We can ill afford to move backward at a time when we are moving forward at a dangerously low rate.

The Senate should not confirm or fail to confirm this nomination because of a threat from any segment of our society, but it must recognize the consequences of its actions.

The Senate has not only the responsibility, if I may humbly suggest, to advise and consent on Presidential nominations to the Court, but has the obligation to examine the candidate's fitness in relation to the potential harm that might be done.

Again, as Professor Black observed—

. . . 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 doing so.

Because there are reasonable grounds to believe that the views of William H. Rehnquist are inimical to the best interests of this Nation, the Senate is respectfully urged to advise the President negatively on this nomination.

I hope that the chairman and members of the committee will permit these Members of Congress and distinguished counsel from Virginia to make these suggestions because it seems very clear to me that unless this view is approached in evaluating this and the other nomination confronting you perhaps a rather serious mistake might be made. In other words, we are suggesting something that is really not new, but has been used and employed by the Senate in being that middle link between a nomination and a commission of Presidential nomination many, many times.

We are asking now that it be carefully reviewed, thoroughly considered, and fairly applied in the instant nomination.

Senator HART. Congressman, you have also a prepared statement which, I take it, you want to be printed in the record in full as if given.

Mr. CONYERS. Yes, Senator; I do ask that this statement be included in the record.

The CHAIRMAN (presiding). We will take it.

(The statement follows:)

TESTIMONY BEFORE SENATE JUDICIARY SUBCOMMITTEE CONSIDERING THE NOMINATION OF WILLIAM H. REHNQUIST TO THE SUPREME COURT OF JUSTICE

PRESENTED BY HON. JOHN CONYERS, JR., MEMBER OF CONGRESS ON BEHALF OF HIMSELF AND MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS

Mr. Chairman and distinguished members of the Judiciary Committee, I consider it a privilege to appear before you in consideration of this Supreme Court nomination.

There would seem to be little room to quarrel with the view that adequate legal experience and honesty alone are insufficient in reaching a determination of a nominee's fitness for the high court. Beyond these requisites, his judicial philosophy is of the highest importance. That is to say his perception of the function of the Court, his obligations as a Justice in interpreting the Constitution are clearly affected by his basic convictions on the socio-economic issues of the day. An individual cannot divorce himself from his past sets of experiences. Even though he may not feel bound by the restraints of personal or constitutional judgment on issues he considered as a citizen, few men can achieve this degree of independence from their past. No one seriously believes that a judge's professional work is not influenced and formed by his world outlook, by his economic and

social and political understanding, by his experiences, and by his personal sense of justice regarding the great questions of his age.

In passing on the fitness of Supreme Court nominations, the Senate cannot ignore the candidate's total outlook. As Charles L. Black, Professor of Law at Yale University, recently wrote:

". . . . there is just no reason at all for a Senator's not voting, in regard to 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 by deference to the President's, as a satisfactory basis in itself for a negative vote."

We are today fully aware that the Constitution we live under and the laws we are judged by are not a lifeless set of wooden precepts moved about according to the rules of a mechanical logic. At least, the law is never that in the hands of great judges. The Constitution of today is what the judges of the past have made it and the Constitution of tomorrow will be what the judges appointed in our time will make it.

Appointments to the Supreme Court must be judged by time-honored standards not by immediate political opportunities or considerations. Presidential administrations come and go; laws are made and repealed; but judicial pronouncements set the course for generations. If tested by these standards, no man of just ordinary insight can be acceptable Court material. Judicial philosophy is an essential consideration of a nominee's fitness for the Court because of its potential effect on our law and the direction of our society. Furthermore, it is consistent with the Senate's constitutional role to examine this philosophy. Article II states: ". . . (the President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court". In giving its advice on a Presidential decision, like the selection of a Court nominee, the Senate must consider those things which went into making that decision. If it did not, it would not be able to advise properly, and would consequently be shirking its duty as spelled out by Article II.

It would be paradoxical to contend that the considerations which play a large part in the President's choice of a nominee are improper for the Senator in making the same decision.

In the *Federalist Papers*, Alexander Hamilton makes the following commentary on the advice-giving function of the Senate:

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.

Hamilton's passage supports the notion that Senators should or ought to consider anything which they believe to bear on the wisdom of the nomination. Foremost among these considerations would be the judicial philosophy of the candidate.

There is ample precedent for the consideration of a nominee's judicial philosophy as a condition of his fitness for the Bench. An examination of Supreme Court nominations since 1900 reveals that great attention has been paid to the philosophy, record, and attitudes of nominees. In every case of opposition since 1900, the socio-judicial philosophy of the nominee was the focal point for opposition.

President Nixon made it very clear in his nominating statement that he chose William H. Rehnquist for his conservative judicial philosophy. In other words, he chose Mr. Rehnquist because he felt the nominee's world view would be good for the country as reflected in his judicial performance. Since the Senate must advise the President on his choice, it would seem that the Senate would have to decide whether the nominee's judicial philosophy would be good for the country. The specific question raised here is whether the nominee is properly equipped to deal with the social and economic issues of his day. To paraphrase Justice Frankfurter, we should explore the depth of his insight into the problems of his generation. This raises the fundamental question—where does Mr. Rehnquist's sense of justice lie in respect to these issues?

The best source for divining a man's worldview is in his record as a practicing professional. In the case of William H. Rehnquist, that record covers his years as

a practicing lawyer and as chief counsel for the Department of Justice. It is that record which is under scrutiny here.

One might agree with Mr. Nixon when he says that "the rights of society and defendants accused of crimes" must be maintained, that "the peace forces must not be denied the legal tools they need to protect the innocent from criminal elements," that "we can strengthen the hand of the peace forces without compromising our precious principle that the rights of individuals accused of crimes must always be protected." But we need not agree with his lawyer's lawyer, the nominee, that such methods as wiretapping, mass arrests, preventive detention, no-knock, abrogation of the rights of the accused, and the extension of executive privilege are desirable means of achieving these ends. The following catalogue of statements exemplifies a viewpoint which would necessarily be a part of the judging equipment the nominee would bring to the high Court.

In the *Civil Service Journal*, "Public Dissent and the Public Employee", January–March, 1971, vol. II, No. 3, p. 7, he wrote:

If Justice Holmes mistakenly failed to recognize that dismissal of a government employee because of his public statements was a form of restraint on his free speech, it is equally a mistake to fail to recognize that potential dismissal from government employment is by no means a complete negation of one's free speech.

The government as an employer has a legitimate and constitutionally recognized interest in limiting public criticism on the part of its employees even though that same government as a sovereign has no similar constitutionally valid claim to limit dissent on the part of its citizens.

In a speech before the Newark Kiwanis Club, he stated: In the area of public law that disobedience cannot be tolerated, whether it be violent or nonviolent disobedience. If force is required to enforce the law, we must not shirk from its employment.

In testimony on March 9, 1971, before the Senate Judiciary Subcommittee on Constitutional Rights, he stated:

While there is obviously no justification for surveillance of any kind that does not relate to a legitimate investigation purpose, the vice is not surveillance per se, but surveillance of activities which are none of the government's business.

. . . we believe that stringent physical and personal security measures can greatly reduce the risk of improper access and dissemination so that it poses no greater threat to personal privacy than manual data storage.

From there he continued,

I think it quite likely that self-discipline on the part of the Executive Branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering. No widespread system of investigative activity . . . is apt to be perfect either in its conception or in its performance. The fact that isolated imperfections are brought to light, while always a reason for attempting to correct them, should not be permitted to obscure the fundamental necessity and importance of federal information gathering, or the generally high level of performance in this area by the organizations involved.

. . . the Department (of Justice) will vigorously oppose any legislation which, whether by opening the door to unnecessary and unmanageable judicial supervision of such activities or otherwise, would effectively impair this extraordinary important function of the federal government.

In testimony on March 17, 1971, before that same subcommittee, he stated:

I do not conceive it to be any part of the function of the Department of Justice or of any other governmental agency to survey or otherwise observe people who are simply exercising their First Amendment rights.

When you go further as, say: 'Isn't a serious constitutional question involved?' I am inclined to think not. . . . This practice is undesirable and vigorously should be condemned, but I do not believe it violates the particular constitutional rights of the individuals who are surveyed.

In response to a question by Senator Ervin asking if surveillance tended to stifle the exercise of First Amendment rights, Rehnquist replied:

No. When the Army did this—and it apparently was generally known that they were doing it—about 250,000 people came to Washington on two occasions to protest the President's war policies.

In a speech entitled "Privacy, Surveillance, and the Law" delivered March 19, 1971, he commented:

The argument in support of the contention that information gathering *per se* may violate First Amendment rights is that such information gathering may have a 'chilling effect' on the exercise of First Amendment freedom.

I have previously stated my belief that the First Amendment does not prohibit even foolish or unauthorized information gathering by the government.

In remarks before the Federal Bar Association presented September 8, 1970, he observed:

The free-speech guarantee of the First Amendment is probably the best known provision of our Constitution. It is entirely proper that this is so, since the right of freedom of expression is basic to the proper functioning of a free, democratic society. Less well-known but, equally important, are those restrictions on complete freedom of speech which result from the balance of competing interests in the jurisprudential scale—the need to preserve order, the need to afford a remedy to the innocent victim of libel, the need of government to govern.

There is a tendency on the part of young people entering the government service to feel that they should have complete and unrestrained freedom to speak out on political and policy matters, regardless of how detrimental their speech may be to government programs in general or to the proper functioning of their own assigned responsibilities within the departments.

In a speech titled "Law Enforcement and Privacy to the American Bar Association panel in London on July 15, 1971, he defended government wiretapping under court order in criminal cases, and without court order in national security cases, both domestic and foreign:

Is the invasion of privacy entailed by wiretapping too high a price to pay for a successful method of attacking this and similar types of crime? I think not, given the safeguards which attend its use in the United States.

In a statement for the Arizona Judicial Conference of December 4, 1970, titled "Official Detention, Bail, and the Constitution", he remarked:

. . . . minimizing the use of money bond does not eliminate the social need to detain those persons who pose a serious threat to the public safety.

I believe that society has the right to protect its citizens, for limited periods through due process procedures from persons who pose a serious threat to life and safety. We do not believe a free society can remain free if it is powerless to prevent wanton misconduct by dangerous recidivists during pretrial release. I believe the pretrial detention provision of the D.C. Crime Bill accomplishes this result in a manner entirely consistent with the spirit and letter of the U.S. Constitution.

With the plethora of rights recently granted him by the U.S. Supreme Court, the criminal defendant can and does do a good deal more than merely present evidence at trial. He attacks by motion and writ every phase of the proceedings against him, with the result that the time between indictment and trial has been necessarily lengthened.

Those opposing pretrial detention assert two constitutional arguments, one based upon the Eighth Amendment and one based on the due process clause of the Fifth Amendment. Neither provision, in my opinion, bars the enactment of pretrial detention provisions in anti-crime legislation.

In balancing the interest of the individual and those of society, I think that the pretrial detention concept represents a rational and constitutional solution to a complex problem.

In a statement before the Subcommittee on Constitutional Rights in 1971, he remarked on S. 895, the Speedy Trial Act of 1971 which would guarantee trials within sixty days, that ". . . this provision is not only draconic, but quite one-sided in its sanctions". The sanctions for the defendant are cited below:

First and foremost of these . . . would be an effort by statute to modify all or part of the exclusionary rule which now prevents the use gainst a criminal defendant of evidence which is found to have been obtained in violation of his criminal rights.

He contended that a system which would permit "a convicted defendant to spend the next ten or twenty years litigating the validity of the procedures used in his trial, is a contradiction in terms". Furthermore, he commented:

". . . the total lack of finality to any judgment of criminal conviction, so long as the prisoner may conceive some new claim of violation of his constitutional rights which occurred at this trial, is itself an affront to the notion of a system which promptly administers criminal justice. Under present practice, either a state or federal prisoner may relitigate again and again the validity of procedures used to convict him, so long as he can think of some new constitutional argument which has not been directly disposed of adversely to him in the rulings on his past petitions.

The Department believes that the modification of the federal habeas corpus statute, in order to more effectively screen out genuinely serious constitutional

violations from the mass of frivolous and technical petitions now filed, is an essential element in the search for the prompt administration of criminal justice.

In those same hearings, he remarked on habeas petitions:

". . . it has been availed of time after time to relitigate issues which not only have nothing to do with the guilt or innocence of the defendant, but nothing to do with the underlying fairness of the fact finding process by which he was found guilty.

In a speech delivered May 5, 1970, at Appalachian State University in Boone, North Carolina, he defended the Mayday arrests:

". . . the doctrine which there obtains is customarily referred to as 'qualified' martial law. In that situation the authority of the nation, state, or city, as the case may be, to protect itself and its citizens against actual violence or a real threat of violence is held to outweigh the normal right of any individual detained by governmental authority to insist on specific charges of criminal conduct being promptly made against him, with the concomitant right to bail or release pending judicial determination of those charges. The courts limited the duration of the power to the duration of the emergency, however, and have also insisted that the claim of violence be not a mere sham.

Police officials, he defended, "have the authority to detain individuals during the period of an emergency without being required to bring them before a committing magistrate and filing charges against them".

In a speech at the University of Arizona on April 22, 1970, he commented on *Miranda v. Arizona*:

I submit it is not at all unreasonable to suggest that the government, if it felt the occasion warranted such action and especially if it were acting under a mandate from Congress, would be entirely within the role allocated to it under the adversary system if it were to ask the Supreme Court of the United States to overrule the decision in Miranda v. Arizona. . . .

I say this not to indicate that such a request should be made or will be made, but simply to point out that under our system the United States, no more than any other litigant is required to accept any particular decision of the Supreme Court in the field of constitutional law as *stare decisis*.

In a Justice Department memorandum of September 5, 1969, on Clement Haynsworth, he wrote:

The legal and ethical question raised by these facts is whether a judge, who owns stock in one corporation should disqualify himself when the second corporation is a party litigant in his court. . . .

. . . It is clear from the facts presented that the Deering-Milliken officials who dealt with vending machine suppliers had no idea that Judge Haynsworth had any connection with any of these companies. As a matter of common sense, as well as of law, it is not possible to identify any conceivable effect that a decision one way or another in the Darlington case would have had on the fortunes of Vend-A-Matic.

There is no doubt in my mind that these (court) precedents support the conclusion, equally readily reached on common sense ethical considerations, that Judge Haynsworth ought not to have disqualified himself in the Darlington case. While the spirit as well as the letter of the statute and canons must be faithfully applied, questions of disqualification are to be decided in exactly the same manner as a judge decides substantive legal questions which regularly come before him.

In the *New York Law Review* in an article titled "The Constitutional Issues—Administration Position," vol. 45, 1970, p. 628, he wrote:

First, may the United States lawfully engage in armed hostilities with a foreign power in the absence of a Congressional declaration of war? I believe that the only supportable answer to this question is "yes" in the light of our history and of our Constitution.

Second, is the constitutional designation of the President as Commander-in-Chief of the Armed Forces a grant of substantive authority, which gives him something more than just a seat of honor in a reviewing stand? Again, I believe that this question must be answered in the affirmative.

Third, what are the limits of the President's power as Commander-in-chief, when that power is unsupported by congressional authorization or ratification of his acts? . . . But I submit to you that one need not approach anything like the outer limits of the President's power, as defined by judicial decision and historical practice, in order to conclude that it supports the action that President Nixon took in Cambodia.

In the Arizona Law Review article, "The Old Order Changeth: The Department of Justice under John Mitchell," vol. 12, 1970, p. 251, he stated.:

Attorney General Mitchell, on the other hand, has felt that the Department of is but one of the several instrumentalities engaged in the process of administering criminal justice, and that under our adversary system the role of the Department is basically that of advocate for the prosecution.

In testimony of October 5, 1971, before the Senate Judiciary Subcommittee on the Separation of Powers on increasing the authority of the ASCB, he asserted: . . . It is my opinion that the order was a valid exercise of powers that Congress has specifically conferred upon the President. The order cannot therefore be considered in any sense as a usurpation of the powers of Congress. . . .

Congress has given the President by statute responsiblity for making regulations for the employment of individuals by the Civil Service, and of ascertaining the character and ability of federal job applicants. . . .

Congress has also by statute given the President power to delegate functions vested in him by law to any department or agency in the executive branch. . . .

What President Nixon has functionally accomplished by the Executive Order is simply to transfer from the Attorney General, where it previously resided, to the Subversive Activities Control Board the function of listing organizations for the information of federal employing agencies. As noted, this is part of a function which, in the absence of delegation by him, Congress has by law confided to the President.

Testifying on April 1, 1971, before the House Judiciary Subcommittee No. 4, Mr. Rehnquist remarked:

The desirability of obtaining some such declaration of policy in the Constitution outweighs the disadvantages of this particular proposal . . . (but) would not be a substitute for legislation. . . .

It may well be that the Supreme Court will likewise broaden its past interpretations in this area. Certainly even a modest expansion of the 14th Amendment decisions dealing with sex would obviate the more egregious forms of differences of treatment which result from governmental actions. With this prospect of expanded constitutional protection of women's rights without the necessity of an added constitutional provision, the committee might conclude that it should await resolution of the cases before it by the Supreme Court of the United States, in order to see whether there is a substantial area of different treatment of men and women which is not prohibited under the Constitution, but with respect to which there is a national consensus in favor of prohibition.

In testimony of June 15, 1964, before the Phoenix City Council on the topic of public accommodations ordinance for that city, he declared:

I am a lawyer without client tonight. I am speaking for myself. I would like to speak in opposition to the proposed ordinance because I believe the values it sacrifices are greater than the values it gives.

I venture to say there has never been this sort of an assault on the institution (of private property) where you are told, not what you can build on your property, but who can come on your property.

What has brought people to Phoenix and to Arizona? My guess is no better than anyone else's but I would say it's the idea of the lost 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.

Concerning that same ordinance, he wrote, in a letter to the editor of the *Arizona Republic* of June, 1964:

I believe that the passage by the Phoenix City Council of the so-called public accommodations ordinance is a mistake.

The ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theatre to choose his own customers . . . 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 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."

Unable to correct the source of the indignity of the Negro, it redresses the situation by placing a separate indignity on the proprietor.

On the subject of Phoenix's proposed school integration plan, the nominee wrote, in a letter to the editor of the *Arizona Republic* of September 9, 1967:

We are no more dedicated to an "integrated" society than we are to a "segregated" society. We are instead dedicated to a free society, in which each man is equal before the law, 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 as 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 minority 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.

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

On the subject of G. Harrold Carswell's nomination, he wrote in a letter dated February 14, 1970, to *The Washington Post:*

My criticism of your editorial, however, goes beyond these misimpressions. The Post is apparently dedicated to the notion that a Supreme Court nominee's subscription to a rather detailed catechism of civil rights decisions is the equivalent of subscription to the Nicene Creed for the early Christians—adherence to every word is a prerequisite to confirmation in the one case, just as it was to salvation in the other. 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 because of a judicial philosophy which 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 over-all constitutional conservatism, rather than to any animus directed only at civil rights cases or civil rights litigants.

Regarding the Warren Court, he remarked in an article printed in *U.S. News and World Report* of December 13, 1957 (vol. 13):

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.

On that same topic, he wrote in an article printed in the *American Bar Association Journal,* "The Bar Admission Cases: A Strange Judicial Aberration", vol. 229, 1958:

A decision of any court based on a combination of charity and idealogical 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 the local trial judge becomes nothing less than a constitutional transgression when enunciated by the highest court of the land.

On the subject of progressives, he was quoted in a *New York Times* article of May 2, 1969 on page 1 as saying:

I suggest to you that this attack of the new barbarians constitutes a threat to the notion of a government of law which is every bit as serious as the 'crime wave' in our cities . . . the barbarians of the New Left have taken full advantage of their minority right to urge and advocate their views as to what substantive changes should be made in the laws and policies of this country.' "

Mr. Rehnquist is cited at length to illustrate an outlook on life, a view of the world which is too narrow, too ill-suited to the times and clearly out of step with the new responses that have emanated from the Courts in an attempt to harmonize age old challenges that require constitutional interpretation. Although it could be argued that no one of these statements taken alone presents a serious threat to civil rights and liberties, it is maintained that they, taken as a whole, reveal a philosophy so rigid and conservative that it cannot help but have a chilling effect upon those who have struggled so valiantly to achieve the small gains made in the last seventeen years under a system of law which has grudgingly given support and shelter to those legal doctrines that enshrine the First Amendment.

We are presently witnessing increasing numbers of violent acts of state terror in America. The over-reaction of law enforcement officers in Watts, Newark and Detroit. The massacres at Kent State, Jackson State and Orangeburg. The tragedies at Attica and San Quentin are current examples of attempts to spread a psychology of fear among oppressed ethnic groups who are demanding power and freedom. And so, nearly 200 years after the establishment of this government, the

contradictions and antagonisms have become regulated and institutionalized, but not eradicated.

The question becomes then whether the Constitution will be used to moderate the conflicting racial and economic struggle in America and keep it within the bounds of law and order, or whether it can be used as a document to lead us to a unified, harmonious and peaceful society. To reconcile traditional antagonisms rather than regulate them is the new challenge confronting the Supreme Court of the land. What are we to say of an individual nominated for the highest Court who views the Constitution with an ante-bellum eye, who sees the gigantic steps forward by the Court as requiring two giant steps backward and one whose philosophy if it had been consistently applied since the inception of the Republic would by now have left us with very little progress in the areas of civil rights and civil liberties. A careful study of these excerpts from Mr. Rehnquist's remarks reveals a clear call for the curtailment of due process, of habeas corpus and of freedom of speech. You will find the justification for wiretapping and other surveillance. The expressed fear of nonviolent disobedience is to be met by force. It's all there—the defense of Haynesworth, the SACB and the handling of the Mayday demonstrators. The real question is: Can this country afford at this perilous time in its history an individual on the Court with an ideology so out of tune with the times that if his philosophy should prevail, even in part, it would threaten to tear at the slender threads now holding us together? Make no mistake about it, the Court is viewed as the last hope by millions of Americans—especially Blacks and other oppressed minorities. Short of the ultimate fulfillment of the American dream, that hope must be maintained. Holding our society together may well depend on maintaining the faith, which still survives even among the most disaffected, that in our highest courts there may still be found equal justice under law. We can ill-afford to move backward at a time when we are moving forward at a dangerously slow rate.

The Senate should not confirm or fail to confirm this nomination because of a threat from any segment of our society, but it must recognize the consequences of its actions. In considering the nomination of Mr. Rehnquist, we might consider the words of Robert Frost:

> The woods are lovely, dark and deep,
> But I have promises to keep,
> And miles to go before I sleep,
> And miles to go before I sleep.

And, we have promises to keep in maintaining a Court which is responsive to a changing America and we dare not sleep—not now.

The Senate has not only the responsibility to advise and consent on Presidential nominations to the Court, but has the obligation to examine the candidate's fitness in relation to the potential harm he may do the country. Again, as Charles L. Black has observed:

> . . . 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 doing so.

Because there are reasonable grounds to believe that the views of William H. Rehnquist are inimical to the best interests of this nation, the Senate is respectfully urged to advise the President negatively on this nomination.

Senator HART. I take it that in addition to your prepared statement you are saying "Amen" to what Mr. Clarence Mitchell and Mr. Joseph Rauh advised the committee during the period you and Congressman Clay were present, is that right?

Mr. CONYERS. That is correct.

We did additionally have an opportunity to review the statement, and we would adopt it as our own.

We would like to point out that it is not necessary to find a member of the Klan or Birch membership lurking in the closets of a nominee to reach the point that disturbs us so much. That is to say, obviously conduct of that magnitude would reduce the inquiry of this committee

to a rather nominal function but the problem that confronts us here, and confronts us in a number of the nominations that the Senate must decide upon, are rarely that easy.

Usually it will require a careful review of all the statements of a nominee, all of his acts, the totality of his conduct put into perspective of the time and the period and the situation under which it occurred.

We do not have any trouble whatsoever, Mr. Chairman, and members, in saying that in applying a reasonable and fair test in the world view, into the outlook of this nominee, that the positions that he would espouse from the Court, based on what he has said and done in his capacities in public life up until now, could clearly indicate to us a danger as certain as if we found some obviously compelling evidence that would disqualify him by its revelation.

Senator HART. Thank you, gentlemen. You watch us every day and we pretend we think we can get into the shoes of a black American or see life as a black American sees it and we know we are kidding ourselves. This does not excuse us from making the effort, but having testimony from you, speaking for the black caucus, is an enormous help. Thank you.

Mr. CONYERS. Mr. Chairman, may I point out that there is yet another statement coming from precisely the same people. If there are no questions that would be put to us on the nomination of Mr. Rehnquist, then concerning the statement on the other nominee, I would raise the question with the Chair with respect to the hour and whether it would be best presented at this point or at another time or under whatever procedure these hearings are being conducted.

Senator BAYH. While the Chair is deciding that, may I ask one question of our witness?

First of all, we appreciate the fact that although the Constitution does not technically give the "other body" a voice in the nominating process, this is not the first time that those of you in the House who are deeply concerned about this area of human rights felt compelled to make what I feel have been significant contributions to the deliberative process in the Senate as we look over the nominations and I am glad you have done so.

Do you, any of you, have any specific information pro or con relative to some of these specific issues that you have heard us discuss with Mr. Mitchell and Mr. Rauh as to Mr. Rehnquist's position on the equal accommodations matter, the school desegregation matter, or the voting practices, the allegations that certain types of intimidation were utilized against the minority, or can you give us any specific instances, or any specific evidence that would further elaborate on what has been said in this area?

Mr. CONYERS. Senator, we do not have any factual or firsthand information that would shed any light on the questions that you raise. I am hopeful that you will, in addition to that, perceive that the questions that we raise do not really require that.

We are perfectly satisfied and willing to accept the nominee on the basis of his public statements that he chooses not to separate himself from his official capacities. Just as you and I have our public records which we would find very difficult to separate from us, I presume the same applies to him.

I am perfectly willing to assume that it was upon that basis that not only the President saw fit to nominate him but that he would ask us to see fit to evaluate him.

Senator BAYH. Of course, I am sure you recognize that there might well be a distinction between the information or evidence necessary to convince us personally, and that, once having been convinced personally that a certain cause is just or a certain nominee is qualified or unqualified, needed to explore the whole record to find whatever evidence might be available so that others might share our belief. It is in that direction I asked the question but I appreciate your comment.

Mr. CLAY. Senator, I think that when you read our whole position paper you will find that the underlying basis for our opposition to Mr. Rehnquist is based primarily on his judicial philosophy, and what we are saying in effect is that when judicial philosophy becomes a primary basis for nominating a person to the Supreme Court that it also must become the primary consideration for this Senate in confirming that person for the Supreme Court, and it is our contention that any person who has a documented history of anticivil rights positions, and anticivil liberties positions and philosophies is unequivocally unqualified to sit on the Supreme Court of the United States.

It was in that light that we prepared this position paper, and are presenting it to you.

The CHAIRMAN. Now, as I understand it, you want to testify against the other nominee.

Mr. CONYERS. Mr. Chairman, we would be willing to defer this. We are prepared——

The CHAIRMAN. I would rather go on; let's clear this whole thing one way or another.

If you are prepared to testify, proceed.

Mr. CONYERS. Very well, thank you.

Mr. Chairman, would you excuse my colleague, Mr. Clay, who is attending on behalf of myself a meeting of the black caucus. His presence is urgently required.

Mr. Chairman and members, I will read only briefly from the prepared testimony. I ask to have the entire statement included in the record.

The CHAIRMAN. It will be admitted.

Mr. CONYERS. In considering the nomination of Mr. Louis F. Powell or in fact any other nominee to the Court, I do not think anyone would deny the Presidential prerogative of examining a potential candidate's philosophy before placing his name before the Senate for confirmation nor is there any requirement of the type of philosophy a nominee should espouse. But it also follows that there is nothing to preclude the Senate from laying bare that nominee's predilections, but even more than that, it has a responsibility to do so.

May I point out that many of the Founding Fathers feared that nominal "advice and consent" of the Senate on nominations to judgeships would create a dependency of the judiciary on the Executive.

It was their intent to make the judiciary independent by insisting on joint action of the legislative and executive branches of each nomination.

Consequently, again it has been pointed out with relation to the Senate's constitutional duty in advising on presidential nominations 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 doing so."

I trust that the distinguished members of this body will not regard it as presumptuous if I reiterate the basis upon which the approach ought clearly to be made in terms of the evaluations and the weighing of credentials and the examinations of a nominee.

It is obviously a heavy responsibility, it is burdensome, but I think that not to be looking carefully at the world view of the outlook that has developed through the nominee's own set of experiences is to omit and eliminate a very wide and important part of your responsibility in making the decision as to whether to advise the President favorably or unfavorably with regard to the nomination.

Competency as a legal technician is not sufficient cause for appointment to the Supreme Court. Since judges by definition must sit in judgment, exercising what Oliver Wendell Holmes called the "sovereign prerogative of choice," they must bring more to their task than a highly specialized technocracy. What a judge brings to bear upon his decision is the weight of his experience and the breadth of his vision, as well as his legal expertise.

In the words of Felix Frankfurter, a Justice ought to display both "logical unfolding" and "sociological wisdom." Or, as Henry Steele Commager put it: "Great questions of constitutional law are great not because they embody issues of high policy, but of pub ic good, of morality." Similarly, great judicial decisions are great not because they are brilliant formulations of law alone, but because they embody high-mindedness, compassion for the public good, and insight into the moral implications of those decisions.

With that background we would urge a careful consideration of the nominee, and suggest that such consideration might lead to a negative vote and a rejection of his nomination on the part of the Senators here and in the body as a whole.

You see, for the past few days the press and the supporters of the nominee have been treating us to a view of Mr. Powell which would have us believe that he was the champion of the successful, gradual integration of the Richmond school board, and presided over the "successful, disturbance-free integration of the city's schools in 1959."

While it is true Mr. Powell sat on the school board of the city of Richmond from 1950 to 1961, serving as its chairman during the last 8 years of that period, something less than successful integration took place.

The opinion of Circuit Judge Boreman, a distinguished member of the court not noted for his liberal views, in a case entitled *Bradley* v. *School Board of the City of Richmond, Virginia*, participated in by distinguished counsel who sits here with me, clearly documents the fact that in Richmond, only a matter of months after Mr. Powell had

left the city school board, after serving as a member and chairman all those years, the court in the case found a "system of dual attendance areas which has operated over the years to maintain public schools on a racially segregated basis has been permitted to continue."

What the very words of the U.S. Court of Appeals, Fourth Circuit, indicate beyond any doubt is that Mr. Powell's 8-year reign as chairman of the Richmond School Board created and maintained a patently segregated school system, characterized by grossly over crowded black public schools, white schools not filled to normal capacity, and the school board's effective prepetuation of a discriminatory feeder or assignment system whereby black children were hopelessly trapped in inadequate, segregated schools.

The entire text of the *Bradley* opinion is submitted for the record of these proceedings so that it may be carefully scrutinized by this committee and Members of the Senate in order that a more accurate view may be gained of the conditions that existed under the Powell administration.

(The opinion referred to follows:)

BRADLEY V. SCHOOL BOARD OF CITY OF RICHMOND, VIRGINIA

Minerva Bradley, I. A. Jackson, Jr., Rosa Lee Quarles, John Edward Johnson, Elihu C. Myers and Elizabeth S. Myers, Appellants,

v.

The School Board of the City of Richmond, Virginia, H. I. Willet, Division Superintendent of Schools of the City of Richmond, Virginia, and E. J. Oglesby, Alfred L. Wingo and E. T. Justis, individually and constituting the Pupil Placement Board of Commonwealth of Virginia, Appellees.

No. 8757.

United States Court of Appeals

Fourth Circuit.

Argued Jan. 9, 1963.

Decided May 10, 1963

Action by Negro pupils, their parents and guardians to require transfer of pupils from Negro public schools to white public schools and, on behalf of all persons similarly situated, for injunction restraining defendants from operating racially segregated schools. The United States District Court for the Eastern District of Virginia, at Richmond, John D. Butzner, Jr., J., ordered that individual infant plaintiffs be transferred to schools to which they had applied but refused to grant further injunctive relief and plaintiffs appealed. The Court of Appeals, Boreman, Circuit Judge, held that where a reasonable start toward maintaining nondiscriminatory school system had not been made, plaintiff pupils, on behalf of of others in class they represented, where entitled to injunction restraining school board from maintaining discriminatory "feeder" system whereby pupils assigned initially to Negro schools were routinely promoted to Negro schools and, to transfer to white schools, they must meet criteria to which white students of same scholastic aptitude would not be subjected.

Reversed in part and remanded.

Albert V. Bryan, Circuit Judge, dissented in part.

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Case of one of pupils who brought action to require transfer to pupils from Negro public schools to white public schools became moot, where he was assigned by Pupil Placement Board to integrated junior high school to which he had applied.