Mr. O'DWYER. I see. Thank you, sir.

The CHAIRMAN. Senator, you are not leaving the inference there that Mr. Rehnquist was in any way involved?

Senator BAYH. No; quite the contrary.

The CHAIRMAN. In any other election?

Senator BAYH. I wanted to make it very clear, first of all, that I concurred in your assessment of what was not in the FBI report.

The CHAIRMAN. That is right.

Senator BAYH. His name was not in the report.

The CHAIRMAN. I think we ought to bring it all out now. The FBI keeps a cross-reference, and any time a man's name is mentioned in any investigation, when they begin a full field investigation, they show it in there, but there is no election matter that his name was mentioned.

Senator BAYH. Other witnesses have suggested voting irregularities. I asked Mr. Rehnquist himself. I do not know of any other FBI reports, I suppose there are none, but inasmuch as the allegations—and they may be totally erroneous; I suggest they are until we have proved the contrary—but allegations have been made. I have here clippings alleging various allegations, and I think many—if not all—of these allegations are politically motivated, having nothing to do with this nominee. But these allegations cover elections from 1962, 1964, 1966, and 1968.

The only FBI report we have, and the only FBI report that I can attest to, is the one concerning Bethune precinct in 1962.

The CHAIRMAN. Well, of course, there has been a full field investigation of Mr. Rehnquist, and he certainly came through with flying colors.

Mr. O'Dwyer, how long do you want, sir?

TESTIMONY OF PAUL O'DWYER, ATTORNEY, NEW YORK CITY

Mr. O'DWYER. About a half hour, sir.

The CHAIRMAN. I'm going to trade with you; let us make it 20 minutes.

Mr. O'DWYER. I am afraid that I will be halfway through, and I was very much impressed by the dialog between the Senators and the witnesses today. I think they sharpened up the issues, and I would hope we would have similar dialog between myself and the committee.

The CHAIRMAN. I cannot promise you unlimited time.

Mr. O'DWYER. We will see how it goes along, Mr. Chairman.

The CHAIRMAN. Sir?

Mr. O'DWYER. We will see how it goes along.

The CHAIRMAN. All right.

Mr. O'DWYER. I am here at the request of the New York Americans for Democratic Action, to submit a statement to the Senate committee in connection with the candidacy of Mr. Powell for a position on the U.S. Supreme Court, and I would like to offer that without reading it, so we have saved about 10 minutes there, Mr. Chairman.

The CHAIRMAN. That will be admitted.

Mr. O'DWYER. I would like to express my thanks to the committee for the opportunity to speak in opposition to the nomination of Lewis F. Powell, Jr., to the Supreme Court of the United States.

I have noted, with a measure of chagrin, the list of supporters for President Nixon's latest nominees to the Court, Mr. Powell, of Virginia, and William H. Rehnquist, of Arizona. Both have been eloquent spokesmen for wiretapping and other insidious governmental techniques designed to stifle dissent and to challenge personal liberties guaranteed by the Constitution and the Bill of Rights.

Mr. Rehnquist is perhaps better known for his thoughts, which are, in my opinion, in complete and absolute contravention of the Constitution. But Mr. Powell also shares the same philosophy as his colleague from Arizona. The effect of the massive criticism of Mr. Rehnquist has had the unsettling effect of diverting attention away from Mr. Powell. From what I have learned and read, the distinction between them is one of style.

Because I have been involved lately in preparing the defense for Father Philip Berrigan and others who are charged by the Justice Department with having plotted to kidnap Presidential Aide Henry Kissinger and to blow up Government heating plants in Washington, I am acutely aware of that Department's use of electronic surveillance. The Justice Department, by the way, has already admitted to tapping, without a court order, the telephone of at least one of the defendants in the *Harrisburg* case.

In the October 1971 issue of "FBI Law Enforcement Bulletin," Mr. Powell, among other things, negates the threats to civil liberties—which many contend are very real—and with shocking disregard for due process, continues the lies about the Berrigans, which has poisoned the case since before even an indictment was handed down.

On behalf of my clients, and the thousands of other Americans—some of whom are Congressmen and Senators—who have been subject to illegal Government surveillance, it is vital that voices be raised against these insidious practices in general and Mr. Powell's nomination in particular.

But let me get back to the Powell article, which he originally wrote for the Richmond Times-Dispatch on August 1, 1971, and which was reprinted not only by the FBI, but also by the prestigious New York Times on November 3, 1971. There are, indeed, many constitutional questions raised in his article, "Civil Liberties Repression: Fact or Fiction." Allow me to present a few of his more salient pronouncements:

> The outcry against wiretapping is a tempest in a teapot. There are 210 million Americans. There are only a few hundred wiretaps annually.

The CHAIRMAN. Could we put that in the record now? It has been used a half dozen times by different people.

Mr. O'DWYER. It should not be used merely a half dozen times, Mr. Chairman.

The CHAIRMAN. All right.

Mr. O'DWYER. It should be used and used and used until every American hears it.

The CHAIRMAN. All right. Now you have got 10 minutes.

Mr. O'DWYER. I would object to a limitation of time, Mr. Chairman.

The CHAIRMAN. Well, I don't care what you object to. I have to have some order in these hearings to hear everybody.

Mr. O'DWYER. I would hope I am not too lengthy, and I think these are important enough for the Senate to hear, and I insist that I be permitted to speak from them. I represent clients who have been

maligned by the men whom you are going to vote for, and I insist on the right to be heard here. If I cannot be heard here, anywhere else——

The CHAIRMAN. You are not going to bluff us.

Mr. O'DWYER. Neither is the Chairman going to bluff me, sir.

The CHAIRMAN. I am not trying to bluff you.

Mr. O'DWYER. I hope not. It just is not going to work.

The CHAIRMAN. You only have 10 minutes.

Mr. O'DWYER (reading):

> There are only a few hundred wiretaps annually, and these are directed against people who prey on their fellow citizens or who seek to subvert our democratic form of government. Law-abiding citizens have nothing to fear.

Nothing to fear? Every citizen certainly does have something to fear when the rights of any one are diminished and when any branch of Government fails to honor the law. Chief Justice Warren has spoken clearly on the subject:

> Our Bill of Rights, [he wrote] the most precious part of our legal heritage, is under subtle and pervasive attacks . . . . In the struggle between our world and Communism, the temptation to imitate totalitarian security methods must be resisted day by day . . . When the rights of any group are chipped away, the freedom of all erodes.

Or, hear the thoughts of Herbert H. Lehman, the first U.S. Senator to publicly condemn a fellow Senator at an earlier era, who also claimed that law-abiding citizens had nothing to fear.

Lehman wrote:

> The threat to democracy lies, in my opinion, not so much in revolutionary change achieved by force or violence. Its greatest danger comes through gradual invasion of the Constitutional rights with the acquiescence of an inert people, through failure to discover that Constitutional government cannot survive where the rights guaranteed by the Constitution are not safeguarded even to those citizens with whose political and social views the majority may not agree.

Or, again, recall the exact wording of the fourth amendment. The authors of this amendment, prompted by Thomas Jefferson, held:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

I represent a number of defendants whose crime is their total opposition to a war which was unconstitutional in its inception and whom vast numbers of Americans, including Senators and Congressmen, have condemned as immoral as well as illegal and unwise. By Mr. Powell's pronouncement, their chances for a fair trial have been diminished. This, gentlemen, is unconscionable and I would hope that the Senators would question Mr. Powell again closely on this subject of great importance, not only to my clients but to all Americans and it must bear on his right to sit on our highest court.

In 1789, when the Constitution and the Bill of Rights were declared "in effect" by the Congress, each citizen was guaranteed the right of privacy. Constitutional scholars and the courts have long held that the right of the people to be protected against techniques, such as electronic surveillance, is inherent in the fourth amendment.

"A man is as safe in his home as a prince is in his castle," wrote James Otis, and neither man nor Government has any right to violate it without the due process of law. By his words, Mr. Powell rejects these sacred concepts.

Let me cite a court case having great bearing on the matter and scope of electronic surveillance. In *Katz* v. *United States*, 389, U.S. 347, 352, 1967, the Court, in a landmark decision, wrote:

Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any "technical trespass" under . . . the legal property "law." (Citing Silverman vs. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 682, 5L Ed 2d 734.)

Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

No less than an individual in a business office, or a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

The impression is being given to the public, by no less than the President of the United States, that new Supreme Court nominees are to reverse the trends developed by the Warren Court. This implies, for example, that outlawing interference into private conversations is the sole invention of the Warren era. But the history of the sacred right to privacy of the fourth amendment predates recent court decisions by two centuries and is deeply imbedded in American tradition. For one of the earliest challenges against unreasonable searches came when James Otis, a distinguished, brilliant patriot from Boston, argued in 1761 that under the writs of assistance, general authorizations for officers to break doors and ransack homes and stores was illegal "Upon the ground that they put the liberty of every man into the hands of every petty officer." Of Otis' denunciation of these flagrant violations to privacy, John Adams offered the following comment: "Then and there was the child liberty born."

And almost two centuries later, it became necessary for Congress to enact the Federal Communications Act of 1934, 47 U.S.C. 605, 1958, which prohibited under criminal penalties the interception and public divulgence of the contents of any wire communication or its interception and use for personal benefit. This provides coverage on both interstate and intrastate telephone calls. Evidence obtained must be suppressed in the Federal courts.

Back to Mr. Powell. He also writes that—

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

In an affidavit, Mr. Mitchell—who sees eye to eye with Mr. Powell—submitted to the U.S. District Court for the Middle District of Pennsylvania, on May 13, 1971, he made this startling admission pertaining to the Harrisburg case:

The surveillance of the telephone installation at the premises described was one authorized by the President, acting through the Attorney General and was deemed necessary to protect against a clear and present danger to the structure or existence of the Government of the United States. The decision to authorize such surveillance was based upon the information contained in a request of the Director of the Federal Bureau of Investigation which was considered in conjunction with the entire range of foreign and domestic intelligence available to the Executive Branch of the Government.

In other words, both Mr. Mitchell and Mr. Powell claim that the President is above the law, the Constitution, and the fourth amendment whenever Mr. Hoover claims the facts constitute "a national security case."

However, our Constitution provides a system of checks and balances to protect the citizen against any excesses of the executive branch. The Supreme Court and Congress provide that balance. But Mr. Powell would not assist in supplying that check. He has already taken sides with the executive branch. On the Court, he would be but their echo. And I contend, gentlemen, that the U.S. Senate should question Mr. Nixon's nominee to discover to what extent he will be the mouthpiece of the retrogression of this administration.

The question presented is not a differing legal philosophy but concerns deep-rooted commitments. The question is whether the new judge could possibly, in view of his firm positions, be an appropriate member of the judicial branch of Government, acting to protect the rights of citizens against the inroads of either the administrative or legislative branches of Government in contravention of the citizens constitutional rights. Mr. Nixon says he will not speak to the new jurist nor seek to influence his opinion. On the basis of the views openly expressed by Mr. Powell, briefing by the President would be totally unnecessary.

In the Omnibus Crime Act of 1968, 18 U.S.C. 2510, Congress recognized and sought to protect the privacy of telephone conversations and communications; 18 U.S.C. 2515 provides—

> Whenever any wire or oral communication has been intercepted, no parts of the contents of such communication and no evidence derived thereon may be received in evidence in any trial * * * If the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2516 reads:

> The Attorney General * * * may authorize an application to a Federal judge of competent jurisdiction for * * * an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or by a federal agency having responsibility for the investigation of the offense as to which the application is made * * *

So, as late as 1968, the Congress reaffirmed our most basic concepts of the law and the fourth amendment. If Mr. Powell is confirmed by the Senate, I believe all of us will wonder whether he will reaffirm what has been basic to this country from its earliest times, or lean toward the more recent efforts to whittle those rights until the words become meaningless rhetoric.

Getting back to the Powell article, let me cite another paragraph which challenges another basic constitutional right, the right to a free trial. Mr. Powell writes—

> The radical left, with wide support from the customary camp followers, also is propagandizing the case of the Berrigans.
>
> The guilt or innocence of these people remains to be determined by juries of their peers in public trials. But the crimes charged are hardly 'political.' In the *Davis* case, a judge and three others were brutally murdered. The Berrigans, one of whom stands convicted of destroying draft records, are charged with plots to bomb and kidnap.

As one of the attorneys for Father Philip Berrigan, I must condemn this statement both as an untruth and a flagrant violation of the defendants' right to a fair trial. For what Mr. Powell has done is to add his comments to the already building number of newspaper clippings and radio and television tapes, filed under the subject of prej-

udicial pretrial publicility. The Government, headed by J. Edgar Hoover and John Mitchell in the beginning, and now Mr. Powell, are the primary culprits. What Mr. Powell has done is to perpetuate lies already festering like cancer sores on the very Constitution he claims to cherish. Allow me to elaborate:

On November 27, 1970, J. Edgar Hoover issued a statement to the press, justifying his appeal to a Senate committee for $14 million to hire additional FBI agents. Mr. Hoover wrote—

> Willingness to employ any kind of terrorist tactics is becoming increasingly apparent among the extremist element. The principal leaders of this group are Philip and Daniel Berrigan * * * The plotters are also concocting a scheme to kidnap a highly placed government official.

That was the opening gun, so to speak, of the Harrisburg indictment, the most recent case of which Father Philip Berrigan is one of the defendants. Two days after Mr. Hoover's pronouncements, the press had the rest of the news. The highly placed official was Presidential adviser Henry Kissinger. It takes little imagination to foresee the height of public interest generated by these announcements. All media, responding as they could be expected to respond, blasted the news across the country, including Harrisburg, Pa.

Almost immediately after Mr. Hoover's statements, a distinguished Congressman, the Honorable William Anderson of Tennessee, requested in no uncertain terms that Mr. Hoover either apologize for bandering the names of Father Philip and Father Daniel Berrigan, or produce evidence for an indictment. About a month later, an indictment was handed down, listing Father Philip Berrigan as a defendant and Father Daniel Berrigan as a coconspirator. But the indictment only brought further questions about Mr. Hoover's capacity, and in the spring a superceding indictment was handed down—this time all reference to Father Daniel Berrigan was removed altogether from the indictment.

It has been argued that the publicity had died down and Mr. Hoover's outrageous barrage might be forgotten. But Mr. Powell would not let that happen. His statement in a national newspaper and magazine would be unjustifiable even if true. The fact that it is demonstrably false makes it indefensible.

"The 'Berrigans'," wrote Mr. Powell this month, "one of whom stands convicted of destroying draft records, are charged with plots to bomb and kidnap." Father Philip Berrigan is a defendant in the *Harrisburg* case. As I said previously, Father Daniel Berrigan is not.

I am told that Mr. Powell stands highly recommended by the ABA, which he once headed. Last year, the same American Bar Association finally gave its attention to the problem, and published a report entitled, "The Prosecution Function and the Defense Function." Chief Justice Warren E. Burger was then the chairman of the advisory committee. An admonition contained in the ABA report presents this guide to prosecutors—

> The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

How the American Bar Association can reconcile its endorsement of Mr. Powell with his violation of its own lofty principle is difficult to understand. It would seem that a review of their decision by virtue of these disclosures would be a signal to all young practitioners that they may look to that august body for future inspiration.

Publicity associated with a case has held the interest of the courts in the *Sol Estes*, *Dr. Sheppard*, *Chicago 7*, *and Panthers* cases. Not only does Mr. Powell see no danger in pretrial publicity, but in violation of law and good practice does his share to pollute the Harrisburg atmosphere. I would think it right and proper for the Senate to question him on this subject in great depth.

The Reardon report, again of the American Bar Association, headed by Paul Reardon, associate justice of Massachusetts, was published in 1968. It dealt with free press and free trial questions. The preamble contained this paragraph:

> It is our belief that this accommodation (first and sixth amendments) will be found principally in the adoption of limitations—carefully defined as to content and timing—on the release of information bearing on the apprehension and trial of criminal defendants by members of the bar and by law enforcement agencies with appropriate remedies available when there is a showing that a fair trial has been jeopardized.

How can a man behave impartially on the bench when he has violated the basic concepts laid down by such a distinguished committee for the behavior of lawyers.

As to Mr. Powell's claim that my clients will receive a fair trial by "a jury of their peers," if they do——

The CHAIRMAN. We will have a 5-minute recess.

Mr. O'DWYER. What did you say, Mr. Chairman?

The CHAIRMAN. I said we were going to have a 5-minute recess at this point. You are excused.

Mr. O'DWYER. What did you say, sir?

The CHAIRMAN. I said you are excused.

Mr. O'DWYER. Is the 5-minute recess for the purpose of getting me out of the room?

The CHAIRMAN. No.

Mr. O'DWYER. I had one page left to go.

The CHAIRMAN. Go ahead, that is all right.

Mr. O'DWYER. As to Mr. Powell's claim that my clients will receive a fair trial by a "a jury of their peers," if they do, it will be with no help, but much hindrance, from the President's nominee.

In another phrase, Mr. Powell asserts that the "radical left, with wide support from the customary camp followers, also is propagandizing the case of the Berrigans."

I contend that this kind of name-calling of any accused yet to be tried not only lacks good taste, but is grossly inappropriate for one whose ambition includes appointment to our highest tribunal.

We have long been plagued with men in high places who render lip service to the Bill of Rights, but with every fiber undermine its effectiveness by seeking to limit its application. Mr. Powell falls into that category. Whatever may be his usefulness in an adversary proceeding, he lacks the commitment to the spirit of our personal guarantees which would entitle him to your approval. There is a requirement of a judge that he be temperate. That is, that he withhold his opinion until he at least has heard the facts. This would seem to be a minimum requirement for a justice of the peace. Sounding off on a case pending before the courts where the very question of the effect of publicity on a fair trial has been raised, would be enough to disqualify a candidate unqualified irrespective of his background or education or skill.

Washington, Jefferson, Franklin, Otis, and Paine are names that will forever be revered, not only here but wherever men meet to discuss freedom. These hallowed leaders laid down a set of rules and bid us follow them if we were to inherit from their sacrifice. Your function must be to guard their gifts for us and for posterity.

Thank you, Mr. Chairman.

Senator KENNEDY. Mr. O'Dwyer, I have no questions. Because of the exigency of time, we won't talk about the Irish Revolution today.

Mr. O'DWYER. I will be glad to take it up with you, Senator.

The CHAIRMAN. I have a statement. I announced this morning that I hoped before the day is over to put in the record some discrepancies that were inaccurate in the testimony on yesterday. We have not yet received the transcript of the testimony of yesterday afternoon; we have received that of yesterday morning. I am going to have to complain to the reporting service that it is their duty to get the transcript of the testimony up to the committee the morning following the testimony. But it will be done just as soon as we can receive it and go over the transcript of the testimony yesterday afternoon.

Thank you, sir.

Senator KENNEDY. Mr. Chairman, could I ask, are those items you just mentioned comments about both Mr. Rehnquist's and Mr. Powell's responses to these charges or allegations, or are they—what is the nature of it? Is the material being introduced now into the record?

The CHAIRMAN. No, sir. I said I did not have it.

Senator KENNEDY. Will it be in behalf of those gentlemen?

The CHAIRMAN. I am just going to point out discrepancies that I consider in the testimony yesterday.

John W. White. Proceed.

TESTIMONY OF JOHN W. WHITE, LEGISLATIVE DIRECTOR, NATIONAL ALLIANCE OF POSTAL AND FEDERAL EMPLOYEES

Mr. WHITE. Mr. Chairman and members of the distinguished Senate Judiciary Committee, I am John W. White, legislative director for the National Alliance of Postal and Federal Employees.

I am accompanied by Mrs. Celeste Gee, my secretary.

Mr. Chairman, at this point I would like to identify my organization as being a member of the Leadership Conference, and further state that we agree with the position that was taken by Mr. Clarence Mitchell and Mr. Joe Rauh yesterday in this room.

The Alliance is a national industrial union of 45,000 members who work for the U.S. Postal Service and other Federal agencies throughout America. Membership is made up predominately of blacks, females, and other minorities. It is black-controlled and came into existence in 1913 to resist a conspiracy between a white racist postmaster general and a white union to eliminate black Americans from the postal service. It is an independent union which addresses itself to the total needs of all postal and Federal employees, without regard to craft, race, color, sex, or national origin.

Fifty-eight years of struggle for civil rights and civil liberties have forced this organization to remain alert to all threats to the freedom of all American citizens, and that is our chief reason for being here today because of our concern.