said, "Paris is worth a mass." On that principle he was apparently prepared to change what he had said before—that he was against all civil rights legislation.

Senator HART. Mr. Rauh, I know you are paraphrasing, but if I am looking at the correct page of the transcript, what Mr. Rehnquist said to Senator Bayh was:

> I think the ordinance really worked very well in Phoenix. It was readily accepted and I think I have come to realize since more than I did at the time the strong concern that minorities have for the recognition of these rights.

Mr. RAUH. Thank you, sir; that is the exact language I was referring to. I paraphrased it, I think, accurately, sir.

Senator HART. I don't quarrel with your paraphrase, but I thought it was appropriate that we put it in the exact language, too.

Mr. RAUH. Thank you, sir.

The third point on civil rights is the Arizona legislation.

Mr. Tunney said at page 161 of the transcript, "There was no State legislation?" Mr. Rehnquist said, "Right."

Well, I happen to have the statute here. For anybody who wants to look it up, the State legislation was passed on—in 1964 and signed in 1965; it is in Arizona Revised Statutes Annotated. I cannot understand how Mr. Rehnquist would have suggested that there was no such legislation. All the press reported that he had opposed it. Indeed, the statement that Mr. Mitchell has on the confrontation was at the time the legislation was being passed in the State legislature. Now,——

Senator COOK. Do you have the dates of the Arizona statute as to when it was passed and when it was signed into law?

Mr. RAUH. Adopted by laws 1965, chapter 27, section 3, Senator Cook. What I have here, of course, is the Arizona Revised Statutes, but, as I see here, it says, "Article 1 consisting of sections 41–1401 to 41–1403 added by laws 1965, chapter 27, section 3." It sets up an Arizona Civil Rights Commission and provides an Arizona public accommodations statute and an Arizona voting rights statute.

Senator COOK. 1965, not 1964?

Mr. RAUH. It is my understanding, sir, it was adopted in 1964 and signed in 1965. It was at the end of the year, sir, is my understanding, but it is easy enough to get it. I can supply it. What I have to do is get the original yearly statute book, rather than the compilation I have.

Senator COOK. I just was not aware of any State legislature that met through the fall and through Christmas and New Year's into the new year.

Mr. RAUH. I would like the privilege of getting the exact dates from the statute book, whereas what I have here is the compilation which indicates it was added by laws 1965.

Now, certainly this matter should be cleared up. We have now an affidavit that there was quite an altercation on the steps of the Capitol on this statute which Mr. Rehnquist said didn't ever occur. So that ought to be cleared up.

Fourth, the issue of desegregation. Here again we have a letter to the Arizona Republic, a voluntary intervention against desegregation of de facto school segregation.

To me, the most shocking quote is this:

> We are no more dedicatd to an "integrated" society than we are to a "segregated" society.

How could a man 13 years after *Brown*—for this letter was written in 1967 and I would like to offer it for the record——

Senator Hart. It will be received.

(The letter referred to follows.)

'DE FACTO' SCHOOLS SEEN SERVING WELL

(By William H. REHNQUIST)

The combined effect of Harold Cousland's series of articles decrying "de facto segregation" in Phoenix schools, and The Republic's account of Superintendent Seymour's "integration program" for Phoenix high schools, is distressing to me.

As Mr. Cousland states in his concluding article, "whether school board members take these steps is up to them, and the people who elect them." My own guess is that the great majority of our citizens are well satisfied with the traditional neighborhood school system, and would not care to see it tinkered with at the behest of the authors of a report made to the federal Civil Rights Commission.

My further guess is that a similar majority would prefer to see Superintendent Seymour confine his activities to the carrying out of policy made by the Phoenix Union High School board, rather than taking the bit in his own teeth.

Mr. Seymour declares that we "are and must be concerned with achieving an integrated society." Once more, it would seem more appropriate for any such broad declarations to come from policy-making bodies who are directly responsible to the electorate, rather than from an appointed administrator. But I think many would take issue with his statement on the merits, and would feel that we are no more dedicated to an "integrated" society than we are to a "segregated" society; that we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.

The neighborhood school concept, which has served us well for countless years, is quite consistent with this principle. Those who would abandon it concern themselves not with the great majority, for whom it has worked very well, but with a small majority for whom they claim it has not worked well. They assert a claim for special privileges for this minority, the members of which in many cases may not even want the privileges which the social theorists urge be extended to them.

The schools' job is to educate children. They should not be saddled with a task of fostering social change which may well lessen their ability to perform their primary job. The voters of Phoenix will do well to take a long second look at the sort of proposals urged by Messrs. Cousland and Seymour.

Mr. RAUH. How could a man 13 years after *Brown* say, "we are no more dedicated to an integrated society than we are to a segregated society"? But worse yet is what he tried to do in this chamber when he was asked about this matter.

When asked about that subject, he said he was against busing. That is on transcript page 146. Of course, he would jump on "busing." Busing is not the most popular item in America today, but that isn't the point.

There are many ways to deal with de facto segregation in the schools. Busing is just one of them. Mr. Rehnquist was against each and every method of dealing with de facto segregation. In this letter, which I have offered for the record, Mr. Rehnquist says:

> My own guess is that the majority of our citizens are well satisfied with the traditional neighborhood school system, and would not care to see it tinkered with at the behest of the authors of a report made to the Federal Civil Rights Commission.

I have that report here; it has dozens of methods to deal with de facto segregation. Busing is only one of them.

The truth of the matter is that Mr. Rehnquist wasn't opposed to just one means of obtaining desegregation. He was opposed to the goal of desegregation. That is the important point about the quote that I read; not that he was opposing a particular means to obtain desegregation, but that he was opposing the goal of desegregation and his sentence can't be read any other way.

I think it was unfair to this committee for him to try to get away with saying that all he was opposing in this letter was busing. He opposed every means to that end and he opposed the goal itself.

The fifth point on civil rights. In a letter to the Washington Post dated February 14, 1970, Mr. Rehnquist, again I take it volunteering, says:

> Your editorial clearly implies that to the extent the judge falls short of your civil rights standards, he does so because of an anti-Negro, anti-Civil Rights animus rather than of a judicial philosophy which, if consistently applied, would reach a conservative result both in civil rights cases and in other areas of the law. I do not believe that this implication is borne out. Thus the extent to which his judicial decisions in civil rights cases fail to measure up to the standards of the Post are traceable to an overall Constitutional conservatism rather than to an animus directed only at civil rights cases or civil rights litigants.

Here Mr. Rehnquist identifies himself with the Carswell positions and tells us, if we will only read, that he, as a conservative on the court, will be, as Mr. Carswell was, an anti-civil rights judge.

Then he was asked twice what he had done for civil rights—once on page 127 of the transcript and once on page 254. On page 127 of the record, when he is saying what he had done for civil rights, he said that he represented some indigents. He didn't list them and he didn't state what he did. Every lawyer in this town knows you had better represent indigents if you get assigned—you do it or else.

And then he said that he was on the Legal Aid Board. That is true in a kind of a strange sense. He was on the Legal Aid Board by virtue of being an ex officio member of the Legal Aid Society because he represented the Bar Association there. The president or the vice president of the Bar Association are automatically ex officio members of the Legal Aid Society in Phoenix. Here he was, making his defense on what he had done for the people on the Legal Aid Society Board, where he was an ex officio member.

Then, I think, in answer to another question (on pages 254 and 255 of the transcript) about what he had done for civil rights, he refers to his Houston law day speech, which I have just read. The only thing that can be said is that this speech ridicules the idea there is anything repressive in America today. Then he referred to his new barbarians speech. Here is the essence of his referrence to the new barbarian speech as proving he was for civil rights, and I quote:

> He who stands in the door of the southern schoolhouse to defy a court order, he who prostrates himself on the railroad tracks to prevent the movement of a troop train, and he who wrongfully occupies a university building are each in his own way attacking this basic premise.

If a man has to use criticism of George Wallace standing in the schoolhouse door as the only thing he has ever done for civil rights, it is a sad day that he would have been the one chosen for this highest honor in America.

It is sad at this time in history that we should have a man proposed for the Supreme Court who, as Mr. Mitchell pointed out, has stated: "I am opposed to all civil rights laws." It is sad to have a man proposed who has no compassion for the blacks, the browns, and the other minorities.

This is enough. But I respectfully suggest that it is only the beginning.

And I turn now to the Bill of Rights.

As Mr. Rehnquist demonstrated in Phoenix that he had no compassion for civil or human rights, he has demonstrated in Washington that he has no dedication to the Bill of Rights.

First, possibly the most revealing thing of all is Mr. Rehnquist's hostility to the Warren court's dedication to the Bill of Rights. In 1957, as there has been testimony, he wrote in the U.S. News and World Report:

> Some of the tenets of the 'liberal' point of view which commanded the sympathy of a majority of the clerks I knew were extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business—in short, the political philosophy now espoused by the Court under Chief Justice Earl Warren.

Note the words, "extreme solicitude for the claims of Communists."

Then he is called on this by another law clerk, William Rogers; and how does he answer? He answers the way every McCarthyite of that day answered such questions. This is Mr. Rehnquist on February 21, 1958, after another law clerk had challenged him on his suggestion of sympathy for communism by the court—and I quote what he said:

> The only way to move forward in such a debate would be detailed documentation naming names and explaining the reasons for classification of political views. The obvious unfairness to the people involved of doing this ex parte in a magazine article, coupled with the inevitable in conclusiveness of the result, suggests that no such attempt be made.

It is the straight language of McCarthyism; having accused, you cannot go forward.

Then let's carry on with what he is saying about this Warren Supreme Court which defended the Bill of Rights. In his article in the Bar Association Journal in 1958 he starts out this way; the man has the audacity to start an article with this sentence:

Communists, former Communists, and others of like political philosophy scored significant victories during the October, 1956, term of the Supreme Court of the United States, culminating in the historic decisions of June 17, 1957.

Let me tell you what happened on June 17, 1957, that he is calling great victories for Communists. It was a great day for the Bill of Rights, but it wasn't any victory for Communists.

That day, John Stewart Service was restored to his post in the State Department because the Supreme Court, without dissent, in an opinion written by Mr. Justice Harland whose seat Mr. Rehnquist seeks to take, said that Service had been wrongfully removed without the State Department following its own regulations.

What is possibly or conceivably Communist about reversing the State Department's firing of a person without following its own regulations? You have to have it in your own mind when you say this decision is a victory for Communists.

What was the second case that day that made the headlines on June 18? It was the *Watkins* case. The *Watkins* case said that a congressional committee had to explain to a witness why they needed the information when they asked for something he didn't want to give them.

What in heaven's name is communistic about fair play at a congressional hearing? I should mention that was a decision by Chief Justice Warren with only one dissent.

The same day was the Sweazy opinion. That involved a State legislative committee; and the result was the same. And here there was Chief Justice Warren's decision with two dissents.

The fourth of this notable four-decision day that Mr. Rehnquist was talking about was the *Yates* case. That was the only one that did directly involve communism. What the Court held there was that mere advocacy of a philosophy without advocacy of action was protected by the Constitution. That again was Justice Harlan, with one dissent.

In other words, there was an average of 8 to 1 in these four cases. Only one of them directly related to communism, and yet you get this outrageous sentence that I read at the beginning.

Then you get a little further along in that article, I guess really the conclusion of that article, and I quote:

A decision of any court based on a combination of charity and ideologica sympathy at the expense of generally applicable rules of law is regrettable no matter whence it comes but what could be tolerated as a warm-hearted aberration in a local trial judge becomes nothing less than a Constitutional transgression when enunciated by the highest court of the land.

This language—used in the law clerks' articles and in the article I have just read involving the *Schware* and *Koenigsberg* cases—is the language of hostility to a court that did believe in the Bill of Rights. If I may say this, and I measure my words—this was straight McCarthyism if, and I will give him this, if it is laundered McCarthyism.

Again, you get the same thing—I heard it from Mr. Mitchell here this morning. I wasn't very surprised because it brings it all into focus. Mr. Mitchell presented an affidavit that Mr. Rehnquist said to the people coming to the Arizona legislature supporting the statute that "you are communistically inspired." Heavens; the NAACP?

Second, the surveillance testimony. I almost don't believe this happened:

Question. "Does a serious constitutional question arise when a Government agency places people under surveillance for exercising their first amendment rights to speak and assemble?"

Answer. "No."

There is not even—he says—a constitutional question raised by surveillance. No judicial restraint should be had, no legislative restraint; rely on self-discipline.

Third, the May Day events. At the time that Mr. Rehnquist spoke at North Carolina, the papers had been filled with proof that people had been arrested illegally. Indeed, Judge Green had already acted because of illegal arrests to get the people out. Yet, on Wednesday of that week, Mr. Rehnquist could make in North Carolina a general defense of what happened.

Now, the worst thing he said there, and it raises a question of what was meant, was the use of the term "qualified martial law." In answer to a question from Senator Cook, he indicated he had not intended to apply that term to Washington May Day.

I would make this point in response to Mr. Rehnquist's answer: Every newspaper in America treated his statement as applying the words "qualified martial law" to May Day. He made no attempt to clarify that matter until you, Senator Cook, raised it with him. I may be wrong—he may have clarified it partially in earlier testimony here, but it is at this same hearing.

Senator COOK. First of all, I think his speech speaks for itself.

Mr. RAUH. I do not. I wanted to go into that, sir.

In the first place, what you are in essence saying is that the speech was misread by every newspaper writer in America. I do not believe speeches get misread.

Senator COOK. It wasn't that widely covered, Mr. Rauh.

Mr. RAUH. My goodness; I saw "qualified martial law" in the papers of May 6. Those words have stayed in my mind since then because that is a most pernicious doctrine.

Senator COOK. I question in how many newspapers that speech was covered.

Mr. RAUH. Well, I will show you that the New York Times, even after the nomination, and the Washington Post, they were still interpreting his North Carolina speech as saying that "qualified martial law" applied.

Now, what other reason would there have been for Mr. Rehnquist using the term? Was he just having an academic exercise? He was talking about May Day. Did he just bring it in as some happy thought?

Now, where he is wrong on "qualified martial law" is that martial law is initiated by a proclamation of the Governor or the President. To apply this concept to a chief of police making sweep arrests is the most dangerous concept you could ever espouse. You try to restrain chiefs of police, not give them authority in these matters. You may read it as you do; but I say he deliberately let the press call it "qualified martial law" right through until he became a Supreme Court Justice nominee.

Fourth: Wiretapping. Mr. Rehnquist believes in untrammeled tapping for domestic as well as foreign subversion and without any limits.

It would be funny, if it wasn't sad, what happened before this committee. On page 320 of the transcript, Mr. Rehnquist—I don't want to use the word "brags" but, shall we say, puffs the fact that he got a shift in wiretapping theory from inherent power to reasonableness under the fourth amendment. That is, Mr. Rehnquist was saying: "I got the Justice Department to shift in defending this right to tap for domestic subversion without a court order from the proposition they were using, of inherent power, to the proposition that it is not unreasonable under the fourth amendment to tap under those circumstances."

That, I respectfully suggest, is a distinction without a difference. I have here the Government's brief prepared under the Rhenquist theory. It is perfectly clear that what they are saying is that the tapping is reasonable because the President has got the power to do it. For example, this is on page 6 of the Government's brief in No. 70–153, October term, 1971, *United States of America* v. *United States District Court*, page 6: "We submit that an electronic surveillance authorized by the Attorney General as necessary to protect the national security is not an unreasonable search and seizure simply because it is conducted without prior judicial approval."

In other words, because the Attorney General says it is necessary to protect the national security, because he says this as a matter of security action, therefore, it is not unreasonable and there he says——

Senator BAYH. Excuse me, Mr. Rauh. Are your reading from the brief or interpolating?

Mr. RAUH. No, the second was my interpretation. The first sentence was from the brief, sir.

Senator BAYH. I wanted to be sure.

Mr. RAUH. In "authorizing such surveillances," now reading from the brief again, "In authorizing such surveillances, the Attorney General properly acts for the President."

Now here, taking the two sentences together, what he is saying is that the President, by deciding to tap, is not doing something unreasonable. Therefore, the tap is not an unreasonable search and seizure. But it is predicated on the same basic philosophy that if the Executive wants to do it, he can do it. The whole brief is of that nature.

Now, in addition to that, Mr. Rehnquist, in defending wiretapping, referred to five previous Presidents who had OK'd tapping without a warrant. But there wasn't any procedure for a warrant in those days. The procedure for a warrant was set up in 1968, and the question today is why don't they follow that procedure. Well, Mr. Rehnquist made perfectly clear why they don't in the Brown speech which is quoted at page 131 of the transcript. They don't follow that procedure because they haven't got the proof to get a warrant.

I must say there was some candor in the Brown speech, but that candor was missing here.

Fifth, Mr. Rehnquist favors limitations on freedom of speech of Federal employees.

Sixth, he favors pretrial detention.

Seventh, he favors stopping habeas corpus after trial.

Eighth, he opposes the exclusionary rule.

Ninth, he describes a violation of the search and seizure provisions of the fourth amendment as a technical violation. This appears at

page 317 of the record. The case he is referring to is *Whitely* v. *Warden*, 91 Supreme Court Reporter 1031. I do not think arresting a man without a proper warrant, without probable cause, is a technical violation of the fourth amendment. Neither did Mr. Justice Harlan who was the writer of that opinion and who is being accused of technical actions.

Tenth, and last on the matter of the Bill of Rights, is Mr. Rehnquist's letter defending Mr. Carswell, but a different sentence from it. This is the letter to the Washington Post by Mr. Rehnquist on February 14, 1970:

> In fairness you ought to state all the consequences that your position logically brings to train, not merely further expansion of constitutional recognition of civil rights but further expansion of the constitutional rights of criminal defendants, of pornographers and of demonstrators.

Any human being who would put demonstrators—idealistic young poeple—in a category of criminal defendants and pornographers, has no devotion to the Bill of Rights.

This long list might not be so damning if there had been some slight deviation, if for just once in his life Mr. Rehnquist had come out on the side of the Bill of Rights. But with a record like this and not a single redeeming statement, how could the Senate possibly say he meets the standards of this great Court?

I come now to what I promised, which was a demonstration that Mr. Rehnquist's testimony before this committee was evasive and lacking in candor.

Mr. Mitchell already has given you one example—on voting harrassment. I shall not repeat what Mr. Mitchell said, but I shall give you nine other examples of evasion and absence of candor.

As I was saying, Mr. Chairman——

Senator HART. Mr. Rauh and Mr. Mitchell, and for the benefit of others who may be interested, it is the feeling, given the schedule problem that may be yours and certainly is for certain members of the committee, that we receive your testimony to its completion and at that point recess for lunch; and assuming you conclude in time to permit this, return at 2, at which time questions can be addressed to you and to Mr. Mitchell.

Mr. RAUH. Thank you, sir. We shall return.

Listing 10 examples of the lack of candor and evasiveness, Mr. Chairman, I referred to Mr. Mitchell's testimony on voting harrassment as the first item.

The second item I would refer to is the claim of attorney-client privilege. That claim in this circumstance was built out of whole cloth. Mr. Mitchell and Mr. Nixon are not Mr. Rehnquist's clients; they are his bosses.

Mr. Mitchell here wants me to make clear I was referring to the other Mr. Mitchell. [Laughter.]

Mr. RAUH. There is nothing confidential about Mr. Rehnquist's present views. He goes out and makes speeches; what's confidential about that? You ask him what his real view is; what's confidential about that?

What he is saying is: "I am using the attorney-client privilege, but I really don't want to embarrass the administration by saying what I really believe."

Well, I think Mr. Rehnquist is like everybody else; I think he said what he believed. It was too rough against civil rights and civil liberties, so he is now saying that he has a privilege not to tell this committee what he really believes. Of course, he did tell the committee his views when he wanted to. He made a very selective use of the privilege. When he wanted to puff about the wiretapping change, why, he happily waived the privilege. When he didn't want to say something, then he didn't waive the privilege.

I have talked to a number of people who are experts in this field and I think one can sum up the attorney-client privilege as one that relates to the sphere of confidential information. Mr. Rehnquist's situation was not within the privilege because he was not talking about information but personal views; and the personal views were not within the sphere of confidence or business relations but what he thinks himself.

Mr. Rehnquist's situation is really not attorney-client privilege; he is invoking it to avoid talking about views that might embarrass the administration. I respectfully suggest Mr. Rehnquist was not being frank when he said he could not talk about administration policies, for, back in 1957, he freely talked about the innerworkings of another institution of which he was a part, the U.S. Supreme Court.

It seems to me what he is doing is abusing the attorney-client privilege. When Attorney General Mitchell this morning or yesterday answered Senator Bayh's request with a statement that there was confidentiality, I would respectfully ask the Attorney General what is confidential about Mr. Rehnquist's present views on anything.

Third, at page 152 of the transcript, Mr. Rehnquist says that he was not suggesting in his writings that the Supreme Court sympathizes with communism. Then what in heaven's name did he bring this subject up for? You don't bring a subject up about—you don't start an article in the American Bar Association Journal with the statement—Communists and former Communists had a field day in the Court, if you are not trying to imply something. These things were written, as I said before, by a laundered McCarthyite who was trying to suggest that the Supreme Court's dedication to the Bill of Rights was somehow ideologically sympathetic to an obnoxious and abhorrent doctrine. He was not frank with the committee. I would admire him more if he had simply said, yes, that is his view and stood by it.

Fourth, he contends in testimony at pages 105 and 106 of the transcript that all he had suggested in the letter to the Post about Carswell was that the Post was at least in part in error. If I have ever seen a letter which addressed itself to totality of error, it was that one. When Senator Kennedy sought to get some answers on the letter, Mr. Rehnquist went back to privilege.

Fifth. This was most revealing. I read you the question that was asked by Senator Ervin: "Does a serious Constitutional question arise when a government agency places people under surveillance for exercising their first amendment rights to speak and assemble?"

Answer: "No."

When the Senators questioned Mr. Rehnquist about this, listen to what he says at page 51: "Surveillance is not per se unconstitutional." He didn't testify before Senator Ervin anything about surveillance not being per se unconstitutional. What he talked about was that surveillance didn't even raise a constitutional question.

And then, on page 137, he said surveillance is not a violation of the first amendment. What he testified was that it doesn't even raise a constitutional question. Here a man is seeking to go on the U.S. Supreme Court who thinks governmental surveillance of the people does not even raise a constitutional question.

Sixth, his suggestion at page 83 and again later with Senator Cook, that his "qualified martial law" statement had nothing to do with May Day runs in the face of the fact that it was given in the context of May Day, was interpreted by everyone as referring to May Day and was never repudiated until the hearing here.

Seventh, when asked what he had ever done for civil rights, he referred to the indigents he had represented with no specifics whatever. And he referred to his membership on the Board of the Legal Aid Society as though it was something he had sought, whereas it was an ex officio membership of the Bar Association of Phoenix.

Eighth, on wiretapping, Mr. Rehnquist showed what he really thought of the attorney-client privilege. He didn't think anything of it. He wanted to get in the record the fact that he had shifted the reasoning of the Government in support of wiretapping in domestic subversion cases without a warrant, so he just waived the privilege and did it.

Furthermore, as I indicated earlier, in the brief which I have here, if anybody would like to study it, the distinction is entirely meaningless.

Ninth, when Mr. Rehnquist wrote in the Harvard Law Record about stare decisis, this is what he said, and I quote:

"There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt."

Over and over again here he referred to the importance of stare decisis even in constitutional law, a total negation of what he had said there.

Finally, No. 10: Mr. Rehnquist said that there was no State civil rights legislation in Arizona. I have it here.

I thank you for your courtesy and your patience and I would just like, in conclusion, to make this very short comment:

What is this man whose record you are considering? Here is what he is: (1) A lawyer without compassion for blacks and other minorities; (2) a lawyer who never once spoke up for the Bill of Rights; (3) a lawyer who believes in unchecked Executive power, whether it is security wiretapping, surveillance of individuals, executive privilege on information for Congress, delegation of functions to the SACB or the Cambodian invasion; (4) a lawyer who fenced with the committee rather than speaking with candor.

Members of the committee, there is a generation of young lawyers watching this committee and the Senate. Many of them, most of them, are idealistic young men to whom the Court is the highest body to which one can aspire, the highest post any lawyer can hope for You must not fail them. You owe it to them to insist on Supreme Court nominees dedicated to human rights and the Bill of Rights. You owe it to the whole generation of young lawyers coming up in this country to say "No."

Thank you, Mr. Chairman.

Senator HART. You indicated that it would be possible for you to return for questioning. I suggest, then, a recess until 2 o'clock.

(Whereupon, at 12:40 p.m., the hearing was recessed, to reconvene at 2 p.m., this date.)

AFTERNOON SESSION

Senator HART (presiding). The committee will be in order.

At our recess, it was indicated that as we resumed this afternoon the two witnesses, Mr. Rauh and Mr. Mitchell, would return in order that any questions the committee members might have would be addressed to them.

TESTIMONY OF CLARENCE MITCHELL AND JOSEPH L. RAUH, JR.—Resumed

Senator HART. Senator Mathias?

Senator MATHIAS. Mr. Chairman, I would like to direct the attention of Mr. Mitchell—let me say it is a pleasure to welcome you to the committee, along with Mr. Rauh—I would like to direct Mr. Mitchell's attention to page 2 of his written statement, the paragraph on page 2 which is numbered 4, in which he said that: "During some of the elections in Phoenix Mr. Rehnquist was part of a group of citizens who engaged in campaigns to challenge voters and thereby prevent them from casting their ballots. Most of such voters were the poor and black citizens of Phoenix."

That does concern me, of course. Mr. Rehnquist testified on Wednesday directly on this point in his testimony which appears on page 149 and 150 of the transcript, to the effect that his responsibilities were never those of challenger but as a group of laywers working for the Republican Party in Maricopa County to attempt to supply legal advice to persons who were challenged.

I think there is an ambiguity here, and I know Clarence Mitchell well enough to know that he wants the record to be in as good a state as it can be.

You have said, Mr. Mitchell, that Mr. Rehnquist "prevented" the casting of ballots. In the boldest construction of that, that would be a serious crime. On the other hand, if in fact he was acting as counsel for those who were properly and lawfully commissioned as challengers on the part of the Republican Party, that would be within the scope of a legal political activity.

I wonder if you can clarify that?

Mr. MITCHELL. I would like to, Senator Mathias, in this way: Apparently this was a well organized effort, going back to 1958, and as described to me, Mr. Rehnquist started off working in the ranks as a person who actually sought to challenge voters. The statement given to us asserts that he went first to the Granada precinct, he and another man. They didn't go as arbitrators but as people to challenge the right of voters to vote.

Senator MATHIAS. I am not personally familiar with the law of Arizona. As you know, the law of Maryland requires that a challenger be someone who is so designated by the organized political parties.

Mr. MITCHELL. That is correct.

Senator MATHIAS. Within the State of Maryland.

Mr. MITCHELL. Well, I do not know whether he had such credentials, but——

Senator MATHIAS. Do you know if such credentials are required in Arizona?

Mr. MITCHELL. I do not. But I do know when he was asked he presented sufficient information that the person who talked with him knew who he was; and as I understand it, instead of raising questions about whether a person lives at the address where he purports to live, and whether he is a member of a party or whatever the requirements were, Mr. Rehnquist personally began asking for interpretations of the Arizona constitution. Then, this occurred over an extensive period of time and with so many voters being held up that the officials in the polling place asked him to leave on the ground that his activities were preventing people from voting.

Then, as I understand it, he went around to another precinct, known as the Bethune precinct, which is at a school named for the late Mary McCloud Bethune, a very prominent colored leader, and in that school Mr. Rehnquist began doing the same thing.

I, in the lunch hour, called Senator Cloves Campbell on another matter which I will refer to at the appropriate time, and Mr. Campbell assured me that a Mr. Robert Tate was present at the time that Mr. Rehnquist was engaging in these activities which prevented people from voting.

The gentleman at the Granada precinct is white and he is a State employee. I have done everything that I could do to persuade those who know him to ask him if he would make a statement and he says he is not going to take a chance on losing his job and isn't going to talk. But I understand from Senator Campbell that Mr. Tate will present information on this. I tried to reach him by long distance phone and I was unable to.

I will continue to try and I will try to get substantiation of what Senator Campbell told me.

Senator MATHIAS. Is it your statement, and is it your understanding, that the purpose of these activities was, in fact, to obstruct persons who were trying to vote? Or is it your understanding that the consequential result of these activities happened to be obstructive? This is a very critical question.

Mr. MITCHELL. I agree; it is; and I think the answer merits exploration of facts by the committee by questioning Mr. Rehnquist. That is why I urged that he be called back because Senator Campbell states that this was a concerted effort to prevent Negroes from voting. He said that the only reason he wasn't present when Mr. Rehnquist was operating is that he was trying to handle another similar problem in another precinct himself.

He says this goes on in almost every election and, as I said in my earlier testimony, Mr. Merritt who was the president of our NAACP told me that a Federal judge down in the area had indicated to him that at one point it had been necessary to call in the FBI. That is the reason I suggested that the committee, I would hope, respectfully, would ask the FBI just what kind of investigation they carried on and what did they find, because it is indeed serious to the point of being a conspiracy to deprive people of their right to vote; and it seems to me that is a serious enough thing to warrant the fullest exploration.

Senator MATHIAS. But at the moment the only evidence that you can point to is the statement that Senator Campbell has given you and which you have submitted to the committee?

Mr. MITCHELL. Well, the story was also published in a local newspaper in Arizona, and that story sets forth essentially the same things.

But it seemed to me that as long as we had people who were making the assertion, I would give their names.

I would like at this point, if you will indulge me, Senator, to call attention to another technicality.

Senator Cambell, whose name I mentioned, provided us with an affidavit. At the luncheon break Senator Cook indicated that he had seen a copy of that affidavit which I submitted, and that it did not have a seal on it; it was not a notarized document. It becomes important for me to do this because Senator Campbell has volunteered to come up to testify in person. I have asked him to send to you and Senator Cook, Senator Hart and all the others who were present, telegrams saying that he is willing to come up, he is willing to testify. But, in the interim, I would like to offer you the notarized copy of his statement which I submitted this morning, and as you can see by feeling the seal, there is a bona fide notary seal on that document; and I think it is important to do that because I would not want this committee to think that I would try to come up here in a spirit of duplicity and allege that something is a notarized document which is not in fact a notarized document.

Senator MATHIAS. I will say, speaking for this member of the committee, he wouldn't entertain such a thought.

Mr. MITCHELL. And if it pleases the Chairman, I would like to submit the original for the record.

Senator HART. The original will be received. I have seen it and it does have the seal and it is in fact a notarized document; and any committee member who has any remaining doubts is free to look at it.

(The affidavit referred to follows:)

AFFIDAVIT

ARIZONA STATE SENATE,
Phoenix, Ariz., November 4, 1971.

I, Senator Cloves Campbell, do hereby testify that on or about June 16, 1964, a city council meeting was held in the city of Phoenix for discussion of an ordinance dealing with public accomodations for all citizens in the city.

At that council meeting Mr. William Rehnquist, the present nominee for the United States Supreme Court spoke in opposition to the proposed ordinance.

After the meeting I approached Mr. Rehnquist and asked him why he was opposed to the public accommodations ordinance. He replied, "I am opposed to all civil rights laws."

(Signed) Senator CLOVES CAMPBELL.

[SEAL]

THELMA HENSEN,
Notary Public, my commission expires Jan. 8, 1974.
City of Phoenix, Maricopa County, Ariz.

Senator MATHIAS. I would like to ask Mr. Mitchell one further question.

You say this incident was covered by the press at the time. Was there any complaint made to any election official or any other appropriate official at the time?

Mr. MITCHELL. Apparently the complaints were made to election officials and, as I understood it, in some way this was brought to the attention of the U.S. district judge in Arizona who asked for or in some way caused to be made an investigation by the FBI.

Senator MATHIAS. Is this a matter of record in the U.S. court there?

Mr. MITCHELL. I do not know. I asked Senator Campbell if he would check that out, and when he comes up, if the committee is willing to hear him, that he be prepared to testify on that point.

But as you know, Senator Mathias, it has for some time been a policy of the Justice Department on election day to have members of the judiciary in their offices available to give almost instant decisions in voting rights disputes. I don't believe that those are necessarily matters of record; but I do know it is an extensive practice. I believe that the judge would certainly verify that he was aware of such a matter; and I respectfully urge that the committee, at least, write him a letter. I didn't think it was proper for me to ask a Federal judge to make a statement for the benefit of this committee, but I would earnestly hope that the committee would address such a letter to him to seek a reply.

Senator MATHIAS. Mr. Rauh, did you want to comment?

Mr. RAUH. I was going to make a comment in support of our position. It seems to me we now have a prima facie case on the voting rights matter and it would be unthinkable that the committee would leave it rest at this point. Without overstating what happened, there are at least charges that are not wholly answered that Mr. Rehnquist did himself deal with voting rights in an illegal way.

You have at least five people who have given information about this: Mr. Campbell, Mr. Tate, the official who doesn't want to be revealed, the State judge and the Federal judge. In other words, with this many people to go to, it would seem to me that some investigation would clearly be in order.

Now, we are in a funny position. The staff of the committee is largely, I suppose, working for a Senator who has already said he has made up his mind and is going to vote for the nominee. I think, nevertheless, that some staff member who is totally independent of one who has made up his mind, ought to be assigned to get this information. So I would hope you would treat our testimony not as an effort to say we know all the facts, but as a sufficient statement of facts that the committee would itself go and make certain what the true situation really is.

Senator MATHIAS. Mr. Rauh, if that air of complacency ascended to such a degree on this committee that it was impeding our effort to find the right answers, I would never bother to make the inquiry of Mr. Mitchell in the first place.

Mr. RAUH. I want to make clear that you have certainly done yeoman service on the civil rights front and I accept that exactly as it was said.

Mr. MITCHELL. Senator Mathias, I would just like to say I have had a lot of trouble with my conscience in deciding whether to give another bit of information that I know because it was a question about whether I should, but I think now that I have got even someone from Arizona to indicate that he knows this individual, I would like to say that I am advised that the gentleman who was with Mr. Rehnquist at the time Mr. Rehnquist said that he and a Democrat were working together, is a State judge in the superior court in the State of Arizona, in the city of Phoenix. His name is Judge Charles

Hardy. I didn't give his name before but I feel, after my conversation with people in Arizona, that I have—I am free to do that and I would respectfully urge that Judge Hardy also be included in the inquiry to determine what his version is of the things that were going on at that time.

Senator MATHIAS. Thank you very much.

The CHAIRMAN (presiding). Senator Bayh?

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

Mr. Mitchell and Mr. Rauh, I listened with a great deal of interest to your testimony this morning. It covered a great deal of the territory that I had covered or tried to cover with Mr. Rehnquist, much of which was to no avail.

I interrupted your thoughts, Mr. Rauh, this morning to ask you to further explain the reason given for Mr. Rehnquist's change of position on that one particular matter of the equal accommodations, the access of minority groups to the drugstores of Phoenix. I was disturbed at the thrust of his testimony both in opposition before the council and particularly in the letter to the editor in which he stressed the fact that we dare not violate property rights and seemed to weigh the property rights and come out ahead of personal and individual rights.

Would it be fair to say that at least as far as the testimony that is now before us, as you read the response to my question from Mr. Rehnquist, he has not said really that he is willing to make a different determination on the merits of the issue, that he now feels that it was wrong to keep black people out of drugstores but that he feels that from a technical standpoint he was sort of surprised to see that it worked so well and there wasn't a great deal of disturbance? Is that a fair summary of what he has said?

Mr. RAUH. I think that is exactly right, Senator. It is what I was trying to point out—that he hadn't changed his views that property rights stand above human rights; he simply found out in this case that the ordinance worked so there wasn't any real clash between the two.

I think Mr. Rehnquist still holds firmly to a scale of values which most people reject. I think everything was corroborated by Mr. Mitchell's affidavit which he just showed Senator Mathias. I think that sentence that, "I am against all civil rights legislation" is really the key to the whole thing. He just doesn't feel that the rights of minorities ought to be protected. "I am against all civil rights legislation." Well, I deduced he was against all civil rights legislation by logic. If you are against the Phoenix ordinance, which is the simplest of all civil rights legislation, you would be against all others. But Mr. Mitchell has an affidavit that he actually said he was against all civil rights legislation.

Senator BAYH. That is the affidavit from Senator Campbell?

Mr. MITCHELL. That is true, Senator Bayh and, as I indicated, I had submitted a xerox copy which didn't show the notary seal. When the committee reconvened I gave the original and the committee now has it. I also have talked with Senator Campbell and told him that Senator Cook had indicated to the television people that Senator Campbell ought to be here himself. Senator Campbell said he would be delighted to come and is sending telegrams asking for an opportunity to be heard, to say in person what he has stated in his affidavit.

Senator BAYH. He has heard the nominee say he is against all civil rights legislation?

Mr. MITCHELL. His statement is that following the nominee's presentation to the city council in 1964 he, Senator Campbell, approached the nominee, talked with him, face to face, and the nominee made the flat assertion that he was against all civil rights legislation.

Senator BAYH. One of the other items that concerned me in the nominee's past record in the whole human rights area was the letter to the editor and the position he had taken vis-a-vis the superintendent of schools in Phoenix with respect to the effort that was being made to integrate the Phoenix school system.

In your study, has your organization tried to decide whether to be for or against or neutral on the nominee? Did you investigate the issue? What was the thrust? What was the issue at that time? And could you give us a further interpretation of what you feel Mr. Rehnquist's position was vis-a-vis that issue?

Mr. MITCHELL. I can, Senator Bayh.

All the information on Mr. Rehnquist that we have presented has come from our people in Arizona. They indicate that at that time, which was in the early days of the school desegregation effort, there were school officials who were trying to find ways to comply with the 1954 decision and to eliminate conditions of segregation which are popularly described as de facto conditions. This, of course, sprang out of the good will of the people of that community who were apparently trying to make an honest effort to be ahead of the courts, not to wait until somebody served a subpena on them; but, as a matter of good will and civic responsibility, to attempt a good faith effort to desegregate the schools. This is what prompted Mr. Rehnquist's attack. So it was a purely gratuitous attack on people who, as responsible officials, were seeking to act in good faith and with good will.

Senator BAYH. Now, in trying to get Mr. Rehnquist's present thoughts on the importance of quality education, and the importance of desegregating schools and an effort to get quality education for all of our children, the best I could get from him on two occasions was that he was opposed to busing children long distances. I suppose if you took a poll of this committee you might get a unanimous vote on that—although, as a kid I was bused long distances to get from the farm to our township school and maybe that is the reason I am like I am—but was that the only issue involved in the Phoenix school battle at that time, busing children long distances?

Mr. MITCHELL. No; as a matter of fact, busing was not an issue of any importance, as I understood it. This was an effort to achieve a condition of desegregation which would not have involved any great degree of busing; and so far as I know, Mr. Rehnquist, in his letter, addressed himself to some of the recommendations which had been made by the Civil Rights Commission.

As Mr. Rauh pointed out this morning, busing was only a minor aspect of the desegregation attempt, that it really was like the old question, you know, do you want your daughter to marry a Negro or do you believe in social equality and that kind of stuff which is not addressing itself to the issue.

But it is clear that if you raise a question of busing, you immediately get the emotions going and get everybody upset; so this was a contrived attempt to divert attention from the real issue which was

orderly desegregation and to make it appear that it was an issue of busing children.

Senator BAYH. I don't want to put words in your mouth, but inasmuch as my question was directed at why the nominee would oppose the efforts to desegregate the Phoenix school system, and the only response I received on two occasions was that the nominee was opposed to busing children long distances, you would suggest that perhaps that answer was not responsive to the question?

Mr. MITCHELL. I would go further, Senator, and say——

Senator BAYH. Please do.

Mr. MITCHELL. I think it was deliberately evasive and the reason I say that is I have read a law review article that Mr. Rehnquist wrote in discussing changes of policies in the Justice Department. The clear thrust of that article with respect to school desegregation is concurrence with the present administration's policy. That policy was best evidenced when the NAACP was attempting to get immediate implementation of desegregation before the Burger court, and the Justice Department, for the first time, was in there opposing us.

I am happy to say that the Burger court unanimously upheld the position of the NAACP.

Mr. RAUH. Senator Bayh, I would like to say I gave 10 examples of evasion this morning, and I left that one out. I think that was a mistake.

Senator BAYH. We will revise the record and let you add an 11th one.

Mr. RAUH. So I guess there are 11.

I would like to make the additional point that the desegregation answer was so tremendously evasive because what you were asking was something that had to do with the goal. Why was he opposed to the goal of desegregation, and he comes back and says he was against one of literally a plethora of means. As Mr. Mitchell says, a man this smart could only have been deliberately evasive.

Senator BAYH. May I proceed a bit further on the voting practices. I think I raised that question in talking to Mr. Rehnquist. On page 149 [of the typewritten transcript] in response to a series of questions that I posed, he said, and I quote:

> My right and responsibilities, as I recall them, were never those of challenger.

In the previous sentence he said, "My recollection is I had absolutely nothing to do with any sort of poll watching."

Now, as I understand the affidavit from Senator Campbell, it relates to hearing him say he was against any kind of civil rights legislation. Did he go further to say—or was that—someplace in your testimony, Mr. Mitchell, I think you referred to someone who witnessed the nominee in the process of challenging at the polling place?

Mr. MITCHELL. That is correct.

Senator BAYH. As I recall, you said you were unable to provide us with the man's name because of fear of retribution or something. Is there any way that we can have tangible evidence? This is sort of a hearsay situation.

Mr. MITCHELL. I am aware of that. As I said——

Senator BAYH. It doesn't at all diminish your credibility but certainly I would feel more comfortable about this if I could look the man in the eye and be able to judge for myself his credibility. I have no concern about yours.

Mr. MITCHELL. I thank you, Senator Bayh. I was acutely aware of it. It is a question of the balancing of an individual's fear, which may be justified, that he would lose his job if he comes forward, and furnishing the committee with information. So, being concerned about that, I called down to Arizona in the lunch break, talked with Senator Campbell who gave me the name of a Mr. Robert Tate, and he said that Mr. Robert Tate did witness Mr. Rehnquist at work, and he expects that Mr. Tate would be willing to come forward and make a statement.

Now, I think that this is bigger though than just the incident which involves Mr. Rehnquist because Senator Campbell says this is a consistent practice in that area of Arizona, where they try to keep the Negroes from voting. And, accordingly, I suggested—I guess you might have been out of the room at the time—that I would hope the committee would check with the U.S. district judge in the city of Phoenix who, as I understand it, had this matter reported to him and did ask for a Federal Bureau of Investigation inquiry.

I also suggested that Judge Charles Hardy, who is in the Superior Court in Phoenix, Maricopa County——

Senator BAYH. Has anybody in your organization talked to him down there? Do you know what his thoughts are?

Mr. MITCHELL. I would stop at saying that I know that our people have talked with the Federal judge. I wouldn't think it would be quite fair for me to say what he would be prepared to testify or give information on, but I think it would be enlightening and probative if he had a communication from the committee.

Senator HRUSKA. Mr. Chairman, may I ask the Senator from Indiana if he would yield briefly for the purpose of inserting a letter in the record?

Senator BAYH. Please.

Senator HRUSKA. Mr. Chairman, this morning my attention was called to an incident which occurred during a jury trial held in the Federal district court in Phoenix, Ariz., some 12 years ago. Judge Boldt of Tacoma, Wash., Federal district judge from that State, was presiding over this particular trial as a visiting judge in Phoenix and one of the attorneys in the case was Mr. Rehnquist.

There were comments made by Judge Boldt during the course of that trial directed to Mr. Rehnquist in regard to some of his conduct during the trial which reflected unfavorably on Mr. Rehnquist. This morning I telephoned Judge Boldt, who happens to be in Washington, and asked him if he recalled the incident. He did, and he proceeded to give me an account of it.

At the conclusion of that verbal account, Mr. Chairman, I asked the judge if he would be willing to set down that account in a written form that could be submitted to the committee and released to the press and to the public.

He agreed to do so and about an hour ago there was delivered to us this letter which is addressed to me, Mr. Chairman, and dated November 9, 1971, and it reads as follows:

Dear Senator Hruska: I do recall the incident in court involving Mr. Rehnquist and myself. It occurred about 12 years ago when I was holding court on a temporary assignment at Phoenix, Arizona. I remember that it occurred during a proceeding in a civil case in which a stockholder of an insolvent Arizona insurance company was suing officers to recover for the company substantial amounts of company assets allegedly misused or misappropriated to the loss of the company.

My recollection is that, as a result of my own misunderstanding of what Mr. Rehnquist said or did during the proceeding, I sharply reprimanded him for what I considered disrespect to the court or something of that kind. After adjournment of the proceeding, other lawyers in the case came to my chambers and told me they thought I had misunderstood Mr. Rehnquist and that he was not chargeable with any impropriety. After their explanation, I was satisfied that the incident arose entirely through my misunderstanding or that of Mr. Rehnquist, or both, and I so informed the lawyers and asked them to extend my apology to Mr. Rehnquist, and if anything more were required to correct the situation I would be glad to do it. From that day until now I have heard nothing further about the incident from either Mr. Rehnquist or anyone else.

In my judgment, it would not be accurate or fair to draw any unfavorable inference whatever concerning Mr. Rehnquist's professional integrity or ability from that incident. Signed Geo. H. Boldt.

Mr. Chairman, I ask consent that this letter be placed in the body of the record at this point.

The CHAIRMAN. Yes.

(Letter from Judge Boldt follows:)

U.S. COURTHOUSE,
Tacoma, Wash., November 9, 1971.

HON. ROMAN L. HRUSKA,
U.S. Senator,
Washington, D.C.

DEAR SENATOR HRUSKA: I do recall the incident in court involving Mr. Rehnquist and myself. It occurred about 12 years ago when I was holding court on a temporary assignment at Phoenix, Arizona. I remember that it occurred during a proceeding in a civil case in which a stockholder of an insolvent Arizona insurance company was suing officers to recover for the company substantial amounts of company assets allegedly misused or misappropriated to the loss of the company.

My recollection is that, as a result of my own misunderstanding of what Mr. Rehnquist said or did during the proceeding, I sharply reprimanded him for what I considered disrespect to the court or something of that kind. After adjournment of the proceeding, other lawyers in the case came to my chambers and told me they thought I had misunderstood Mr. Rehnquist and that he was not chargeable with an impropriety. After their explanation, I was satisfied that the incident arose entirely through my misunderstanding or that of Mr. Rehnquist, or both, and I so informed the lawyers and asked them to extend my apology to Mr. Rehnquist, and if anything more were required to correct the situation I would be glad to do it. From that day until now I have heard nothing further about the incident from either Mr. Rehnquist or anyone else.

In my judgment, it would not be accurate or fair to draw any unfavorable inference whatever concerning Mr. Rehnquist's professional integrity or ability from that incident.

GEO. H. BOLDT.

Senator BAYH. Mr. Chairman, I appreciate the fact that the Senator from Nebraska made this insert. I want the record to be unequivocally clear that so far as I am concerned nobody has made an issue of this. I don't know where the information came from. I don't know why the Senator from Nebraska considered it pertinent to the questioning because nobody had raised that one issue.

I may say that specific issue had been brought to the Senator from Indiana and I thought it was so irrelevant that I hadn't even brought it up, had no intention of bringing it up, because it involved a specific case, the nuances of which I was not appraised, and thought this would be very unfair to the nominee to bring it up.

Senator HRUSKA. The Senator from Indiana is one of the most steadfast and persistent advocates of having all the facts brought before this committee. I had it on reliable information that on issue

would be made of it, that disclosure would be made of it, and in order that we could get all the facts pertaining to this incident, I requested this letter.

Now, if that criticism is not raised this letter will not in any way hamper our consideration of this nomination. At any rate, does the Senator object to the letter being put in the record?

Senator BAYH. Not at all, I thought if you have any more letters like that, I would be glad to have them read into the record, too; they make interesting reading. I just think it is important for us to keep our focus and each member of this committee has the responsibility of determining what is important and what is not. But I don't want us to be deterred from some issues that I think that are before us that are of a rather critical nature. This is just one matter of one incident in a case, at least, as brought to my attention, was not even important enough to deserve bringing before the committee.

Senator HRUSKA. I did think it was that important and I recall that only last Thursday the Senator from Indiana brought a letter of his own into the committee hearing and had it put into the record and distributed to the press. Mr. Chairman, there are extra copies of Judge Boldt's letter available and Mr. Holloman can distribute them if he will to each member of the committee and to the press.

Senator Kennedy. Is this the same George Boldt who has just been appointed to the Pay Board?

Senator HRUSKA. That is the same George Boldt and he is presiding over that board.

Senator BAYH. We can reconvene as a Ways and Means Committee here.

Mr. MITCHELL. Senator Bayh, on the question of fact, and exploring allegations, I would be the last person to want to offer something that is not supportive of facts. But this morning on a national television network there was an allegation made concerning the nominee. I talked with our people in Arizona and, as I understand it, an Arizona newspaper, a respectable newspaper, has also published this same allegation. I have no knowledge whatsoever myself on it. I do not undertake to vouch for its credibility, but it does seem to me if a national television network and a newspaper in the home State of the nominee have both today made this statement, it ought to be a matter of which the committee would at least take notice.

Senator BAYH. Mr. Mitchell, may I ask us to stop playing games; are we talking about the allegation that the nominee was a member of the John Birch Society?

Mr. MITCHELL. I am talking about that and I am respectfully saying I am not playing games. I was prefacing my remarks with the language that I used for the purpose of making my own position clear. I am no character assassin.

Senator BAYH. I know you are not.

Mr. MITCHELL. But I believe that when a Supreme Court nomination is at stake, and a television network, plus a newspaper makes such a statement, it does seem to me that this is a matter on which inquiry should be made.

The CHAIRMAN. You mean the John Birch Society?

Mr. MITCHELL. That is the allegation, Mr. Chairman.

The CHAIRMAN. Yes, sir.

Senator BAYH. I understand there is an affidavit coming from the Justice Department from Mr. Rehnquist avowing that—has that been received by the committee?

The CHAIRMAN. Just a minute. "William H. Rehnquist being first duly sworn on his oath deposes and says that:

"He is not now, nor has he at any time in the past, been a member of the John Birch Society. William H. Rehnquist."

That will be placed in the record. There goes that bunch of stuff. [Laughter.]

(The affidavit referred to follows:)

AFFIDAVIT

William H. Rehnquist being first duly sworn on his oath deposes and says that: He is not now, nor has he at any time in the past, been a member of the John Birch Society.

WILLIAM H. REHNQUIST.

Subscribed and sworn to before me this ninth day of November , 1971.

ANGELINE JOHNS,
Notary Public.

My commission expires April 14, 1972.

Senator HART. I think I will inquire on behalf of one of my colleagues on the committee whether that had a seal on it.

The CHAIRMAN. It is properly sealed.

Mr. MITCHELL. I would like to say, Mr. Chairman, right very respectfully, in the light of the evasive tactics of the nominee, I would not assume myself that a mere disavowal on his part was a sufficient puncturing of whatever this is described as being.

Senator BAYH. Let me say this, as one member of the committee who has had a good bit of his staff involved in trying to find answers to questions and trying to differentiate fact from rumor, it is awfully difficult and none of us want to become involved in the character assassination of someone just because we disagree with him. That is why I want to get it all out on the table. I heard this morning this affidavit was forthcoming and I was not totally surprised to see our distinguished chairman had it as of this time. But I have investigated with the greatest care from a number of sources the rumor that the nominee has been a member of the John Birch Society. I have not found any evidence to substantiate this myself. I say that very frankly. I am alarmed about the philosophical difference we have. He has appeared and made speeches before a number of rather extreme rightwing groups. I have not found any evidence that he belongs to any of them.

Now, if anybody has any records to the contrary, I am sure the members of the committee would be glad to have them.

Let me say I think that your request that this be investigated is proper and I don't hold out our investigation as infallible, but we did make a good faith effort to deduce whether there was any fire as well as the smoke there.

Mr. MITCHELL. I would say, Senator, it is not customary for people who are members of organizations like that to leave a clear and available record of their identification and activity and, as I said, I do feel that mere disavowal is not necessarily the whole story.

Senator BAYH. Just a matter of mere speculation does not prove the contrary to be the case; I am sure you would be the first to say that.

Mr. MITCHELL. No.

Mr. RAUH. Senator Bayh, I never thought much of this Birch thing.

Senator BAYH. Would you please say John Birch, Mr. Rauh? [Laughter.]

Mr. RAUH. I never thought much of this John Birch stuff until I heard that affidavit. I have been in this field for a long time where people are accused of right or leftwing activities.

The normal answer to a charge of extreme right or leftwing activities is much different from that. Usually if you are denying that you were in an organization of the extreme right or left you would not only deny membership but you would also deny any connection with it. I previously had not thought much of the charge but I think that affidavit is one of the most potentially revealing documents. The real point isn't a simple statement of nonmembership; the question is what was the connection. From the failure to say anything about the connection, I for the first time think there might be something in the charges. All morning I have been saying I didn't think there was anything in it, but that affidavit is the weakest denial I have ever heard. It says he wasn't a member. What about all the relationships that are possible short of that? I am absolutely flabbergasted that a man who is trying to get on the Supreme Court of the United States should send up an affidavit so limited in its denial of relationships.

Senator KENNEDY. Now, Mr. Rauh, if you would yield, I think your suggestion here is completely unwarranted and completely uncalled for; and I reject that suggestion as one who has been very seriously concerned about it. I may be proven wrong. I talked to Mr. Rehnquist myself about this question and I am completely satisfied with it and I don't think it serves the cause for those of us who have some very serious reservations to have this kind of a charge to leave the atmosphere as suggested by you and Mr. Mitchell, by this kind of an association. So I just want you to understand very clearly my position on it, and I don't feel that you are serving the cause of enlightenment with regard to the nominee by this kind of suggestion.

Mr. RAUH. I have made no suggestion. I said I didn't consider a denial of membership——

Senator KENNEDY. You have commented on this——

Mr. RAUH (continuing). A total denial.

Senator KENNEDY (continuing). Very adversely and left an atmosphere which I think is rather poisonous in terms of the nominee. And if he has made that statement and anybody is able to rebut it, then we obviously ought to have that information. But to try to suggest from it any kind of question in terms of—I have questioned a lot of his positions, but I don't think there has been a fundamental question in terms of his basic integrity, in terms of this type of misleading suggestion, and if there is then I think you ought to have a good deal more to go along with it than the kind of suggestions you are making here.

Senator BAYH. I would just like to reiterate what I said before: I think it is a fair question to be raised. Having been raised and having

the nominee's opinion and the result of a rather extensive investigation which I personally have made, I have not found any evidence to sustain this allegation. I did find that he made a speech before one very ultra-rightwing organization. Beyond that, we have no evidence of membership.

Let me move on, if I might, please, so that some of my colleagues can have an opportunity to share their views.

Are either one of you gentlemen familiar with Judge Walter Craig?

Mr. MITCHELL. I am not.

Senator BAYH. He is a former president of the American Bar Association, now a Federal judge in Phoenix. Judge Craig testified in support of Mr. Rehnquist. He happens to be a Democrat, as I recall, and I asked some of these same questions of him that I would ask of Mr. Rehnquist in trying to explore Judge Craig's knowledge, as one of the leading members of the Phoenix bar as well as the American Bar Association and now on the Federal bench, if he had personal knowledge about any bias or prejudice that Mr. Rehnquist may have, and he said quite the contrary. I just wondered if either of your gentlemen would care to comment on that? I thought Judge Craig made a very strong witness in behalf of Mr. Rehnquist.

Mr. MITCHELL. Well, you know, Senator Bayh, I don't want to sound like a racist, but as I have listened to the committee's reaction to some of the testimony that we have presented, the reaction to Mr. Rauh's position, and the assertions made by Senator Cook after the hearing, the trouble with all this is that for some reason the white people that I know and have worked with or who come up and testify before these committees, just don't seem to see this thing in the same light that we who are the victims of injustice see it. So I am not surprised if a judge, who is a Federal district judge, were to come up and say that so far as he knows this is a very wonderful gentleman, and that he is the epitome of fairness, and that kind of thing.

But against that statement which the judge has made, there is a whole body of information by the black community, and it really boils down to a question of whether, in a Senate Judiciary Committee, and in the U.S. Senate, the testimony of a large number of black people against the nominee will have sufficient weight to influence the statement of one white person from the community who happens to be a Federal judge?

I am sorry to say that in my experience in dealing with a great many people who are in important positions in this country you can have 100 black people who are eye witnesses, and stated unequivocally what happened, but one white person can come up and say to the contrary and the testimony of 100 black people will be discredited.

So I would say I think it ought to stand on its own feet. We have said what the people down there who were black think of him, and against that is the statement of a judge.

It would be interesting to see whether the Senate of the United States attaches more weight to the testimony of that one white man than it does to all these other colored people who have expressed themselves as they have.

Senator BAYH. Well, Mr. Mitchell, it has been my good fortune to know you for some time, and we have had some rather intimate conversations on a number of legislative issues. From hearing of your

personal experience I must concur, although I wish it were otherwise, and it probably would be absolutely impossible for anybody who has not walked in your shoes and been subjected to the type of abuse that you have over the years to look at every issue with the same kind of perception that you do, since you have been there.

Do you really think it is fair, let me ask you, in light of some of the battles that have been fought before this committee over the last few years concerning this very subject, a Supreme Court nominee, to say this committee and some of its members have not been sensitive to what the black people of a given constituency have said about a proposed nominee?

Mr. MITCHELL. I would not say that the committee members have not been sensitive. But I would say, with a few notable exceptions, when a statement is made which a black man considers devastating in its impact it just does not seem to have the same credibility and attention that a white person making a counterstatement has.

For example, how could we possibly in the Carswell nomination have been insensitive to the fact that the judge had, as a candidate for office, made an open declaration of his belief in white supremacy? But there were many people who did not think that in itself was sufficient to be against him, and they were prepared to forgive it on the ground that he was young.

But then, as I said this morning, after the nomination was rejected, on the record, in his Florida campaign, the judge went back and did what we had figured he would do all along.

The same thing is true in the Haynsworth nomination. It was our contention that Judge Haynsworth in his interpretation of the Constitution was going to do it in a way that was against the civil rights of Negroes.

It was only a few days ago that there was a case before the Fourth Circuit Court of Appeals in which a majority held that a place of recreation which anybody with a scintilla of eyesight and commonsense could see was being operated under the guise of a private club when in fact it was public but operated under the guise of being a private club for purposes of evading the law, Judge Haynsworth was one of the judges who said it was a private club and there was a very good dissent in that by Judge Butzner, pointing out that to reach that kind of conclusion it was necessary to fly in the face of precedents.

Well, this did not surprise me on Judge Haynsworth's part but I am sure if we had said at the time we were up here testifying that we expected that kind of thing would happen there would be a whole lot of people who would have said no; that just could not happen.

Senator BAYH. Well, you are not looking at one Senator who would have said that, are you?

Mr. MITCHELL. No; I hope I am making it clear that I certainly am not.

Senator BAYH. Your statement was rather sweeping and I wanted to make sure that I was not included.

Mr. MITCHELL. As I remember in that effort, to me the only thing that was needed for the purpose of defeating those nominees was the question of whether they had been faithful to equality under the law as a legal principle, and that, of course, in the judgment of many other people, was not sufficient, and other extensive matters were brought into the picture.

But I said then and I say now and I will always believe that anybody who publicly at any time in his adult career takes a position that the black citizens of the United States are not entitled to equal treatment under the law is unfit to sit on the U.S. Supreme Court and that ought to be the rule.

Senator BAYH. Unfortunately, there are not as many people who share that specific judgment as you would want, and thus it seems to me the responsibility we have for a true test of the quality of the nominee or nominees is to see what their judgment is now and the fact that you are here and I think are making such a credible record indicates that one man with a black face would be received with open arms and with great consideration by this committee.

I am concerned about what white people or black people have said about the nominee, and I am also concerned about what the nominee himself has said.

Mr. MITCHELL. That is what I tried to develop.

Senator BAYH. We developed this on the accommodations and the school matters, we tried to get at it, and I hope we will get testimony from those who have first-hand information on the voting matter. But let me deal just one other question as far as what the nominee himself believes.

I did send a letter referred to by our distinguished colleague from Nebraska to the Attorney General. I have received a reply and since there are no objections, I do not think there is any lawyer-client relationship between the two of us, I would like to put it in the record at this time so everybody would have the opportunity to examine it.

Senator HART. Without objection, it will be received.

(The letters referred to follow.)

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., November 4, 1971.

Hon. JOHN MITCHELL,
Attorney General of the United States,
Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: When President Nixon announced the nomination of William Rehnquist to be a Justice of the Supreme Court, he stated that one of the criteria he used was "the judicial philosophy of those who serve on the Court." The President has said that these nominees share his judicial philosophy, "which is basically a conservative philosophy."

The Members of the Senate Judiciary Committee have been attempting for the last two days to explore for themselves the judicial philosophy of William Rehnquist. Many Members of the Committee appear convinced that this is a fit subject for inquiry by the Senate. Indeed, Mr. Rehnquist has stated at the hearings that he believes that the Senate should fully inform itself on the judicial philosophy of a Supreme Court nominee before voting on whether to confirm him. *See also* William H. Rehnquist, "The Making of a Supreme Court Justice," Harvard Law Record, Oct. 8, 1959 p. 7; C. Black, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 Yale L. J. 657 (1970).

Unfortunately, the Committee has been unable to inform itself fully regarding Mr. Rehnquist's judicial philosophy because he has felt it necessary to refrain from answering a number of questions. Some of the questions at issue involve Mr. Rehnquist's refusal to respond based upon his claim of the lawyer-client privilege arising out of the work as Assistant Attorney General since 1969. In my view, the lawyer-client privilege does not require Mr. Rehnquist to remain silent concerning his *own* views on questions of public policy and judicial philosophy merely because he has advised the Department of Justice on these matters or because he has publicly defended the Department's position. As one scholarly observer has noted:

"The protection of this particular privilege is for the benefit of the client and not for the attorney, the court, or a third party. The client alone can claim the

privilege, and in fact the client must assert such privilege, since it exists for his benefit." E. Conrad, *Modern Trial Evidence* § 1097 (1956).

And as Professor McCormick has noted (*Handbook of the Law of Evidence* § 96 (1954)), "it is now generally agreed that the privilege is the client's and his alone."

Despite my view that the privilege is inapplicable here, I am writing to urge you—in the interest of the nominee and of the nation—to waive the lawyer-client privilege in this situation. I have made a similar request of the President. This would release Mr. Rehnquist from any obligations he might have under Canon 4 of the American Bar Association Code of Professional Responsibility, see Code of Professional Responsibility, DR 4-101 (c)(1), or any other obligations he may have to refuse to answer questions involving his own views on questions of public policy or judicial philosophy. It is essential that the Senate, which must advise and consent to this nomination, have the fullest opportunity to determine for itself the nominee's personal views of the great legal issues of our time. I hope you will be able to cooperate to this end.

Sincerely,

BIRCH BAYH, *United States Senator.*

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., November 5, 1971.

HON. BIRCH BAYH,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BAYH: As I understand your letter of November 4, 1971, you are requesting that I, as Attorney General of the United States, waive what you refer to as the "lawyer-client privilege" with respect to matters on which William H. Rehnquist, as an Assistant Attorney General in the Department of Justice, has advised me and with respect to which he has taken a public position on my behalf. I further understand that this request is made by you individually rather than by the full Senate Judiciary Committee before whom Mr. Rehnquist has appeared as a nominee as an Associate Justice of the Supreme Court of the United States.

The issue raised by Mr. Rehnquist or any Supreme Court nominee's refusal to respond to certain questions during confirmation hearings is far broader than the scope of the lawyer-client privilege. There are other considerations which prompt a refusal to comment. For example, a nominee may feel that it would be improper for him to respond to the kind of question that might come before him as a Justice of the Supreme Court. Past nominees have confined themselves to fairly general expressions, declining to provide their view of the Constitution as it applies to specific facts.

Even in those few instances wherein Mr. Rehnquist, relying on the lawyer-client privilege, declined to answer questions concerning what advice he may have rendered me, I feel constrained to say that a waiver would be entirely inappropriate. As Attorney General of the United States, I am acting on behalf of the President. In such a capacity as a public official, I do not consider the same factors the private client considers in deciding whether to waiver the lawyer-client privilege.

I can well appreciate your personal, intense interest in probing into all aspects of Mr. Rehnquist's work while at the Department of Justice. I am sure you appreciate, however, that it is essential to the fulfillment of my duties and obligations that I have the candid advice and opinions of all members of the Department. Further, I am sure you realize that if I should consent to your request or other requests to inquire into the basis and background of advice and opinions that I receive from the members of my staff, it would be difficult to obtain the necessary free exchange of ideas and thoughts so essential to the proper and judicious discharge of my duties. It would be particularly inappropriate and inadvisable for me to give a blanket waiver of the lawyer-client privilege in this situation. Ordinarily, a waiver should only be considered as it may apply to a specific set of facts. The range of questions which may be put to a nominee is so broad that it would be difficult, if not impossible, to anticipate what a general waiver would entail. Because Mr. Rehnquist, as Assistant Attorney General in charge of the Office of Legal Counsel, renders legal advice to others, including the President and members of the Cabinet, obviously I cannot waive the privilege that may exist by reason of those lawyer-client relationships. And determining the limits of each relationship cannot be done with precision.

I have received a letter from Chairman Eastland and Senator Hruska stating, in their experience, that the Senate Judiciary Committee has never gone behind a claim of the attorney-client privilege or made an effort to obtain a waiver of the privilege from a client of the nominee. While ordinarily I would defer a decision until a request had been received from the Committee, I felt it necessary and desirable in this case to explain to you why I considered your request, or any similar request, inappropriate.

This letter may be considered a response by the President to you with respect to your letter to him of the same date and with respect to the same subject matter.

Sincerely,

JOHN MITCHELL, *Attorney General.*

Senator BAYH. To capsulize the very thoughtful 2-page letter, the Attorney General refused to waive the attorney-client relationship. I will read excerpts from it. For example—

There are other considerations which prompt a refusal to comment. For example, the nominee may feel it would be improper for him to respond to the kind of question that might come before him as a Justice of the Supreme Court. Past nominees have confined themselves to fairly general expressions declining to provide their view of the Constitution as it applies to specific facts.

I suppose it is fair to say that that is a legitimate hypothesis on the part of the Attorney General that we should not require a prospective nominee nor should he reply to questions in this regard that cause him to prejudge a cause.

Mr. Rauh, as a learned attorney, would you concur with that assessment?

Mr. RAUH. Precisely. It was exactly because of that point that I said the lawyer-client privilege did not apply. The right not to comment on cases that are coming before the Court obviously is correct, and we would make no challenge to his refusal on that ground, Senator Bayh.

Senator BAYH. Well, I want to say that this was not the request that I made. I do not see how I could ask a nominee—or the Attorney General to force a nominee or make it possible for a nominee—to answer such questions. That would be totally inappropriate. But contrary to a letter sent by our two distinguished colleagues, Senator Eastland and Senator Hruska, that in their experience the Senate Judiciary Committee has never gone beyond the claim of attorney-client privilege, I do not recall in the 9 years I have been in the Senate a prospective nominee to the highest Court of the land invoking a client-lawyer relationship. Now, I do not recall that ever happening. There are grounds for where a man should refuse to testify, but it is difficult for me to determine what William Rehnquist himself feels in general terms about the critical problems that confront us today unless he can separate himself from the statements that he has made which he now says were made totally as a representative of the Justice Department, which concern me very much.

Do you have any specific suggestions as to how we can get around this lawyer-client relationship, and the prohibition of the Attorney General to waive it?

Mr. RAUH. No; I guess I feel as defeated as you do. I do not think there was any lawyer-client privilege in any situation about which you asked him. I think some of the questions to which he pleaded lawyer-client privilege might, carefully analyzed, have included some possibility of a case before him later on. If he had then said, "I do not want to answer this because it may come before me," I think you would have

stopped right away. In fact, you always did stop when that point was raised, so I do not see that problem.

I think the Attorney General made a terrible error of law. First, he assumed that there was a privilege that does not exist and then he said he would not waive it. I do not know who is acting as his lawyer now; Rehnquist was supposed to be his lawyer and obviously could not act in this matter. So I do not know who is acting as the lawyer for the Attorney General at the moment. But what he is saying is, "There is a privilege that does not exist and we will not waive it anyway."

Senator BAYH. It concerns me, I do not know what to do about it and I thought maybe you could tell me what to do.

Mr. RAUH. I can tell you what you have to do about it. In the absence of any other answer, one has to assume that he meant what he said. In other words, when he went out on the hustings and made a statement, one has to assume that that is what he believes just as you would assume that Mr. Mitchell and I, although we stand here representing more than a hundred organizations, are saying what we believe, not what the organizations believe or what somebody else would tell us. Roughly, we are trying to describe their position, but when we say something we believe it.

I think the only thing the Members of the Senate can do, in the absence of his willingness to amplify his position, is to assume what Rehnquist said is what he believes. And on what he has said, he is not fit to be a Supreme Court Justice.

Senator BAYH. On a number of these occasions, and this will be my last question—you have been very patient and so have my colleagues—on a number of these questions that I posed to him, as you recall from what you said, you read the transcript of the record, I have taken specific quotations and have asked him if these represented his views, his views on human rights, or the administration position. Very frankly this concerns me. I have asked him one basic question: "Did you say this and does this now represent your point of view?" Is that a fair question?

Mr. RAUH. Certainly. I do not see how there can be any question about it or any assertion of confidentiality necessary for the lawyer-client privilege. I think the whole lawyer-client privilege thing before this committee is just like the emperor walking down the street without his clothes on. Nobody knew it until the child said the emperor did not have his clothes on. It is just simply that. There is not a lawyer-client problem here.

Senator BAYH. Thank you.

Senator HART. Senator Hruska.

Senator HRUSKA. Would the Senator yield?

Senator BAYH. I yield completely.

Senator HRUSKA. Even partially would be all right, temporarily. In this committee room not many years ago, the first black man who was ever appointed to the Supreme Court appeared and was questioned. He was subsequently confirmed, and is serving well and creditably across the street.

Time after time after time he was interrogated by some Senators who sat to the right of the chairman, and time after time after time he said, "I decline to answer that question," not only as to his views past and present, but as to comments on cases that had in the past or might in the future come before the court.

Now, I can hardly differentiate that from the situation here where a question is asked of a nominee, and he says, "I do not choose to answer that question; I do not think I should answer it; I think it is an improper question." We have never in the past gone beyond this type of answer of the nominee in this committee to my recollection.

Now insofar as the law on waiver of privileged communications is concerned, my own belief, and I have done some reading and have had some personal experience in this area, is that a lawyer representing other people has no business nor has he a right to waive privileged communications without consulting with those whom he represents. In many instances, as the Attorney General has indicated in his letter, Mr. Rehnquist has served as lawyer and counselor to many officials of the executive branch. It would be impossible to contact all the people he has represented for the purpose of asking their permission to waive the privilege.

But I come back to this proposition: we sat here for 2 or 3 days when Mr. Thurgood Marshall was before us, and we respected his answer when he said, "Mr. Chairman, that is an improper question to ask of one who has been nominated to the bench," because of the many reasons which he recited.

Senator BAYH. If the Senator will yield, or if I have not yielded totally and may reclaim the part I did not yield.

Senator HRUSKA. I will yield.

Senator BAYH. I just want to make one statement because as we look through the record before us we will find the nominee respectfully, very respectfully, and I am not at all concerned about the demeanor or the way he approached this, I think he has legitimate concern, conscientious concern, but in this particular instance he relied on two different and distinguishable grounds. One was that he did not want to put himself in the position where his opinion and his articulating it before the committee would prejudge a case which might come before him as a Supreme Court Justice. That was the answer that has been used on several occasions by almost every nominee that I have had the good fortune to sit on this side of the table to listen to. That was the basis of the refusal of Justice Marshall.

I do not recall anybody relying on another type of reason for not answering. Indeed, the lawyer-client relationship which, as we read through the record, Mr. Rehnquist often involved—he did this not on the basis that he did not want to prejudge the case but that he did not want to disclose any confidence he might have with the Attorney General. He said he did not want to embarrass the administration or something like this, and that is why I think it is entirely proper to ask for a waiver of the privilege. It would be helpful if the Attorney General had sent back a different answer than he sent back to us so we could get not the administration's position, not the Attorney General's position, but get Mr. Rehnquist's position, his thoughts on these critical issues in a general way so we could know whether he indeed did believe the words that came out of his mouth concerning these important matters that we have discussed.

Now, that is the difference I have with my distinguished colleague from Nebraska and the distinguished Attorney General.

Senator HRUSKA. May I suggest that the Senator from Indiana recall that Thurgood Marshall served on the bench before he became

Solicitor General, that he was Solicitor General when he testified to this committee, a highly comparable situation to that of an Assistant Attorney General who is in charge of the Office of Legal Counsel. If he had been asked questions similar to those asked Mr. Rehnquist regarding internal Justice Department affairs his refusal to answer would have been totally justifiable because there are many situations in which the Attorney General requires complete candor from his associates in setting departmental policy and in serving as lawyer for the executive branch. If advice given, and possibly rejected, is to be made public, this candor will be lost.

Mr. MITCHELL. Mr. Chairman, I would like to say I was, of course, present at all of the hearings and I recall distinctly that on one occasion when Mr. Marshall was being considered as an appointee to the Second Circuit Court of Appeals, the only way that it was possible to conduct a hearing was because you, although you were a member of the minority party, convened the hearing and did conduct it.

I recall distinctly also that there were many questions which it seemed to me if Mr. Marshall answered it would raise a lot of additional questions, and to me it seemed that it was not necessary to do it. But I must say he performed in a manner of disclosing everything that anybody could conceivably think of as relevant, and my recollection is that in those hearings you personally commended him for his willingness to try to tell the committee everything within reason that it wanted to know.

I think the problem with the contrast between the Marshall hearings and the Rehnquist hearings is here are matters of great moment which affect the country no matter which administration is in power, and it does seem to me that everybody ought to bend over backward in that kind of a situation to make a full disclosure of the public business.

We have laws which make disclosure mandatory with respect to the ordinary citizen, and I think when something so vital as the Supreme Court is involved there ought to be a full disclosure and the administration itself ought to be willing to bend over backward.

Of course, I agree that nobody ought to be asked to predict how he is going to rule on a question that comes before him in the Court. But I do think that his general philosophy ought to be spread on the record so that the public may know in minute detail just what he stands for.

Senator HRUSKA. During the hearings last week, the witness will remember that it was my suggestion that Mr. Rehnquist was guilty almost to a fault in trying to express himself by way of answering on general personal philosophy. But when he was asked as to matters that came to his official attention as counsel to the President and the Attorney General he respectfully refused, and regretted that he could not answer. I submit that refusal was proper and mandatory.

Senator BAYH. If the Senator would yield.

Senator HRUSKA. I thought that was very fair and it is in keeping with the privilege, confidential privilege, of communication between lawyer and client.

Senator BAYH. If the Senator would please address himself to the question he just raised, that issue was not brought before this committee when Mr. Marshall was here.

Senator HRUSKA. Which question?

Senator BAYH. The relationship he had had with certain administration officials. The concern some of us have is that out of Mr. Rehnquist's mouth have come some statements in support of the administration position concerning the Bill of Rights that are of great concern to us. We simply want to know whether they are his opinions or whether they constitute the Justice Department's, for whom he was serving as a lawyer, as an agent or whatever, and he has refused to disclose whether this is the case or not. I do not see how that bears on the questions directed at Justice Marshall when he refused to answer not because of any secrecy that was necessary between him as Solicitor General and the administration but because he did not want to prejudge a case that might come before him.

Cannot the Senator from Nebraska make a distinction between those two?

Senator HRUSKA. The record will show the nature of the questions which Senator Ervin asked as well as some questions which Senator McClellan asked of Thurgood Marshall. Some of them did bear upon situations that arose while he was the Solicitor General and concerned the discharge of his duties and the Supreme Court cases decided while he held that high office. He declined to answer them, and very properly so, and the same thing is true in regard to the answers given by Mr. Rehnquist.

Mr. RAUH. May I make two points, Senator Hruska, in answer to what you have been saying? First, I do not believe Thurgood Marshall at any time pleaded the privilege of lawyer and client.

Secondly, I do not believe that Senator Bayh in any way is suggesting that he wants any privileged communications. You keep using the words "privileged communications." That means a confidential relationship between lawyer and client. When Mr. Rehnquist went to Brown and made a speech on wiretapping and Senator Bayh now wants to ask him whether that is his view or not, that is not a question based on a privileged communication. Therefore, the lawyer-client relationship does not apply.

If he wants to say, "I intend to sit on that case and, therefore, I will not answer," it would be a proper answer.

Now, he cannot say that because he does not intend to sit on that case as he has already worked on the brief.

Senator HRUSKA. And he frankly said so and he said he would disqualify himself on that particular case.

Mr. RAUH. That is exactly why the lawyer-client privilege does not apply.

Senator HRUSKA. Not privileged communication in that particular instance, perhaps, but in the other instances it did apply. The Senator from Indiana asked the Attorney General to wave some kind of a magic wand and say, "This privilege has now disappeared, you may testify." It does not work and it cannot work that way if the sanctity of privileged communications is to mean anything at all.

Senator HART. Senator from North Dakota.

Senator BURDICK. I would like to thank Mr. Mitchell and Mr. Rauh for their contributions here. I am disturbed by a contradiction in testimony. We will put the two together and perhaps Mr. Mitchell can clarify it for me. On page 4 you talked about the letter from Mr. Moses Campbell, and in the letter it states, and I will quote: "I was

present at the time our Past President"—that was of the NAACP—"Reverend George Brooks and Mr. William Rehnquist exchanged bitter recriminations concerning the group's purpose for marching, intimating that the march was communistically inspired." Mr. Campbell further asserts that Mr. Rehnquist's conduct, "brought irreparable harm and insult to the blacks of Phoenix, Ariz." You say "He opposes the nomination of Mr. Rehnquist. I offer a copy of Mr. Campbell's letter for the record."

On Monday of this week, at page 297 of the record, we find the following language, question put by Senator Hruska——

Judge Craig, in regard to the first whereas of the resolution of the southwest area NAACP I would like to read you an excerpt from yesterday's Washington Post. "When Rehnquist was nominated for the Supreme Court the former Reverend George Brooks"—

I presume the same one mentioned in the letter—

charged in 1965 Rehnquist confronted him outside the State Capitol and argued in abusive terms that a Civil Rights Act later passed by the State legislature should be opposed.

Further quoting from the record—

The Arizona NAACP promptly passed a resolution and the text of the resolution and the whereas read by the Senator from Indiana a little bit ago, now getting back to the story of the Washington Post. By the end of last week Brooks was telling a different story. He now says that the discussion with Rehnquist was calm, the tone was professional, constitutional, and philosophical.

Have you any idea when Mr. Brooks was right?

Mr. MITCHELL. I would say that on two occasions Mr. Brooks had indicated that the conversation was heated and there were recriminations. On one occasion, if he is correctly quoted in the Washington Post, he takes the opposite position. The first time he made that assertion was when Mr. Rehnquist was under consideration for his present position of Assistant Attorney General. In fact, Mr. Brooks was one of the leaders of the group which tried to prevent the confirmation of that nomination by writing to various people and nothing came of it but one of the principal points in the argument against Mr. Rehnquist was his performance up there at the State capital.

Then, subsequently Mr. Brooks made a similar statement which, I think, was published in the New York Times. After that publication I talked with him on the telephone and said I hoped very much that he would comes here to testify. He said he would not do so. I subsequently learned that Mr. Brooks' status has changed, that he is now in a position which I think has some connection with either the Federal or the State government, and apparently, like other persons who have information, he is unwilling now to describe the incident in the same fashion as it was described then.

I do not say that to be derogatory or to disparage Mr. Brooks. It is an ugly fact of life in this country, and I guess in many places that when your economic circumstances are at stake it requires a great deal of courage to be willing to come out and make a statement which might cause you to lose that status, so I would think on the basis of all the information that has been given to us that the Campbell description of that is correct, and that the first two Brooks descriptions are correct, but that the more temperate description is not correct.

Senator BURDICK. Is Mr. Brooks still president of the local chapter?
Mr. MITCHELL. No; he is not the president now.
Senator BURDICK. That is all. Thank you.
The CHAIRMAN. Senator Tunney.
Senator TUNNEY. Thank you very much, Mr. Chairman.
Mr. Rauh and Mr. Mitchell, I want to thank you for your contribution here today for having highlighted before the committee your reasons for opposition to Mr. Rehnquist.
I would like to determine more precisely the parameters of your objections to Mr. Rehnquist. First of all, does either one of you think that he is not qualified on the basis of professional competence?
Mr. MITCHELL. May I say I think he is not qualified on the basis of professional competence for the reason that I cannot separate from professional competence the duty of a lawyer to be fair and impartial or a judge to be fair and impartial. This is where I part company with so many people, and I am awfully reluctant to say this because I do not want to offend anybody, but as a black man, and a lawyer, I cannot believe that an individual who is blind to the requirements of the 14th amendment, who believes that it is some kind of imposition on a drugstore owner because you ask him to open the doors so somebody can buy an aspirin tablet, I cannot believe that this represents legal competence.
Senator TUNNEY. Mr. Rauh, do you wish to make a statement?
Mr. RAUH. I think we have a little bit of a semantic problem here. I subscribe to everything that Mr. Mitchell said. I, too, feel a person is not competent who does not have equality in his heart.
If you are giving me the specific question whether I think he had a good record in law school, and so forth, I have to answer that, in all honesty, yes. But I think that, in truth, Mr. Mitchell comes closer to it than a more legalistic answer. Had he not spoken first, I might have given too legalistic an answer to you. I suggest that competence means more than the ability to pass an exam or try a case. Competence, as Mr. Mitchell and I are using the term, means in its broadest sense a lawyer loyal to the community, a lawyer making a better world. In that sense I wholly subscribe to Mr. Mitchell's suggestion that this man is not competent.
Senator TUNNEY. You would be referring perhaps to judicial temperament, that he did not have the judicial temperament?
Mr. RAUH. I think it is obvious that he is an activist of the most amazing type. That is clear from his statement, his actions. If he gets on that Court, heaven help the lawyer who tried to argue his own case. This is one of the most intermeddling of lawyers—rushing out when nobody else in Phoenix wants to stop this ordinance, rushing in to fight for de facto segregation, saying that store decision does not apply in constitutional cases. If there ever was an activist, Mr. Rehnquist is it. For President Nixon to call him a judicial conservative is absolutely 180 degrees wrong. This will be the most judicial radical for reaction that we have ever had.
Senator TUNNEY. Do you feel that President Nixon was attempting to politicize the Court and, if so, do you feel that the Congress, the Senate, would be escalating the politization if we should turn down Mr. Rehnquist?
Mr. RAUH. I did not get one of the words.

Senator TUNNEY. Was the President trying to politicize the Court, and would we be escalating that politization of the Court if in fact we should reject Mr. Rehnquist's nomination?

Mr. RAUH. Again, I think there is a problem of semantics in the words "politization of the Court." I think President Nixon has been trying to put on the Court people who share his views of criminal law. I think he has had some bad luck, if you want to know the truth. I think he really thought Mr. Rehnquist was his kind of man on criminal law who was against all these frills of the Warren court like *Miranda* and *Escobido*, and these other things that the Warren court has done. I think Mr. Nixon is the most surprised man in America to find out that Clarence Mitchell has a case against him on civil rights that is overwhelming.

I do not think the administration realized that they were getting an anti-civil-rights nominee. I think what they were looking for was a nominee who would reverse the Warren decisions on the Bill of Rights and they did not figure that they were getting this man who was so extremely reactionary on Negro and brown and other rights like that. I think they just made another blunder.

It seems to me that Rehnquist is the same type of administration blunder that Haynsworth and Carswell were. It is not really a question, it seems to me, of politicizing the Court so much as the fact that they have again made a blunder by inadequate investigation. And I can see how this happened.

On Wednesday, October 20, they were planning to appoint two other people. Then Wednesday night comes the "no" from the Bar Association. Within 24 hours they have to have two Supreme Court nominees. They were unable to do any adequate research into Mr. Rehnquist's civil rights record. They found his anti-Warren court record exactly what they wanted, and they never looked for the other.

For you to accept that nomination, it seems to me, whether you call it politization or not, would simply be acceptance of someone who has no qualifications in the sense in which Mr. Mitchell so eloquently put it.

Mr. MITCHELL. My I comment on that, too, Senator Tunney? I think you have to look at the whole picture of this administration on civil rights questions to understand that this is, in fact, a political appointment, and an attempt to politicize the U.S. Supreme Court.

If you start back with the Republican National Convention, you will remember that the President in his acceptance speech made some reference to the fact that one of the first things he was going to do as President of the United States was fire the Attorney General. Now, everybody knows that the Attorney General would not serve under the administration, and this was one of those things that appeals to the gut reactions of crowds.

Then he made some reference to the fact that he was not going to have a Supreme Court——

Senator KENNEDY. Do you think if we fired this Attorney General that that would cause a gut reaction?

Mr. MITCHELL. I did not hear that.

Senator KENNEDY. Do you think if we fired this Attorney General it would cause a gut reaction in the crowd?

Mr. MITCHELL. I think upper or lower depending on your point of view. [Laughter]

He referred to the Supreme Court as sitting in the capacity of a school board. This again was one of those things that causes a crowd to get emotional.

Now this, you could say, is just politics. But what happened when the administration was called on to take a position with respect to school desegregation? The first thing that the administration did was to get one of the beloved and highly respected Solicitors General, who as dean of Harvard had always been on the side of civil rights, and it was a very painful experience for me to sit in the Supreme Court and to find the dean, now the Solicitor General of the United States, acting on the advice of the administration, taking a position against the acceleration of school desegregation; and the two appointments of Mr. Nixon that he made did not pay any attention to that so he is continuing to try to get on the Court somebody who will please that element of this country which somehow believes that the Supreme Court is the great advocate of racial mixing, busing, and all that kind of thing, and if you put people on there who will stop that then you are going to have a different situation.

Now, as to the second part of your question with respect to the politicizing of the issue if the Senate rejects him, I think the Senate in this case is the only bulwark between the people of this country and a demeaning of the U.S. Supreme Court, and I would say that if the Senate of the United States concurs in this nomination it will never be able to explain to the people of this country that it was not a party to the demeaning politicizing of the U.S. Supreme Court.

Senator TUNNEY. Mr. Mitchell, as I understand your arguments against the confirmation of Mr. Rehnquist, as contrasted to Mr. Rauh's, your objections are purely on civil rights, whereas Mr. Rauh goes into civil liberties in his statement, is that a fair analysis?

Mr. MITCHELL. This was a division of labor, and he has a greater love for that, although mine is amorous.

Senator TUNNEY. I would like to ask you, you have read the record and you have read, I am sure, most of the published statements of Mr. Rehnquist in the past 10 years. Do you feel that Mr. Rehnquist' civil rights attitudes have changed within the last 7 years?

Mr. MITCHELL. I do not believe that there has been the slightest change, Senator Tunney, and I reject wholly his present statement—it is very interesting if you listen carefully to what he said, one of the statements that Senator Hart read this morning, I believe he said, "I think that I would probably have a different position now." It seems to me if he does not know as distinguished from thinking then he probably has not changed.

Senator TUNNEY. Do you think anyone who is not in favor of making public accommodations open to all races should be, on that basis alone, excluded from consideration for the Supreme Court?

Mr. MITCHELL. I would say emphatically yes; because if a person is so insensitive, and so contemptuous of the feelings of his fellowman that he does not believe a mother with a child has a right to go in and get a meal at a lunch counter, or a person shivering and cold does not have a right to go in and get a cup of coffee to warm himself up, then that person has no business on the Supreme Court.

I will just mention this: Senator Thruston Morton once told me, he was a Senator from Kentucky, he told me one of the reasons he

had decided to vote for the public accommodations legislation in 1964 was because he was a friend to a Negro who was in the Kentucky Legislature, Mr. Anderson, and he said, "You know, I would think about Anderson's wife going downtown with that child of theirs and if the child", as he put it "wanted to tinkle, there was no place for that child to go because it was black." He said that kind of humiliation just ought not to exist in this country.

Well, I think that is an evidence of a sensitive person reacting. But to somebody who just feels, "Well, it is too bad, let him go somewhere else," I do not see how he has any place on the Supreme Court.

Senator TUNNEY. Do you feel, Mr. Rauh, that Mr. Rehnquist's attitudes on civil liberties have changed in the last few months, particularly since the time that he was nominated by the President to the Supreme Court, from his record?

Mr. RAUH. I do not think Mr. Rehnquist's attitudes have changed. As I said, he gave certain evasive answers which were for the purpose of possibly mollifying those who believe in civil liberties. But I do not see any change over a long history. The history goes back to 1957 when he suggests that the Supreme Court, to which he should have been loyal, had an ideological sympathy with communism. I should point out here something that I did not make clear this morning. When he later was trying to explain what he meant, he said the Court had an ideological sympathy with the underdog. But that word "ideological" is evidence that he was trying to imply that the Supreme Court, to which he should have been loyal, had an ideological sympathy with something bad. From the moment in 1957 and 1958 when he wrote the articles trying to imply that there was something wrong with the Warren court, through the civil rights period, his actions were all part and parcel of the same thing.

Let me say very frankly that the same people usually oppose civil rights and civil liberties. It is not strange that you find the same people opposing both. So you get Mr. Rehnquist in 1957 accusing the Warren court of ideological wrongs; in 1958 saying the same thing in his article in the ABA Journal; in the 1960's, back in Phoenix, attacking all along the civil rights front; then down here as the architect of the Mitchell anticivil liberties front. You get a picture of 13, 14 years in this thing. I think that a man who has lived roughly his whole adult life in the milieu of anti-human-rights and anti Bill of Rights is incapable of change.

Incidentally, there was a very good article in the Washington Post on Sunday making the point that most Supreme Court Justices have not changed on the Court. In other words, the Justices have largely carried out the views with which they went on the court. It is a myth, even if it was said by great men, that there is a change when one puts on robes. The fact of the matter is that that has not been proven by history. History shows us that the record of the past is what the man takes to the court and what he is on the court. Especially is this so with an outspoken and aggressive a man like Mr. Rehnquist who has fought all the advances in civil rights and civil liberties of the last decade and a half. I think the chance of change is very limited, and I say that we certainly see in these hearings no evidence of change. What you see is an evasion of the record, an effort to try to rewrite the record, not a showing of change.

Senator TUNNEY. I have two last questions that I would like to ask: One, Mr. Rauh, would you more fully describe the evidence on which you conclude that Mr. Rehnquist was merely participating in legal aid activities in Arizona as an involuntary ex officio duty?

MR. RAUH. I did not use, Senator Tunney, the term involuntary or at least I did not mean to use it because I do not know that much about it.

I do have the record of the Maricopa County Legal Aid Society for the period that I understand that Mr. Rehnquist was on the board, and he is listed this way: "Ex officio, William H. Rehnquist, Maricopa County Bar." So it appears that he was there as an ex officio member.

I could not say that he did not want to be there. I simply am saying that for him to raise that ex officio membership as his great contribution to civil rights, I think that is to overstate the case on his own behalf.

Senator TUNNEY. The last question is, do you note any distinctions between Mr. Rehnquist and Mr. Powell and, if so, what are those distinctions?

Mr. RAUH. Well, obviously, Mr. Mitchell and I do draw a distinction.

The Leadership Conference on Civil Rights is not opposing Mr. Powell. We would, I suppose, not have appointed him; maybe as Senators we would vote no. But, when you take an organization as important as this one into a struggle, you must have overwhelming proof that you are correct. You must have it black and white, if I may use the expression. With Mr. Powell there appears to be a number of areas in which one must praise him. Jean Cahn writes an eloquent letter about his record on legal assistance for the poor. One must take note of that.

Apparently, although I am not a student of Mr. Powell's record—I have spent all my time on this struggle that we have before you today—I gather that there is no question that Mr. Powell did make a fight for legal aid for the poor inside the bar association.

Second, if one looks at the record in Richmond on school desegregation, it was a serious problem. I think Mr. Powell did something quite bad when he let State money get to Prince Edward County. Nevertheless, there is on the other side the fact that he did, over and over again, speak for keeping the schools open at the time of massive resistance. While I do not claim to be an expert on Mr. Powell, I gather from those who do know that there are things in his life where he has made real contributions. It seemed to us that to take our organization into opposing him, when one might say it was in a gray area, would have been a mistake.

Here we feel that there are no redeeming factors. We find nothing in Mr. Rehnquist's record in the civil rights area, like Mr. Powell speaking to keep the schools open. With Mr. Rehnquist we find nothing in the civil liberties area like aid to the poor for legal assistance. In other words, the record is all one way with Mr. Rehnquist.

That does not appear to be true of Mr. Powell, and so we decided we would take no position as we did in the case of Mr. Burger and Mr. Blackmun. We do not find any great joy in being the spearhead of the opposition in these matters. We felt we had to oppose when it came to Judge Haynsworth and Judge Carswell. We felt the same way on Mr.

Rehnquist. We did not feel the same way on Mr. Powell, and we are not taking any position on his nomination whatever.

Senator TUNNEY. Mr. Mitchell, do you have anything to add?

Mr. MITCHELL. I would just like to emphasize what Mr. Rauh said about our attempt to be fair. In all of these fights we have tried to get the story of the nominee before we made any kind of declaration about his position. When Mr. Blackmun was nominated by the President I undertook to get from the State of Minnesota and from the State of Arkansas, because Arkansas was in the circuit in which he served, information concerning his attitude on racial matters, and it was entirely favorable. In fact, the observation was made that Mr. Blackmun had come down from the bench on one occasion and said to our lawyers that he thought the Department of Justice was making a terrible mistake in trying to slow down school desegregation. So, obviously, we were not going to oppose that nomination.

In the case of Mr. Powell, we made a careful inquiry among his associates and friends in Virginia. There were mixed feelings on the part of black lawyers and others. I understand that there are those who are going to come forward and make observations about him, so it seemed to me they, because I know that one of them is a member of the Virginia Bar, a distinguished member of the Virginia Bar, ought to be the people who would say whatever had to be said. So we stood mute on the Powell nomination and were not for or against it.

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

Thank you, Mr. Mitchell and Mr. Rauh.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. I just have two questions of Mr. Mitchell and Mr. Rauh. I want to commend you, Mr. Mitchell, for your opening statement and also Mr. Rauh. I thought it was terribly helpful in pulling a great deal of information together, and I think it provided some very valuable insights.

How do you respond to the observation that is made that Mr. Rehnquist was really the lawyer for a rather authoritarian Attorney General, so to speak, in terms of his actions, whether you're talking about May Day, surveillance, or many of the wiretappings, and so on? Now he came up here, he indicated to the Committee that if he felt that these positions had been obnoxious to him he would not have defended them, which I find distressing in trying to distinguish his own views from those he had presented. How do you rebut the argument made by those saying that those who try to take from his speeches or statements a personal philosophy are doing a disservice to him? He was actually acting for a more authoritarian Attorney General, how do you react or respond to that?

Mr. RAUH. Senator Kennedy, it seems to us that Mr. Rehnquist has two choices. He may either disavow those positions or he may ask to be confirmed on the basis of them. He chose the latter when, for different reasons and especially for a nonexistent reason of lawyer-client privilege, he refused to tell you whether he accepted those positions and whether those were his present positions.

Now, I believe they were his personal positions. He did not just work as a quiet drone in the Attorney General's office, Senator Kennedy. He went out on the hustings as the administration spokesman. He wrote articles, he wrote letters to the papers. It is one thing to be

the inside person working with the Attorney General; but would anybody except a true believer be the principal spokesman outside the Department and especially on college campuses? He told the committee how he was the leader of the task force that went to college campuses. He is the principal article writer of the Department, the principal letter writer of the Department. I would say that, if he did not believe all this, it would be a great reflection on his character.

I think the truth of the matter is that he does believe what he said. His entire record, as I was trying to say, from 1957 through 1971, makes him a part of that rightwing philosophy. I have little doubt that he believes what the Attorney General believes. Whether the Attorney General could get confirmed here is a different story. But I believe that Mr. Rehnquist's views and the Attorney General's are identical. You gave him a chance to try to dissociate himself and he rejected it. I think you have to, as a legal matter, act on the presumption that the views he gave in his speeches, articles and letters are his views.

Senator KENNEDY. And how much weight do you think we can give or should give to those views in fulfilling our responsibility to advise and consent?

Mr. RAUH. Senator Kennedy, I guess this is really coming back to where we started. If you take the Professor Charles Black view, you have a right to consider everything that the President can consider. I fully accept that as the better view of the responsibility of the Senate based on the history set forth by Professor Black. But I do not believe for the rejection of Mr. Rehnquist that it is necessary for you to accept what we might call the expansionist view of the Senate's role. It seems to me that a narrower position is possible than that Professor Black proposes. The lesser position is this: That the Senate, at least, has the right to see that court nominees are of such a nature that the Constitution is carried out and that the people of this country have the feeling that there is on the court a man dedicated to human rights.

In this period of our history the court has been the last resort of black and brown people. I think the Senate, even if it does not go as far as Professor Black, must at least go to the point of insuring that the nominees are dedicated to the Constitution and to the rights of minorities.

Therefore, I would suggest that you would be remiss in your duty if you did not go into these matters, whether you are willing to go as far as Professor Black did or not.

Senator KENNEDY. Let me, Mr. Mitchell, just ask a final question, and to you, Mr. Rauh. You know we talk about whether men change when they take on the robes of the Supreme Court, and you mentioned, I think, Mr. Rauh, the fact that history shows that they really have not changed that much. I am not familiar with the article that refers to it, but I am not so sure I would be willing to accept that as a general thesis.

I would suppose one of the very perplexing problems that any of us has is trying to look on into the future and see how these men will decide a range of different issues of questions relating to human rights or liberties.

Mr. Mitchell, do you think you would, knowing what you did about Hugo Black, have been up here prepared either to support him? or

from what you have known about any of these other men who have gone on the Court, what can you say to help us on this question, really? I mean, when you put those robes on, I personally do feel there is a change. How significant and how weighty and how important that is, it is terribly difficult for any of us to judge. But certainly in Hugo Black you saw an enormous difference. What can you tell us about this in terms of our being fair to any of these nominees?

Mr. MITCHELL. Well, Senator Kennedy, when Justice Black was nominated to the Supreme Court, I, along with some of my contemporaries, attempted to stage a huge protest demonstration. Part of our equipment was Ku Klux Klan hoods. We all agreed we would go out and distribute handbills for this meeting wearing Ku Klux Klan hoods dramatizing the fact that Mr. Black had been a member of the Ku Klux Klan.

But there was living at that time Walter White, who was the Executive Secretary of the National Association for the Advancement of Colored People.

Mr. White had known Mr. Justice Black as a Senator from Alabama, had known him intimately, and had great respect for him. It was Mr. White who convinced us that although the Justice had this Ku Klux Klan identification in earlier life that he was in fact a person who had deep convictions.

It was because we trusted Mr. White as an expert witness on the nominee that we took off our Ku Klux Klan hoods, and we refrained from protesting, and up until one of the last decisions that Mr. Black made in the *Mississippi Park Closing* case, we have never regretted that.

I think in the case of people like Judge Haynsworth, Judge Carswell, and the present nominee, Mr. Rehnquist, you have to rely on the assurances that you get from people who are really experts on them either because they have worked with them intimately and known them well or are convinced themselves that this individual is different from the image that he projects. That is not present in the Rehnquist nomination.

The only thing we have as evidence of a change of heart is the fact that under circumstances where the prize for conformity is the U.S. Supreme Court he has been willing to say to men of good will like yourself, willing to say on the record, and in a somewhat evasive manner, that he has changed.

I do not think that is sufficient evidence. I do not think that the country can afford to take that kind of chance, and I repeat, as I said, in the earlier part of my testimony, in the words of Senator Hart, can you ever, could you ever, expect that a black man going into the U.S. Supreme Court, seeing Mr. Rehnquist sitting up there, knowing what his record is, would believe that he could get fair consideration? I think it is important that the people will believe that they get fair consideration, and I do not believe that Mr. Rehnquist has been convincing in that respect.

Senator KENNEDY. Have there been any—let me just ask—have there been any black leaders at all who have come forward that you know about or that you have respect for in behalf of Mr. Rehnquist, who would fill that same role as Mr. White did for you at the time of Justice Black's nomination?

Mr. MITCHELL. No one has, Senator Kennedy. The people of Arizona who know him by direct contact, have been unanimous in their condemnation of him. There has not been a single person of any importance who has come forward saying that they feel he has changed and he ought to be on the Supreme Court.

Mr. RAUH. Senator, may I say a word on the Justice Black analogy? I was a law clerk at that time for Justice Cardozo. When Justice Black went on the Court, he was one of America's foremost liberals. At the moment Justice Black, as a Senator, was President Roosevelt's leader in the Senate of the United States. When, I guess it was Justice Vandevanter retired, and there was a vacancy, the question arose whether Senator Black should get it. This was based on whether he could be spared from his New Deal duties in the Senate. He was, after Senator Barkley, the leader of the group seeking to get New Deal legislation through Congress. He had already proved his anti-Klan feelings.

What happened was that Black was then confirmed as a very liberal man.

Subsequent to his confirmation the story of the Klan association came out. There were people who felt as Mr. Mitchell did, and they were answered by Mr. White. But even at the time the story came out about the Klan, Black was at that moment respected as one of the great liberal Senators of the time. So, it is not really fair to put the question in those terms.

Had Black's record in the 20 years previous to his nomination been consistent with his Klan membership, it would have been one thing. But his record for 20 years was totally inconsistent with that short Klan membership.

Senator KENNEDY. And I suppose the point that you are making, Mr. Rauh, is that Mr. Mitchell indicated how heavily he relied on Mr. White's giving those kinds of assurances, having an intimate knowledge of Mr. Black. And I suppose the point you are making here is that the same kind of human concern or human compassion toward fellow human beings is lacking in Mr. Rehnquist's experience, so far as you have been able to detect both from what he has been able to present here and also from your own study.

Mr. RAUH. Precisely.

Senator KENNEDY. That might be at least helpful and useful to us, if someone could show a broader spirit or a man who conducted himself in that manner.

Thank you very much.

Mr. RAUH. Mr. Chairman, I have two things that Senator Cook mentioned this morning. May I quickly answer them for the record?

Senator HART. Yes.

Mr. RAUH. I promised Senator Cook I would get the dates on the Arizona civil rights law and I have them. The Arizona civil rights law passed the senate on February 16, 1965. It passed the house on February 26, 1965. It was finally passed by both houses on March 26, 1965. It was approved by the Governor April 1, 1965. That is the Arizona civil rights law which includes the Arizona Civil Rights Commission and no discrimination in either voting or public accommodations. Senator Cook asked me for the dates.

The other point that Senator Cook raised was the question of the press picking up the "qualified martial law" statement and using it.

I said that I believed it had been used even after the nomination since it was so commonly known. I would like to refer to the New York Times, Wednesday, November 3, 1971, where the following is reported:

> Reacting to the criticisms that during the May Day protest in the District of Columbia many individuals had been swept into the police mass arrest net and held without opportunity to make bail, Mr. Rehnquist replied that an undeclared qualified martial law had existed.

I would also like to refer to the Washington Post of Sunday, November 7, 1971, in which the following occurs in the B section (I do not have the page number):

> At the last mass arrests that were made by Washington police in the May Day, Rehnquist espoused the doctrine of qualified martial law.

I only mention those two items because Senator Cook had indicated he was going to bring forth some evidence that this was not the accepted newspaper reporting.

Thank you, sir.

Senator HART. Gentlemen, thank you very much. As has been true on other occasions, your testimony has been relevant and of great significance. Thank you.

Mr. MITCHELL. Thank you.

Mr. RAUH. Thank you.

Senator HART. Before I recognize Senator Kennedy, let me say that next we shall hear on behalf of himself and members of the congressional black caucus and a very distinguished colleague of mine of the Michigan delegation in the House, the Congressman from the First Michigan Congressional District, the Honorable John Conyers.

Senator Kennedy?

Senator KENNEDY. Mr. Chairman, yesterday I asked that a memo utilized in questioning Mr. Powell be made a part of the record. It was the memo regarding the consensus of the FBI conference that the FBI ought to enhance the paranoia endemic in the New Left so as to "get the point across there is an FBI agent behind every mailbox."

I said it was not a classified memo because it did not have the usual stamped classification in the usual place. However, I now notice that at one point the text says that it should be given the security afforded a document classified confidential. Although the memo has appeared many times in the media, I file it now with the suggestion that the committee determine from the FBI whether there are any continuing national security reasons for treating it as a classified document.

Senator HART. Before I say yes, shall I have a newspaper copy?

Senator KENNEDY. You figure that.

Senator HART. This will be placed in the record.

Congressman, we first welcome you, and then we express our appreciation that you have been willing, and that your schedule permitted you, to wait.

STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN; ACCOMPANIED BY HON. WILLIAM CLAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI, AND HENRY L. MARSH III, ATTORNEY

Mr. CONYERS. Thank you, Mr. Chairman, Senator Hart, and the distinguished members of this committee.