Is that your feeling as to the appraisal of the opinions that you examined?

Mr. LAFITTE. That is correct, sir.

The CHAIRMAN. Now, as I understand, the American Bar has three ratings: well qualified—that's the highest; next, not opposed by the committee; and third, not qualified.

The American Bar, as I understand from you, recommends him as well qualified; is that correct?

Mr. LAFITTE. That is correct, sir.

The CHAIRMAN. Do you gentlemen of the committee recommend him to the Senate Judiciary Committee to be approved by this committee and the Senate?

Mr. LAFITTE. That is our recommendation, sir.

The CHAIRMAN. We are now going to take a recess until 2 o'clock. We have got some different votes coming up so we will come back at 2 o'clock. You gentlemen are excused.

[Whereupon, at 11:42 a.m., the committee adjourned, subject to the call of the Chair.]

AFTERNOON SESSION

[Whereupon, at 2 p.m., the committee reconvened, Hon. Strom Thurmond, chairman, presiding.]

The CHAIRMAN. The committee will come to order. It is 2 o'clock. Are there any Democratic staff members here? You might tell your Senators.

Is Senator Biden's staff member here, the ranking minority member? If so, I would like for you to call him.

[Pause.]

The CHAIRMAN. It looks like we are going to have to take a recess for 5 minutes.

[Brief recess.]

The CHAIRMAN. Judge Rehnquist, I would remind you that you are still under oath, Mr. Justice.

TESTIMONY OF HON. WILLIAM H. REHNQUIST, NOMINEE, TO BE CHIEF JUSTICE OF THE UNITED STATES

Justice REHNQUIST. Yes, Mr. Chairman.

The CHAIRMAN. We are going to alternate 20 minutes each. I will take 20 minutes, Senator Biden 20 minutes; then we will pass on to other members 20 minutes each.

We will turn the red light on at 19 minutes so they see they have 1 more minute to wind up.

Justice Rehnquist, since the announcement of your nomination to be Chief Justice of the United States, there has been much talk about the opportunity you will have to lead the Court in a new conservative direction.

Would you please tell the committee to what extent you believe that a Chief Justice can influence, if at all, the philosophical direction of the Court?

Justice REHNQUIST. Mr. Chairman, members of the committee, I think that the Chief Justice can exercise a certain amount of leadership on the Court, but I do not think it is apt to be in a philosophical direction.

Several of the cases this morning that were mentioned—*Brown* v. *The Board of Education*, the Nixon tapes case—were those kind of rare great cases where I think the Court develops a consensus that the opinion ought to be written by the Chief Justice, and there is a real institutional feeling that it ought to be unanimous, if possible.

You take another case like the steel seizure case, which was an equally important case, and there the Chief Justice was in a minority of three. The only way for him to have led the Court there would have been to change his own vote and make it 7 to 2. I do not think that is leadership to simply say that since you are outvoted you will change your mind.

I think the Chief Justice does have a couple prerogatives, again, that have been mentioned: the authority to lead the conference discussion and the authority to assign cases. And I think both of these, properly exercised, can lead to a smoothly functioning Court. But the idea that the power to lead the conference discussion to start off and be the first one to discuss means that the Chief Justice can pull the wool over other people's eyes by his discussion and make them think that green is blue, my 15 years on the Court convinces me that is not the case.

The same with the assignment power. The Chief Justice, by properly exercising the assignment power, can pick out the strengths and weaknesses of his colleagues, play on the strengths, avoid the weaknesses, and again, work toward a smoothly functioning Court.

But if the Chief Justice assigns the case to someone who feels very much the way he does about it, but not like the majority of the Court feels about it, the person to whom the case is assigned is not going to be able to get a Court opinion.

So I think the Chief Justice does have a leadership role, Mr. Chairman, but I do not think it has much to do with the philosophical direction of the Court.

The CHAIRMAN. Justice Rehnquist, we will again hear allegations today that you harassed voters in the polling place in the 1960's. This allegation has already been covered during your hearing in 1971 for Associate Justice.

At that time, you responded to questions concerninq these allegations and submitted a lengthy written rebuttal. However, a few individuals have now come forward, some 20 plus years later, with the same information.

There is nothing new that I am aware of regarding this matter. I reviewed the FBI report and found absolutely no new information to support these charges.

Justice Rehnquist, how do you respond to these allegations?

Justice REHNQUIST. In the absence of any more careful description of the allegations, I think I would say, Mr. Chairman, that I have reread very carefully the statement I made to the committee in 1971 and have absolutely no reason to doubt its correctness now.

The CHAIRMAN. Justice Rehnquist, in the past several decades, the caseload of the Supreme Court has grown rapidly as our laws have become far more numerous and complex. In an effort to reduce the pressures on the Supreme Court, an intercircuit panel was proposed to assist the Court in deciding cases which involve a conflict among the judicial circuits.

The Judiciary Committee on June 12, 1986, approved legislation establishing such a panel on a trial basis. As you know, Chief Justice Burger has been a strong advocate of this panel.

Would you please give the committee your thoughts on the current caseload of the Court and the need for an intercircuit panel?

Justice REHNQUIST. I would be happy to, Mr. Chairman.

I think we do need an intercircuit panel of some sort, and I so stated publicly, as has the Chief Justice. Different reasons have been assigned for it. There are nuances of differences, as I understand it, as to how the panel would be made up. But I think the basic problem is this: That for the last 50 years, the Supreme Court has never heard more than about 150 or 160 cases a year on the merits, as opposed to just denying certiorari. And I do not think any careful student of the Court thinks that the Court ought to try to hear more than 150 cases a year.

So that in this country right now, we have a nationwide decisionmaking capacity for questions involving Federal statutory law and constitutional law of 150 cases a year. Now, that just is not a large enough nationwide decisionmaking capacity, in my view, to accommodate the need to resolve conflicts among the circuits on statutory questions and to decide debatable, novel, constitutional questions.

Again, 50 years ago, the Court had roughly 800 petitions for certiorari which gives you some rough idea of how many cases the Federal courts of appeals and the State supreme courts were turning out.

Today, we have somewhere around 4,500 petitions for certiorari, an increase of almost sixfold, and yet the nationwide decisionmaking capacity is exactly what it was 50 years ago. I think we very badly need to increase that nationwide decisionmaking capacity by creating some version of the intercircuit tribunal to which your question refers, Mr. Chairman.

The CHAIRMAN. Justice Rehnquist, in a dissenting opinion in *Community Communications Company* v. *City of Boulder,* a 1982 case, you discussed the Federal preemption of the State law in the context of an antitrust challenge to certain actions by a municipal government.

Would you please tell the committee what in a general sense you perceive as the proper relationship between Federal and State law?

Justice REHNQUIST. Mr. Chairman, I think Congress is probably the ultimate decider as to what the proper relationship between State and Federal law is in most situations. Our Court has adopted various preemption doctrines which allow it to interpret whether or not in a given set of circumstances Federal law, which does not say so in so many words, nonetheless preempts State law. And I joined in a number of opinions to that effect, and it strikes me as a sound exposition of the doctrine.

But how much is going to be Federal law in any area in which the Congress power reaches and how much is going to be State law, really in the last analysis, depends upon Congress.

The CHAIRMAN. Justice Rehnquist, in 1976, an article which you authored entitled, "The Notion of a Living Constitution," appeared in the May 1976 edition of the Texas Law Review. This article ad-

dressed the issue of how the Constitution is to be interpreted by judges.

In recent years, the debate on this subject has increased, and a number of questions have been raised, such as: Are the words of the Constitution to be narrowly construed? What weight is to be given to the intent of the framers of the Constitution? Should the instrument be interpreted to conform with or adjust to conventional societal behavior or attitudes, and so forth.

Of course, a judge's philosophy on this type of issue obviously has a direct and substantial bearing on his or her decision.

Justice Rehnquist, would you please briefly summarize for the committee your views concerning constitutional interpretation by the judiciary?

Justice REHNQUIST. Mr. Chairman, I will certainly do the best I can within the limits of the constraints which I feel are on me.

As a sitting Justice of the Court, I may certainly refer to cases and perhaps try to describe them from memory, and I feel I can also perhaps, where I am informed, speak in fairly general terms. But I could not, of course, express any view on a question that might come before the Court or I could not attempt to say, well, you know, this case that was decided in 1980 will soon be interpreted, or maybe later be interpreted to mean such and such.

This may seem an overly simplistic answer to your question, but it is the kind of question that has to be answered either very shortly or ad infinitum because there are so many nuances.

I think a judge has the obligation, when sitting in a Federal system like ours under a written Constitution, to attempt to use every bit of information and every method he can in order to find out what the Constitution means.

Certainly a large part of this is the written word that the framers used, not the undisclosed intentions of the framers, but the words that they used.

Other useful things are the previous decisions of the Court which have always represented a decision by nine people—or at least nine since some time in the 1830's—who have taken the same oath of office that the then-sitting Justice had, and who presumably have done their best to figure out what it means.

And I think that is as good a short answer as I can give you.

The CHAIRMAN. Justice Rehnquist, a fundamental principle of American judicial review is respect for precedent, for the doctrine of stare decisis. This doctrine promotes certainty in the administration of the law, and yet at least 182 times in its history, the Supreme Court has overruled one or more of its precedents. More than half of these overruling opinions have been issued since 1950. Actually, 96 since 1950.

Justice Rehnquist, would you tell the committee what factors you believe attribute to this increase in overruling previous opinions?

Justice REHNQUIST. I will certainly venture my opinion, Mr. Chairman, although I have not done the research that I would like to do in order to make a more careful answer.

I think the biggest thing about the caseload of the Supreme Court in 1950 and the caseload today is the vast increase in the number of decisions involving constitutional questions. The principle followed by the Court following Justice Brandeis' opinion, I be-

lieve, in either the *Ashwander* or the *Burnett* case, is that stare decisis is a very fine rule of law, and it should virtually be unanimously adhered to when you are talking about construing a statute. But when you are talking about construing a provision of the Constitution where Congress cannot come back and change it if it feels the Court has made a mistake, then there is more latitude for overruling precedent.

I think that probably the reason there have been so many more overrulings since 1950 is that a much larger percentage of the Court's docket has involved constitutional cases.

The CHAIRMAN. Justice Rehnquist, the fourth amendment exclusionary rule was judicially created to prohibit admission of illegally seized evidence. However, the Supreme Court stated in *Stone* v. *Powell,* a 1976 decision, that the fourth amendment has never been interpreted to prescribe the introduction of illegal seized evidence in all proceedings or against all persons.

Recent decisions such as *United States* v. *Leon* and *Massachusetts* v. *Shepard* have recognized a good-faith exception as applied to search warrants.

Would you please briefly discuss the Court's recent approach toward narrowing the application of the fourth amendment exclusionary rule?

Justice REHNQUIST. Again, Mr. Chairman, I am on somewhat difficult grounds, because I think I can describe the holdings of the cases which you describe, and of course, I will be describing them from memory, and I should state very emphatically that it is the opinion of the Court in those cases that speaks authoritatively. My synopsis from memory may well have some errors in it.

But I also realize that you cannot at an oral hearing such as this simply point to a volume of the U.S. Reports and tell someone to go look at it.

So, in Stone against Powell, the Court held that——

The CHAIRMAN. Speak into your mike.

Justice REHNQUIST. Surely. I am sorry, Mr. Chairman.

When a fourth amendment claim had been fully decided against a criminal defendant in the State court system, that the same claim could not be renewed on Federal habeas corpus in an effort to have the State court decision set aside because of a violation of the exclusionary rule.

United States against Leon and Massachusetts against Shepard held—and I think it was only in the case of a warrant—that if there was a good-faith mistake on the part of the officer seeking the warrant and his conduct was objectively reasonable, although it turned out it was mistaken, that the exclusionary rule would not be applied in those cases.

The CHAIRMAN. Justice Rehnquist, division within the Supreme Court is increasing. Between 1801 and 1900, the average number of cases per term decided by a bare majority was one. The trend during this century has been one where the number of 5-to-4 decisions is ever increasing. In fact, in the just completed 1985 term, 37 cases were decided in whole or in part by five-to-four votes.

Justice Rehnquist, would you tell the committee what, in your opinion, has attributed to the increase in the bare majority decisions?

Justice REHNQUIST. Mr. Chairman, again, I will certainly venture an answer without having had the opportunity to look into it the way I might like to if I were to give a more comprehensive answer.

The staple of the Court's work in the 19th century was basically common law. Most of the cases were in the Federal system by reason of diversity of citizenship, and the principles were what were called general principles of common law. There were very few statutes involved.

That was in the days when being learned in the law had a very definite connotation. When you said a judge was learned in the law, it meant that he knew Story's Commentaries, and various other commentaries which were largely based on the common law. And so there was a good deal of unanimity of opinion in those days. There was not the sort of discussion, debate, and controversy that has come in the 20th century with difficult questions of statutory interpretation and, again, the increasing constitutional docket of the Court, where we deal often with fairly broad, general phrases, disagreements are natural as to their meaning, and as a result, there are going to be divisions that there were not when you were just dealing with the general common law.

The CHAIRMAN. Justice Rehnquist, at present, Federal judges serve during good behavior, which, in effect, is life tenure. Federal judges decide when they should retire and when they are able to continue to serve. Congress, in the Judicial Conduct and Disability Act of 1980, provided some limited ability for the judicial councils of the circuits to act with respect to judges who are no longer able to serve adequately, whether because of age, disability, or the like.

The Supreme Court is not covered by this act. Justice Rehnquist, do you feel the Supreme Court should be covered by the Judicial Conduct and Disability Act? And would you give the committee your opinion on the need to establish a constitutional amendment on mandatory retirement age for judges and justices?

Justice REHNQUIST. The first part of your question, Mr. Chairman, I think was whether the Supreme Court should be covered by the Judicial Conduct Act. There was a good deal of feeling, I think, among the lower court Federal judges that they had some reservations, as you might imagine, about the Judicial Conduct Act, though I think many of them agree that something of that sort may be necessary.

But I think with all respect to those judges, that if you are talking about even a judicial council determining that one of nine members of the Supreme Court is unable to serve and avoiding the impeachment requirement of the Constitution, that is something I would want to take a very, very long look at. And I think the way to do that would be to see how the Judicial Conduct Act works when applied to the judges to whom it is now applicable.

I think one should take a couple of very close looks before translating that to the Supreme Court.

The CHAIRMAN. For the information of the members who were not here when I made the announcement, we are allowing the members 20 minutes. The red light will come on after 19 minutes, so they will have 1 minute to wind up.

The distinguished Senator from Delaware.

Senator BIDEN. Thank you, Mr. Chairman.

Again, welcome, Mr. Justice, and it should be noted lest any of us lose our perspective here that you are on the Supreme Court and that you will be on the Supreme Court regardless of what happens in this hearing.

Mr. Justice, what I would like to do if I may is go back and cover a little ground that has already been covered by the chairman and maybe in a little bit more detail if I may in this first round.

Yesterday former Federal judge and former Attorney General Griffin Bell, in response to questions regarding whether or not there was a need for unanimity in certain occasions in Court decisions said, and I quote at page 96 of the transcript, "It would have meant"—referring to the Nixon tapes case—"It would have meant that the people often have doubt as to whether a Supreme Court decision is the law. And if it is a close decision, 5 to 4, or something like we have been getting in recent years, what we call the 'plurality opinion', people are not inclined to follow those decisions, and they do not know for sure what the law is."

Skipping down, still quoting, "The Brown decision was hard enough to carry out, and if it had been a divided Court, it would probably not have been carried out."

Continuing to quote, skipping a paragraph: "There are some of these cutting edge issues that face society."

Further on in Judge Bell's testimony, in response to a question, "Do you think that Justice Douglas would have been a good Chief Justice at the time he was on the bench?" the answer was that he would not have been a good Chief Justice. "That takes nothing away from his ability." End of quote.

Now, what I would like to know is whether or not you agree with Judge Bell's statements regarding how difficult the *Brown* decision would have been to carry out had there not been absolute unanimity, and whether or not you think Justice Douglas would have made a good Chief Justice.

Justice REHNQUIST. As to the first question, Senator Biden, certainly at the time I was a law clerk when *Brown* was first argued, there was talk about the South possibly shutting down the public school system. I would defer to Judge Bell's judgment, even if it did not coincide with mine, because he is from Georgia, and that is where the decision was going to be operative.

And then I would certainly add, yes, unanimity was certainly essential.

And as to Justice Douglas and the Chief Justiceship, I think I remember Judge Bell yesterday saying he did not think he would ever have accepted. And I think that is where I would rather leave it.

Really, I think if he had accepted it—he was a remarkably able person—if he had accepted it, I think he would have put his hand to it and done a good job. But I just do not think he ever would have accepted it.

Senator BIDEN. Let us talk about the *Brown* case a minute. In his book, "Simple Justice," Richard Kluger describes the very careful and deliberate process by which Chief Justice Warren worked to achieve a unanimous vote in the *Brown* decision. Do you agree with me that by reaching and engaging in that process, Chief Justice Warren was serving a critical function?

Justice REHNQUIST. Yes. I am not sure I have read the book in full that you mention. I have read a recent biography of Chief Justice Warren which certainly makes the same point, and I do agree.

Senator BIDEN. I would like to read a passage from the book, if I may, for you, where the author says, "The new Chief Justice was determined to create a unanimous ruling, but he knew Reed was very troubled," Justice Reed.

The Chief lunched with Reed 20 times between the first conference the Court held on the Brown case and early May. And finally, the Chief went to see him, and his former clerk, George Mickum,

M-i-c-k-u-m, Mickum, I believe that is the correct pronunciation,

who was on hand, summarized the meetings as follows,

quoting the clerk:

He said, "Stan, you are all by yourself in this now," Mickum recalls. "You have got to decide whether it is really the best thing for the country." He empathized with Justice Reed's concerns, but he was quite firm on the Court's need for unanimity on a matter of this sensitivity.

Mickum then discussed his conversation with Reed after the Chief left. "I think he was really troubled by the possible consequences of his position," Mickum added. "Because he was a Southerner, even a lone dissent by him would give a lot of people a lot of grist for making trouble. For the good of the country, he put aside his own basis for dissent."

My question to you, Mr. Justice, is whether you would have done what the Chief did, generally, in the case, and specifically, whether you would have gone to Reed and made those arguments.

Justice REHNQUIST. The question is very difficult to answer, Senator. Certainly, from the point of view of hindsight, realizing the importance of *Brown,* the importance of unanimity, one would like to say in answer to the question: "Yes, of course I would." And I think I can probably answer the same way, that if I had seen the thing, seen the case the way the Chief Justice did, and the need for unanimity, I certainly would have tried to persuade a last dissenting colleague that it would be better for the country to make it unanimous.

Senator BIDEN. Did you see the case as the Chief saw it at the time? You were there.

Justice REHNQUIST. I was not—I think——

Senator BIDEN. Not at the time of the decision, but you were there——

Justice REHNQUIST. I was there when it was argued for Chief Justice Vinson.

Senator BIDEN. Correct.

Justice REHNQUIST. You are asking me what I thought of it as a law clerk?

Senator BIDEN. Yes. At the time, did you see it as the Chief saw it, with regard to the merits of the case; and second, with regard to what the Chief, the later Chief, what the Chief later did on the second term that it was argued in——

Justice REHNQUIST. I do not know that law clerks think in terms of the need for unanimity, but I do not think I saw it as a law clerk as Chief Justice Warren later came to see it.

Senator BIDEN. How did you see it as a law clerk at the time?

Justice REHNQUIST. I thought that—putting myself back in 1952 as best I can—I thought that *Plessey* against *Ferguson* was wrong

in saying that when you segregate races by law you are not depriving anybody of equal protection. I also thought that *Plessey* against *Ferguson* had been on the books for 69 years, that the same Congress that promulgated the 14th amendment had required segregated schools in the District. I saw factors on both sides, I think.

Senator BIDEN. You graduated No. 1 in your class from Stanford Law School. You were picked as one of the most outstanding law graduates in America to clerk at the Court. And you obviously were not, although you were not a sitting Justice, you were a very, as you are now, a very, very bright person with as significant a legal background as you could have had at the moment. And you are unable to give me a more definitive answer as to how you felt at the time? Did you believe it was the wrong decision at the time?

Justice REHNQUIST. Did I think that *Plessey* was wrong?

Senator BIDEN. No. Do you think that the decision ultimately reached in *Brown* was the incorrect decision?

Justice REHNQUIST. When *Brown* came down?

Senator BIDEN. When *Brown* came down.

Justice REHNQUIST. No, I do not think I did, because when the Court went on record saying that, the stare decisis problem was gone.

Senator BIDEN. Isn't that somewhat a little bit of sophistry—well, let us—at the time you were writing for Jackson, did you believe that *Plessey* should have been struck down?

Justice REHNQUIST. I had not come to rest on that, Senator. I thought about it, and perhaps if I had stayed, if the case had been decided in the term I was there and I had seen circulating drafts, I would have come to a firmer conclusion than I now recall coming to.

Senator BIDEN. Mr. Justice, you know—you do not remember back as to that time, whether you had an opinion as to which way you would have ruled if you had been a judge? I mean, you are a clerk. I know as a young lawyer, just advising a senior partner, I had pretty firm views. I was not sure I was right or wrong, but I had pretty firm views about things that I thought that I had delved into deeply.

Obviously, the senior partner knew a great deal more about the case than I, but after doing hundreds of hours of research, as I am sure you did, hundreds of hours of research on this, I arrived at a conclusion in my mind. It maybe has changed in subsequent times, but at the moment, this was a question of phenomenal moment for the country, and it was realized as being such even during the time Vinson was alive, in the first term it was argued.

And are you telling me that you do not recall what your view was, nor did you form a view, as to whether or not the plaintiffs in *Brown* were correct in the case as argued before the Court when you were a clerk, sitting there at the same time the Court heard the decision?

Justice REHNQUIST. I have told you everything I recall about my views then, Senator.

Senator BIDEN. Would you tell me once more, then. I must have misunderstood them.

Justice REHNQUIST. Yes; that I thought *Plessey* had been wrongly decided at the time, that it was not a good interpretation of the

equal protection clause to say that when you segregate people by race, there is no denial of equal protection.

But *Plessey* had been on the books for 60 years; Congress had never acted, and the same Congress that had promulgated the 14th amendment had required segregation in the District schools.

Senator BIDEN. Therefore, you—is it reasonable—let us try to finish that thought. If you got that far, then it seems your conclusion must have been that it was the Congress' business, not the Court's, to change *Plessey*?

Justice REHNQUIST. Senator, I do not think I reached a conclusion. Law clerks do not have to vote.

Senator BIDEN. No, but they surely think.

Justice REHNQUIST. Yes, they do.

Senator BIDEN. I'll be darned. OK. Let me move on.

If you had been Justice Reed, with the obvious doubts which I am sure were known the first time the case was argued, clearly the second time the case was argued, if you had been Reed, holding the views that he did, would you have changed your position to make it a unanimous decision?

Justice REHNQUIST. I just do not think I can put myself in the position of Justice Reed. I think you can certainly say that he performed a service in doing what he did, and yet I do not think you can say that every time, even in a very important case, the Court stands 8 to 1, that you nonetheless ought to alter your view.

Senator BIDEN. No; I am not suggesting that. I am just talking about that specific case. I mean, it is not like, Mr. Justice, I am picking a case that you are not familiar with, and were not familiar with at the moment it was being discussed.

I know, for example, I have four former Supreme Court clerks who helped me prepare for these hearings. And all four of them remember with great pride and incredible clarity those decisions of moment that they participated in for their Justice at the moment. It is something a little bit like saying, "I was in the campaign of 1952 with Ike when he made the speech." It is the nature—those are things you do not often forget.

You were one of nine young women and men chosen in all of America to sit in what we lawyers know is the single most prestigious job you can be offered coming out of law school. And that is why it kind of surprises me that you did not have a firmer view of where the thing was or was going. That is——

Justice REHNQUIST. I was 1 of 18 men chosen at that time.

Senator BIDEN. Well, 18, not 9—I am sorry.

Justice REHNQUIST. And I might add, Senator, that things came to a stop so far as working on any drafts, I believe, the year I was there after the oral argument. It was not the kind of a situation where you would have followed the case through, seen the drafts circulate, see the opinion finally come down.

Senator BIDEN. It was also not one of those cases anybody felt was going to go away, was it?

Justice REHNQUIST. No, no, it was not.

Senator BIDEN. No. Let us move on for a moment, if I may. Let us take the flipside of this now, the Nixon tape case, which has been mentioned by Judge Bell and by me and by the chairman and others.

In the Nixon tapes case you had, in a strange sense, the reverse. You had a Chief Justice who had doubts about the wisdom of the decision as finally decided—the light is on.

The CHAIRMAN. One more minute.

Senator BIDEN. Well, why don't I reserve that. I will come back to Nixon later. He is back to us, so we might as well go back to him later. He waited long enough. I can wait. [Laughter.]

Thank you very much, Mr. Justice. I will do it in my next round.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. Justice Rehnquist, let's see if we can forget about all these other people in the room and just talk to each other as one lone dissenter to another, I have noticed the proliferation of dissenting opinions in the Court in recent years. Many very important cases that addressed crucial issues have been decided by coalitions of one sort or another in the Court. One side effect of these shifting coalitions has been a proliferation of individual views, which make it a little more difficult for Court watchers to analyze what is in fact the true judgment of the Court.

Do you think that this spate of individual opinions impedes the Court in carrying out its constitutional responsibilities?

Justice REHNQUIST. To a certain extent, Senator, I think I would have to say yes, although I am sure I have been a contributor on occasion, as have all nine of us, to what you refer to as something of a proliferation of individual opinions.

One of the previous witnesses—it may have been Mr. Lane—made the statement that when the Court comes up with a plurality opinion, or with a Court opinion in several concurring opinions, it just is not clear to judges in lower courts and perhaps to lawyers exactly what the law is. And that cannot be a plus.

There is a great tendency to feel—and I felt it myself, and I have followed the tendency myself, although I must say I try to restrain it lately—that so-and-so who is writing the Court opinion has not said it quite the way I think it should be said, and therefore, I will write this little concurrence; it will not harm anybody. Well, in fact, it does tend to muddy the message a little bit.

So I agree with you it is regrettable.

Senator MATHIAS. Those are temptations that are not exclusively present in the Supreme Court. We not only have the temptations here, but we succumb to them a good many times.

Is there anything that a Chief Justice can do in order to temper this problem?

Justice REHNQUIST. Senator, the Chief Justice can cajole or urge, as Chief Justice Warren did Justice Reed, but I have a feeling that when you get to the ordinary kind of case that it does not work very often.

I think one thing the Chief Justice can surely do is lead by example. That is, if the Chief Justice makes it a practice of not writing separately, except when he feels it is absolutely necessary, I think that then the Chief might have some weight in speaking to someone else and saying, "Look, do you really need to say this?" But if the person spoken to has the feeling it is the pot calling the kettle black, they will not get anywhere.

Senator MATHIAS. Do you think that is the basis of the questions that have been raised about your nomination? I believe it is Joe Rauh who has awarded you the title of "the all-time champion lone dissenter" He has implied that that record will make your leadership less effective.

Justice REHNQUIST. And you would like me to comment on it? [Laughter.]

Senator MATHIAS. What do we tell him?

Justice REHNQUIST. I will be happy to comment, Senator. It is rather easy to put together statistics showing A, B, C, or D if you choose the right year. I think certainly the early days of my tenure on the Court, I filed, quote, "lone," closed quote, dissents probably more often than any of my colleagues except Justice Douglas.

I think in the past 5 years, the statistics indicate that my colleague Justice Stevens has filed lone dissents more than I have. And I think that is an interesting example, because no one would contend that Justice Stevens is on either the right or the left wing of the Court; he is regarded as a centrist. And yet he has filed more lone dissents than anyone else. Sometimes it is not that you are way over on one side, but you may just disagree with the way the Court has reasoned through a rather fine point.

So I think if one were either in lone dissent or in dissent with two or three other people very, very frequently, it probably would have an effect on how you are able to perform as Chief Justice. But the statistics I have just referred to, it seems to me, indicate that I should not have any great problem.

That does not mean there will not be an occasional lone dissent.

Senator MATHIAS. As Senator Biden has observed, you are already a member of the Supreme Court. Thus, are not discussing whether you should join the Court. We are really just here to talk about what chair you will sit in. The chair to which you have been nominated, of course, is one which is the seat of leadership of the entire judicial branch of Government.

Chief Justice Burger has highlighted this aspect of the Chief Justice's role during his tenure. He has devoted a lot of energy and a lot of time to the administration of justice. As result, the Judicial Conference, of which the Chief Justice is the chairman, is stronger. It is more active on issues of concern to the whole Federal bench. The Federal Judicial Center has enhanced the judicial branch's capacity for research and training. Chief Justice Burger in his statements on judicial compensation, on the litigation explosion, on competency of courtroom advocacy, just as a few examples, has articulated the concerns of Federal judges and of a great many State and local court judges.

How do you view this particular aspect of the role of the Chief Justice? What thoughts can you share with us as to how you would approach the administrative and leadership role?

Justice REHNQUIST. I view it as a very important aspect of the role of the Chief Justice, Senator. Chief Justice Burger will be a hard act to follow in that respect, because certainly, no Chief Justice has ever devoted the attention to the sort of things you have just described as he has. But I do not think it is something that ought to be regarded as kind of an idiosyncracy of his, because I think that the lower Federal court judges, State court judges, have

really felt that he was speaking for them on many occasions, calling problems of the profession or of the Judiciary to the attention of Congress or of the profession in the way a highly visible spokesman can, but in a way that a multitude of less visible spokesmen cannot.

I think the Chief Justice is going to have to keep on in that role, and I think it is a very important one.

Senator MATHIAS. Is it your intention to continue that kind of active leadership in this field?

Justice REHNQUIST. Yes; as I say, the Chief's act is a hard one to follow, but I would certainly do my best if the Senate confirms me.

Senator MATHIAS. In your judicial career, you have been interested in the subject of federalism and the division of powers between the national government and the State government. There is a new development in federalism about which I would like you to comment.

It has become increasingly common for a State court which is considering a case that affects individual rights, to base its decisions on the State's constitution, even though the pertinent provision of the State constitution may exactly parallel a provision in the Federal Constitution. The search and seizure cases provide a good example. It appears to some legal commentators that the State courts are getting more active in the areas in which the Supreme Court has cut back on the scope of the protections that it previously found to exist in the Federal Constitution.

Have you observed this development? What thoughts do you have about it?

Justice REHNQUIST. I have, Senator Mathias, and I think that is just the way the system should work. The Federal Constitution certainly lays down one rule for all 50 States, and if some States want a more stringent prohibition against searches and seizures than that provided by the fourth amendment, it just makes sense that they ought to have it. If some States are content with the Federal provision, which everybody has to live up to, it seems to me that makes sense for them to have that. I think it is a very healthy development.

Senator MATHIAS. So you would view the protections in the Federal Constitution as the floor and not as the ceiling?

Justice REHNQUIST. Oh, absolutely.

Senator MATHIAS.You do not feel that that is a challenge to the Court's preeminence as the final arbiter of the law of the land?

Justice REHNQUIST. No; I do not think the Court is necessarily the final arbiter of the law of the land. It is the final arbiter of the U.S. Constitution and of the meaning of Federal statutes and treaties. But we still live in a somewhat pluralistic society where the States' highest courts are the final arbiters of the meaning of their State constitutions. That is just as it ought to be, I think.

Senator MATHIAS. What about the charges that the Supreme Court has become anti-Federalist in certain instances. There are a number of cases in which the Court has upheld actions by State officials which the State courts had struck down on fourth amendment grounds or on some parallel State constitution grounds. What deference should the Supreme Court give to decisions of the State courts interpreting Federal constitutional provisions?

Justice REHNQUIST. Speaking generally, Senator, and of course, that is the only way I can speak in response to a question like that, because——

Senator MATHIAS. We are speaking in very general terms.

Justice REHNQUIST. Yes; the same type of deference as the Supreme Court gives to decisions of lower Federal courts interpreting the U.S. Constitution. The decision is obviously entitled to weight, but if it does not fully square with precedents from the Supreme Court then it probably, if brought up, should be overturned.

Senator MATHIAS. What about State courts interpreting State constitutions that are at odds with Federal precedents?

Justice REHNQUIST. That was the question I believe you brought up a moment ago, and that is every bit their privilege. But it is when State courts say this conviction should be reversed not because it offends the State constitution, but because the search offended the fourth amendment; that, of course, is a Federal question, and the final authority on Federal questions like that is the Supreme Court of the United States.

Senator MATHIAS. Now looking at another development in the court system, since you and I began the practice of law there have been a lot of changes. Some of them are quantitative. In those days, we had just a few dozen appellate judges in the country. Today there are hundreds. The caseload numbers have also climbed substantially. These quantitative changes have probably resulted in some qualitative changes as well.

Some would say that Federal judges today perform a job that is more bureaucratic than it has ever been. With the flood of litigation, judges are at least proportionately more managers than they are decisionmakers.

What is the future of the Federal courts? Do you see more litigation and larger caseloads? Will we respond with the appointment of still more judges, and create a larger judicial bureaucracy? If so, can we continue to maintain the concept of a single Supreme Court with nine individuals ultimately resolving issues that work there way to the top of the pyramid?

Justice REHNQUIST. That is kind of a tall order. Let me go immediately to the multiplication of Federal judges. This is a concern which has been voiced by me in the past, by Judge Rubin of the fifth circuit, by Judge Higginbotham of the fifth circuit. It is a very real concern to anyone interested in the Federal judiciary. The Federal judiciary obviously does not pay comparably to what a lawyer with a substantial practice in a good-sized city would make. And so the attractiveness of the job and the ability of the Federal courts to get first-rate lawyers has got to depend on the—prestige sounds somewhat like it is a social thing—but the significance of a Federal judgeship and the sort of work that Federal judges do, how interesting is it. To the extent that the Federal judge is no longer trying cases, deciding motions and that sort of thing, but simply reviewing what subordinates do, I think the job is going to be less attractive.

There will always be plenty of people lined up for Federal judgeships, but the question is are they the people that you want to have Federal judgeships.

Senator MATHIAS. Should we be thinking about structural changes in the court system?

Justice REHNQUIST. I think we should be thinking very definitely about a national Court of Appeals or an intercircuit tribunal, as I indicated to the chairman when I answered his question.

I think some more thinking is going to have to be done, and to me, this is the area in which the next Chief Justice could devote some attention not with the idea that I am bringing in some ideas that I know exactly what ought to be done, but let us get some people to sit down and look and think about what is going to be done.

Senator MATHIAS. Well, the interaction between the next Chief Justice and this committee will be very important.

Justice REHNQUIST. I should think it would be extraordinarily important.

Senator MATHIAS. Although I will not be here, I invite you, on behalf of my colleagues, to keep in close touch.

Justice Frankfurter once wrote:

> The judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussion at conference. Without adequate study there cannot be adequate reflection; without adequate reflection, there cannot be adequate discussion; without adequate discussion, there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions. It is, therefore, imperative that the docket of the Court be kept down so that its volume does not preclude wise adjudication.

That sounds like an almost utopian formulation for the Court. However, during the preceding term, the Court issued 146 signed opinions after reviewing a docket bulging with 5,158 cases. These figures seem overwhelming to an outsider.

Does that volume of cases preclude wise adjudication? I know there is some dispute on this. Chief Justice Burger contends very strongly that it does, that the Court is greatly overburdened, but some other members of the Court do not seem to have the same view. I wondered what your thoughts were.

Justice REHNQUIST. I do not agree with the Chief Justice on that point. I think that 20 or 25 years ago all the courts, State courts and Federal courts simply worked at a more leisurely pace, and it may very well be there was a little more time for ripening of ideas and that sort of thing.

But I just do not think with the kind of litigation explosion that we have had in the last 20 or 25 years courts should or really can aspire to go back to that. I think they have to work a little bit faster and quite a bit harder up to the point where you get to a certain point where you become kind of a bureaucracy, and you begin sacrificing all of the contemplative aspects. That is not good either.

But I think the 150 cases that we have turned out quite regularly over a period of 10 or 15 years is just about where we should be at. The certiorari cases, the number grows every year. I think you cited the figure 5,100 this past year.

They take time and the more of them there are the more time they take, but even 5,100 of them do not take a substantial minor fraction of the Court's time to dispose of, I do not think.

I think it would be on the order of somewhere 20, 25 percent of the Court's time spent disposing of certioraris, and I am just guessing, because I am guessing on the figures in my own chambers, and I really do not have any basis for saying how much the other chambers put in on certiorari.

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

The CHAIRMAN. The distinguished Senator from Massachusetts.

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

Welcome, Mr. Rehnquist. I would like to direct your attention to the issues that were raised after the end of our hearing back at the earlier consideration for your nomination to go on the Supreme Court, and this is related to the whole question of voter intimidation in Phoenix.

You remember these allegations came up after the conclusion of our hearings. Senator Bayh, Senator Hart, myself inquired of you about your own conduct and your activities on election day in the early 1960's.

At that time, Chairman Eastland chose not to reopen the hearings. We did receive responses to our questions but we never did have an opportunity to go through the various allegations and charges during the course of that hearing or any direct opportunity to inquire of you about those particular allegations and charges.

And it is my understanding, and these are quotes that are put in chronological order that are taken from the responses which you gave to us in the written questions that are included in the record.

Justice REHNQUIST. Senator Kennedy, I have a copy with me, if I might get that.

Senator KENNEDY. I do not think you will probably disagree with my summary. If you do, maybe you want to go back and look at it. I would like to just try to put the line of questions into some kind of perspective.

The CHAIRMAN. Excuse me just a minute. I might say this. If you wish to refer to any notes or books or anything before answering, you have a right to do that.

Justice REHNQUIST. Thank you, Mr. Chairman.

Senator KENNEDY. In 1971, you made the following statements about your involvement in election day activities:

> In 1958 I became involved in the election day program on quite short notice. Spent all the day at Republican county headquarters at Phoenix. In 1960 on election day, I believe that I spent most of the day in county headquarters. In that year, however, we had enough other lawyers available in county headquarters so that I probably spent some of the day going to precincts where a dispute had risen and attempted to resolve it.
>
> With respect to 1962 on election day, my recollection is that I spent most of the day in Republican county headquarters; however, I think that on several occasions in 1962 just as in 1960 I went to precincts where disputes had arisen in an effort to resolve them.
>
> With respect to 1964, my recollection is that on election day during this particular election I spent all of my time in county headquarters. In none of these years did I personally engage in challenging the qualifications of any voters.
>
> I have not, either in the general election of 1964 or in any other election, at Bethune precinct or in any other precinct, either myself, harassed or intimidated voters or encouraged or approved of harassment or intimidation of voters by other persons.

I believe as part of that record you actually signed an affidavit which says the following:

I have read the affidavits of Gordon Harris and Robert Tate, both notarized in Maricopa County. So far as these affidavits pertain to me, they are false. I have not either in the general election of 1964 or in any other election at Bethune precinct or in any other precinct either myself harassed or intimidated voters or encouraged or approved the harassment or intimidation of voters by other periods.

Signed William Rehnquist. November 17, 1971.

Do those statements refresh your recollection? Do you understand those to be correct statements?

Justice REHNQUIST. I cannot recollect them. Were you reading from the document?

Senator KENNEDY. Yes.

Justice REHNQUIST. If that is from what I said in 1971 I think they are correct. Yes.

Senator KENNEDY. Several witnesses have come forward and made statements about your activity as a leader in the Republican ballot security program in Phoenix in Arizona in the early 1960's.

We will hear, as I understand it—at least it has been requested we hear from Mr. Charlie Pine—who describes your activities at Bethune precinct in 1962 or 1964 as follows:

"I saw him there and I saw him approach at least one voter, if my memory is correct, two. He asked them, he said, 'Pardon me. Are you a qualified voter,' to this black gentleman. The man said, 'Yes.' And he said, 'Do you have any credentials to indicate that you are?' The man said, 'No.' And he said, 'Well, then perhaps there is a question of whether or not you are qualified.' And the man instead of standing in line, if he had advanced, by that time, he got to the voting table he would have found his name on the voting list, but he turned on his heels and left the voting precinct.

"I felt that the whole purpose of that was to discourage blacks from voting."

Do you know Mr. Pine? Charlie Pine.

Justice REHNQUIST. I do not believe so, Senator. It has been a long time, some 20 years ago, but the name does not certainly ring a bell.

Senator KENNEDY. Do you know any reason why he might make that statement?

Justice REHNQUIST. Since I do not know him, I certainly do not know any reason why he would make that statement.

Senator KENNEDY. Mr. Quincy Hopper has stated that he was at the Bethune school on election day 1964 and that you were there at the school having voters read from the Constitution to test for literacy. Do you know a Mr. Quincy Hopper?

Justice REHNQUIST. No, I do not, Senator.

Senator KENNEDY. Do you know any reason why Quincy Hopper would make that statement?

Justice REHNQUIST. No, I do not.

Senator KENNEDY. Rev. Benjamin Brooks who is the pastor of the South Minister Presbytrian Church has stated that he is familiar with you. He saw you at the Julian precinct where Pastor Brooks was an inspector on election day, the year that Paul Fannin and Phil Morrison were running for Arizona Governor, and Reverend Brooks stated that on that day you challenged black, elderly working class voters for literacy by having them read the Constitution out loud.

Do you know Reverend Brooks?

Justice REHNQUIST. I do not believe so, Senator. No.

Does he say the year Bob Morrison was running against Paul Fannin?

Senator KENNEDY. Yes.

Justice REHNQUIST. Well, that would have been 1958, I think, which would be 28 years ago. No, I do not really think I do.

Senator KENNEDY. Dr. Sidney Smith, who was a psychology professor at Arizona State University from 1947 to 1964 stated that he served as a poll watcher in the early 1960's. Dr. Smith states that on election day in 1960 or 1962 as a poll watcher at Southwestern Phoenix poll he saw you arrive with two or three other men.

He says he recognized you from political functions and was positive of his identification. Dr. Smith states that you approached a group of voters holding a card in your hand and said, "You cannot read, can you? You do not belong here."

Dr. Smith says the voters were intimidated by your actions. Do you know a Dr. Smith?

Justice REHNQUIST. I do not believe I do, no.

Senator KENNEDY. Mr. James Brosnahan, a prominent San Francisco attorney, former assistant U.S. attorney in Phoenix stated that on election day 1962 he received complaints of voter harassment at polling places. The complaints were that Republican challengers were challenging voters on the grounds that they could not read.

He went to a precinct with an FBI agent. You were sitting at a table where the voter challenger sits. A number of the people complained to Mr. Brosnahan that you had been challenging voters.

Do you know Mr. Brosnahan?

Justice REHNQUIST. Yes, I do.

Senator KENNEDY. Did you engage in any of these activities, Mr. Rehnquist?

Justice REHNQUIST. Would you read me again what Mr. Brosnahan says that I did.

Senator KENNEDY. He said he went to a precinct with an FBI agent and you were there sitting at a table where the voter challenger sits, and a number of people complained to Brosnahan that you had been challenging voters.

Justice REHNQUIST. No, I do not think that is correct.

Senator KENNEDY. Well, are any of the other statements that I just read correct.

Justice REHNQUIST. No, I do not believe they are.

Senator KENNEDY. Would you not remember something like that if it had happened?

Justice REHNQUIST. I would think I would, yes.

Senator KENNEDY. Are all these witnesses wrong?

Justice REHNQUIST. Well, Senator, I gave my best recollection in 1971. I reviewed that statement, and that stands as the best of my knowledge. So I suppose if they say I did something that I have said I did not do, I would have to say, yes, they are wrong.

Senator KENNEDY. Why would the witnesses, do you think, make these statements, all of them make these statement relatively similar in nature about your activity on election day? What is their motivation, do you think?

Justice REHNQUIST. Really do not know.

Senator KENNEDY. Do you think they are all mistaken or what?

Justice REHNQUIST. I think they are mistaken. I just cannot offer any further explanation.

Senator KENNEDY. Whose idea was the ballot security program?

Justice REHNQUIST. I do not think the ballot security program as you refer to it took on that name until 1964. Before that I think it was just called poll watching or challenging. I have no idea whose it was.

Senator KENNEDY. I gather from your response to my questions that you deny categorically that you were engaged in any of these activities that are identified by any of these individuals in any of the polling places that were mentioned.

Justice REHNQUIST. When you refer to these activities, Senator, that may cover a lot.

Senator KENNEDY. Just the ones I read about.

Justice REHNQUIST. Would you read them to me again?

Senator KENNEDY. Well, we first have Mr. Pine. Your activities in Bethune precinct 1962 or 1964. "I saw him there. I saw him approach at least one voter, if my memory is correct, two. He asked them. He said, 'Pardon me. Are you a qualified voter' to this black gentleman. And the man said, 'Yes.' And he said, 'Do you have any credentials to indicate that you are?' And he said, 'Well, then perhaps there is a question of whether or not you are qualified.' And the man, instead of standing in line, he had advanced. By the time he got to the voting table, he would have found his name on the voting list, but he turned on his heels and left the voting precinct. I felt the whole purpose of that was to discourage blacks from voting."

Justice REHNQUIST. Yes, I do deny that.

Senator KENNEDY. And Mr. Quincy Hopper stated that he was at the Bethune school on election day and that you were there at the school having voters read from the Constitution to test for literacy.

Justice REHNQUIST. Yes, I do deny that.

Senator KENNEDY. And Benjamin Brooks, the pastor of South Minister Presbyterian Church stated that he is familiar with you. He saw you at the Julian precinct where Pastor Brooks was the inspector on election day that Paul Fannon and Morrison were running. Reverend Brooks states that on that day you challenged black elderly working class voters for literacy by having them read the Constitution outloud.

Justice REHNQUIST. I deny that.

Senator KENNEDY. And Sidney Smith, Dr. Smith, psychology professor at Arizona State from 1947 to 1964 stated he served as a poll watcher in the 1960's. Smith states that on election day in 1960 or 1962, a poll watcher at a southwest Phoenix polling place observed you arrive with two or three other men. He says he recognized you from political functions, positive of his identification.

He states that you approached a group of voters holding a card in your hand and said, "You cannot read, can you? You do not belong here." Dr. Smith says the voters were intimidated by your actions.

Justice REHNQUIST. I am sure he is mistaken as to the latter part. It is perfectly possible that I could have arrived at a south-

west Phoenix polling place with a couple other people, and again, I gather he is not definite as to the years, because one of my jobs as notice reading what I said in 1971 and recalling as best I can now, was to go to polling places where our challenger was not allowed into the polling place or if a dispute came up as to something similar to that, either I or along with my Democratic counterpart would go.

So it is not at all inconceivable that I would have been with a group of two or three other people going to a southwest Phoenix polling place in whatever year that was. But the later part is false.

Senator KENNEDY. Well, the activity described basically is personally challenging voters. That is the activity alleged, and you categorically deny ever having done that in any precincts in the Maricopa County in the Phoenix area at any election, is that correct?

Justice REHNQUIST. I think that is correct.

Senator KENNEDY. Well, what is "I think." I mean you would remember whether you did or not. Harassing or intimidating voters is not something you are going to forget.

Justice REHNQUIST. Senator, let me beg to differ with you on that point, if I may. I thought your question was challenging. Now you say harassing or intimidating. As to harassing or intimidating, I certainly do categorically deny anytime, anyplace.

If you are talking about challenging, I have reviewed my testimony, and I think I said I did not challenge during particular years. I think it is conceivable that 1954 I might at least have been a poll watcher at a westside precinct.

Senator KENNEDY. Well, did you challenge individuals then?

Justice REHNQUIST. I think it was simply watching the vote being counted.

Senator KENNEDY. Then you did not challenge them?

Justice REHNQUIST. I do not think so. But a challenge——

Senator KENNEDY. Well, you would remember whether you challenged them now, Mr. Justice, would you not? Did you at any time challenge any individual?

Justice REHNQUIST. A challenger, Senator, was someone who was authorized by law to go in the polling place and frequently the function was not to challenge but to simply watch the poll, watch the vote being counted.

Senator KENNEDY. Well, that is fine. I mean, as I understand your testimony, you said you were a poll watcher. A challenger has a different connotation or activity.

Justice REHNQUIST. But to be a poll watcher at that time, I think you had to be a challenger.

Senator KENNEDY. Well, have you ever personally challenged any individual in any precinct?

Justice REHNQUIST. I do not think so.

Senator KENNEDY. Well, you would know it, would you not, if you did?

Justice REHNQUIST. I am not entirely sure. I cannot recall ever challenging any person, but you are talking about a period——

Senator KENNEDY. Well, these people might be——

The CHAIRMAN. Let him get through his answer.

Justice REHNQUIST. No. I have responded in each case that you said to say that I did not agree with it, but if you are asking me

whether over a period from 1953 to 1969 I ever challenged a voter at any precinct in any election, I am just not sure my memory is that good.

Senator KENNEDY. Well, your affidavit says I have not either in the general election of 1964 or in any other election, in any other election. That is what your sworn affidavit was in 1971.

Justice REHNQUIST. What does the rest of the affidavit say?

Senator KENNEDY. In any other election at Bethune precinct or in any other precinct either myself harassed or intimidated voters or encouraged or approved harassment or intimidation of voters by any other person.

So you might have challenged them but you did not intimidate or harass them is what I should conclude.

Justice REHNQUIST. Well, I answered all your questions the best I can.

Senator KENNEDY. Were you aware that Mr. Brosnahan indicates the decision was made not to prosecute any of the activities in terms of challenging various voters in the precincts in Maricopa County that there was a consideration for prosecution of these kinds of ballot law activities? Were you ever aware that that was under consideration?

Justice REHNQUIST. I do not believe I was.

Senator KENNEDY. So you never knew that a prosecution for harassing or intimidating or challenging voters was ever being considered by the U.S. attorney at that time?

Justice REHNQUIST. My present recollection 24 years later is that no, I did not know it.

Senator KENNEDY. So you never participated in any meeting about how to handle these potential investigations or prosecutions by the assistant U.S. attorney?

Justice REHNQUIST. Not that I recall.

Senator KENNEDY. In 1971, a citizen of Phoenix, Clovis Campbell, a member of the State senate, gave an affidavit, that you told him in 1964, that you oppose all civil rights legislation. You denied this in writing. Do you know Senator Campbell personally, or, by reputation? Do you know any reason why he would give a false affidavit against you on this point?

Justice REHNQUIST. I have met Senator Campbell. I had met him in Arizona. No, I do not.

Senator KENNEDY. You opposed the Phoenix ordinance permitting blacks to go into stores, restaurants, and the like, in 1964, as I understand it. One of the statements of Clovis Campbell: in his affidavit he says that you told him that you oppose all civil rights legislation.

Can you think of any civil rights bill that you favored at that time, in 1964?

Justice REHNQUIST. It is difficult for me to think back that long. It seemed to me there was a Republican, or some Republican, some type of version of the, perhaps a precursor of the 1964 Civil Rights Act, that would have extended Federal coverage to interstate highways, and that sort of thing, and that had always seemed pretty sensible to me.

Senator KENNEDY. Well, it was the same year that Senator Goldwater supported the 1964 Civil Rights Act, here, in the U.S. Senate.

And as I understand, your recollection is that you supported some civil rights act dealing with interstate transportation? That was the one civil——

Justice REHNQUIST. Well, supported it is——

Senator KENNEDY. Well, how else——

Justice REHNQUIST. Well, you read about it in the paper. You think, you know, this might be a good idea.

Senator KENNEDY. Well, you were active, obviously, in the political swim at the time. This is not just a Joe Q. Citizen who is sort of out reading the newspapers up in Scottsdale. I mean, you were an active political figure there. You are aware, obviously, of the political debates and discussions that were taking place, and so we are not considering these in a vacuum.

You have got a State senator that said that you told him you opposed all civil rights legislation. You have denied that in an affidavit. You know of no reason, evidently, why Clovis Campbell would express that view in a sworn affidavit, and your response is, I understand, that you support, the best of your recollection you do support some civil rights bill that was being considered on interstate transportation?

Justice REHNQUIST. Well, Senator, if you mean by support, publicly announce in favor of, no.

Senator KENNEDY. Sure.

Justice REHNQUIST. No.

Senator KENNEDY. Well, you did not mind publicly announcing your opposition to the——

Justice REHNQUIST. Right. Because I had thought it was——

Senator KENNEDY [continuing]. Public accommodations provisions in Phoenix, and also writing about that, too. Is that correct?

Justice REHNQUIST. Correct.

Senator KENNEDY. You wrote about that in a newspaper. You went to a public hearing on that, and indicated your opposition. So you were involved, at least, in the debate and discussion about civil rights, to some extent. And my question is, as you were prepared to take a position in opposition to those particular provisions in 1964, by direct testimony and by writing the newspaper, and we have a State senator that says that you told him that you could not find any civil rights legislation you supported.

I am just asking you whether you, to the best of your recollection, can remember any? That is the question. Or whether we might be able to draw that Clovis Campbell might have been correct?

Justice REHNQUIST. Your question, Senator——

Senator KENNEDY. Well, I suppose it is a repeat. If you can think of any civil rights legislation that you——

Justice REHNQUIST. No, other than what I have said, I think that is it.

Senator KENNEDY. Could I just go to a different area, and this is with regards to the Jackson memorandum.

The CHAIRMAN. Senator, your time is up.

Senator KENNEDY. My time is up. Thank you.

The CHAIRMAN. The distinguished Senator from Nevada.

Senator LAXALT. Justice Rehnquist, what, exactly, was your political role in the early 1960's, in Arizona?

Justice REHNQUIST. Senator, recalling as best I can after this lapse of time, at some point there I was counsel to the Republican county committee.

Senator LAXALT. Was that on the State level or the county level?

Justice REHNQUIST. I think it was on the county level, but it might have been on the State level for a short period of time. I honestly cannot remember.

Senator LAXALT. Do you recall what you were charged with doing in that capacity?

Justice REHNQUIST. Giving legal advice to the county committee, I think.

Senator LAXALT. And part of that, I suppose, would relate to the eligibility of prospective voters?

Justice REHNQUIST. I would think so, yes.

Senator LAXALT. It is normal, isn't it, in any political contest to have challenges on the part of either party to determine the qualifications of people to vote?

Justice REHNQUIST. Well, the only State I was ever active in, really, was Arizona, and it certainly was normal there.

Senator LAXALT. And really, it would be part of essential political responsibility to make certain that the ballots that were cast were cast by eligible people?

Justice REHNQUIST. Yes. The statutes authorized challenges.

Senator LAXALT. And in Arizona, as is true in most States, there was an active program being conducted, I assume, by both parties?

Justice REHNQUIST. Certainly, but I think the Republicans were the first to get active, but I think the Democrats became active very shortly afterward.

Senator LAXALT. So, essentially, you were chairman of some type of political committee on a local level, intending to establish guidelines and have people out in the field to ensure that the conduct of that election was honest in terms of eligibility of voters?

Justice REHNQUIST. Yes. I am not sure that I was ever chairman of the entire program, even in Maricopa County, Senator Laxalt, and again, I would refer back to the statement I made in 1971, because my reflection, my recollection was a good deal more closer then than it is now. I think that I was chairman of the lawyers group which was active on election day, and before hand, doing the sort of things that you mentioned. I am not sure that I was ever chairman of the entire program, say, recruiting the challengers, and that sort of thing.

Senator LAXALT. There seems to be some sinister connotation to the word "challenger". That is a legal phrase, is it not, or, a legal word in connection with the mechanics by which——

Justice REHNQUIST. It certainly was in Arizona.

Senator LAXALT. And I know that it is in my State of Nevada. That is the precise term that is used to determine whether or not a given person is eligible, or not, a perfectly appropriate political procedure.

Justice REHNQUIST. Yes.

Senator LAXALT. Well, now, in connection with your own activities—and we were dredging up old, old material here, admittedly some 24 years ago, rather substantially explored in the 1971 hearing. Senator Eastland listened to some of the testimony and then

concluded it, abruptly, in the minds of some of my colleagues. But at that particular time, 24 years ago, your capacity, I understand, was pretty much of a supervisor?

Justice REHNQUIST. A supervisor of lawyers. I do not think I had responsibility for the overall program.

Senator LAXALT. And the mechanics I suppose would be that as these people arrived at the various precincts, indulged in by both parties, if there was a question concerning their eligibility to vote, they were challenged according to State law?

Justice REHNQUIST. I think that is accurate, Senator. I think most challenges, when the program started out, were on the basis of residency. But again, let me repeat what I said to Senator Kennedy: that the usefulness of the challenger program, as I recall it, to the Republicans, was that it was the only way we could get a person in the polling place to watch what was going on. Because although State law provided for two persons of one party, and one person of another party to constitute the election board, that constituted, that ran the election, in some very heavily Democratic precincts, that person, the person on the election board, had to be a resident of the precinct. And we simply could not find, in some precincts, a Republican to be a member of the election board.

And so there would be a two-person or a three-person election board of the opposite party and the only way we could get someone who was of the Republican faith—if you want to call it that—into the polling place at all, to see that things went on as normal—was to put them in as a challenger.

Senator LAXALT. So that if you had indulged in that kind of activity—the point I am trying to get at is a distinction, and you attempted to draw it yourself, between challenging, perfectly legal, and harassment and intimidation which is improper and illegal.

Justice REHNQUIST. Well, I agree with you a hundred percent.

Senator LAXALT. And you can categorically state here, that as far as harassment and intimidation is concerned, in none of these elections did you indulge, personally, in that kind of activity?

Justice REHNQUIST. Yes, I have stated it in 1971, and I state it again now.

Senator LAXALT. And for that matter, not have it condoned by others, in behalf of your campaign effort?

Justice REHNQUIST. Correct.

Senator LAXALT. Do you know a Charles Pine?

Justice REHNQUIST. No. I do not.

Senator LAXALT. I might state to you, that he is the former Democratic chairman of the State of Arizona. Would that refresh your recollection?

Justice REHNQUIST. Do you know when he was Democratic chairman?

Senator LAXALT. During that period. If you do not recall——

Justice REHNQUIST. No, it still—I am sorry—it still does not refresh my recollection.

Senator LAXALT. Now James Brosnahan apparently was an assistant U.S. attorney and you have testified that you knew him?

Justice REHNQUIST. Yes; that is correct.

Senator LAXALT. I might indicate to you, that in a quote that was given to the Baltimore Sun dated July 26, 1986, Mr. Brosnahan was

quoted to this effect. Quote: "I recall William Rehnquist was there. I cannot say I saw anything, specifically, that he did." So the so-called Brosnahan position is not nearly as definite as it might appear.

Justice REHNQUIST. Does the statement say where I was?

Senator LAXALT. I think they are referring to the Bethune precinct.

Justice REHNQUIST. Oh.

Senator LAXALT. I think most of the inquiry is in connection with that particular activity. So, in summing up, once again, you can categorically state, that you did not engage in any campaign intimidation or harassment in connection with any of these elections in the State of Arizona?

Justice REHNQUIST. Yes, I can, Senator.

Senator LAXALT. Let me change direction, if I may, for a moment or so. Why do you believe that you are qualified to be Chief Justice of the U.S. Supreme Court?

Justice REHNQUIST. I guess the first qualification I feel I have is nearly 15 years service as an Associate Justice which enables me to, or I hope will enable me to perform a large part of the Chief's responsibilities without having much difficulty getting started. I have sat at the conference table for 15 years, and I know how conference discussions go. I know the procedural niceties which any institution has, which may not be terribly important, but they are the way any institution works, and someone coming in from the outside and getting used to the—it just takes a while to get used to how things are handled. So, I think that is a valuable experience.

And I think 15 years of getting to know the other eight people, although I of course have not known all of them for 15 years, is a very valuable asset. It will not be a group of strangers to me, obviously.

And I also think—perhaps I am being immodest—that I have a very real interest in the Federal judicial system and the American judiciary. I have a great interest in the Supreme Court and its work. But I have a very great interest in trying to see improvements made, not just in the lower Federal courts, but seeing what might be done through the Center for State Courts, in helping State courts, at least getting financial assistance to them without trying to tell them what to do.

Senator LAXALT. Don't apologize for being modest around here. I do not think it is the place for it. You know, it has been stated here, in rather strong terms by the opposition during the last several days, that the Chief Justice is vested with awesome power, and it has been stated, almost categorically, that the Chief Justice, procedurally, under this Court, and perhaps historically—I do not know—literally has the power of life and death over the matters that the Court will consider. Is that true?

Justice REHNQUIST. Senator, I think the position of Chief Justice is an awesome position just because it is the No. 1 judicial position in the United States of America. I do not think it is because of the awesome power, that the Chief Justice possesses. I tried to indicate, in answer to the Chairman's question, and in answer to Senator Mathias's question, that the Chief's prerogatives in the conference, the prerogative of assigning opinions, and the prerogative of lead-

ing conference discussion, while important, are seldom, if ever, ones that he can use to foist his judicial ideas, his jurisprudential ideas, off on an unwilling colleague.

But it is because it seems like, with the increasing caseload of all the courts, that we are looking at real problems, and not just in the Supreme Court, and not just in the Federal judiciary, but in the entire American judicial system. And the Chief Justice is a visible spokesman for those concerns. That I think it is an awesome responsibility.

Senator LAXALT. Let me draw a rough parallel. Does the power of the Supreme Court, the Chief Justice: is it akin to the power of a majority leader in the United States Senate? Are you going to be able to designate the business that the Court is going to handle? Or mechanically, help us. Do you arrive at that through a consensus? What is the procedure by which the Court determines what pieces of major litigation it is going to consider?

Justice REHNQUIST. The Chief Justice, Senator, has been referred to as primus inter pares, the first among equals, and I have a feeling, from the way you described the power of the majority leader, that he is a good deal more equal than the majority leader. The Court, by vote, grants certiorari in a case to bring it up for review. It takes four votes in the conference to bring the case up for review.

The Chief cannot bring a case up for review himself. The cases are generally placed on the docket in the order in which certiorari has been granted. So the Chief, as far as I know, has no particular power in deciding, well, we will hear this case out of order, or, we will hear these cases because I want to hear them, even though they were filed later.

It is all, so far as I know, virtually a mathematical thing, in the order in which the cases are granted. So, the Chief has virtually no control, singlehandedly, over the cases the Court will hear, or the order in which it will hear them.

Senator LAXALT. There have been some questions raised, also, Justice Rehnquist, in connection with your positions, historically, and perhaps currently, in the broad areas of civil rights and in the broad areas of women's rights.

Do you carry with you, at the present time, or have you, historically, some kind of bias in the area of civil rights?

Justice REHNQUIST. No, I do not, Senator. No, I do not.

Senator LAXALT. Is there any rational connection between your positions, historically, on some civil rights legislation in cases before the Court, that would establish with some validity, or credibility, a claim that you are less than impartial when a civil rights matter comes before the Court?

Justice REHNQUIST. I do not think that claim can be credibly made, Senator. I think that the constitutional positions I have taken in some cases involving the equal protection clause, have resulted in less favorable rulings, or votes on my part, for women's rights issues, and for some issues involving blacks, and other minorities, than would a broader construction of the equal protection clause.

But I have taken the same position on the equal protection clause with respect to corporations. It is nothing peculiar to the

fact that blacks, and minorities are invoking it. It is simply the fact that I read the equal protection clause, giving it the best interpretation I know how, somewhat more narrowly than some of my colleagues.

Senator LAXALT. And that has been historically your position, certainly in the area of women's rights?

Justice REHNQUIST. I think it has.

Senator LAXALT. Well, tell me: do some of the women's groups that we have been hearing the last several days have cause to fear lest Justice Rehnquist becomes the Chief Justice of the Supreme Court? Are women going to be prejudiced, or people who are involved in furthering feminist causes going to be prejudiced by your being confirmed?

Justice REHNQUIST. I do not believe so, Senator. The Congress has taken over a great deal of the protections of women's rights, and things like title VII of the Civil Rights Act.

And I authored an opinion for the Court just this past June, I think, the *Meritor Savings* case, where we held that harassment in the workplace was the responsibility of the employer, even though not performed directly by the employer. It certainly was regarded, I think, as a victory for the cause that you are talking about.

Senator LAXALT. So what you are saying, essentially, if I hear you correctly, is that you do not carry into these cases, or into the Court, or into your new position, any blatant historical or other bias in these very, very important areas?

Justice REHNQUIST. Well, I hope no bias, blatant, or otherwise, Senator.

Senator LAXALT. And I gather what you say is, that your interpretation, particularly of the 14th amendment, as it applies in the area of women's rights, and also civil rights, just from the standpoint of legal philosophy differs from some?

Justice REHNQUIST. Yes. It does.

Senator LAXALT. And that essentially is the line of difference, and it is ideological, rather than your carrying any bias in?

Justice REHNQUIST. Yes, it is, Senator.

Senator LAXALT. And bottom line, Americans need have no concern lest Justice Rehnquist be elevated to the highest legal position in the land, on the basis that a standard would be uniformly applied to mete out equal justice to all Americans?

Justice REHNQUIST. I think and believe that you are right.

Senator LAXALT. I thank the chairman. I thank the Justice.

The CHAIRMAN. Thanks very much, Senator. We are going to take a 10-minute recess, and I want to make this announcement at this time. We will hear from approximately 10 individuals who allege Justice Rehnquist intimidated voters in the 1960's. These witnesses will be invited to appear before the committee on Friday morning at 8 a.m., and this hearing will adjourn at 1 p.m., Friday. We will go as late as necessary tomorrow night, all night, if necessary, to finish everything with these witnesses from Arizona, and we will finish them by 1 o'clock, Friday. I am prepared to go as late as necessary tonight, and tomorrow night, as I stated, but I intend to conclude these hearings on Friday, as stated.

Senator BIDEN. Mr. Chairman.

The CHAIRMAN. Yes.

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Senator BIDEN. Mr. Chairman, would you share with the rest of the committee the magic of 1 o'clock on Friday as opposed to 4 o'clock on Friday, or 12 o'clock on Friday.

The CHAIRMAN. Well, a good many of the members have made engagements, and this is the second day of the hearing, we have got a third day tomorrow, and Friday, at 1 o'clock will be the fourth day. I think that is long enough. And I would admonish the members now: it is not necessary to duplicate.

If I have asked him questions and he has answered, or if you ask him questions he has answered, Senator Biden, it is not necessary for some other member to go on and harangue him, and ask him over and over again.

Senator BIDEN. I do not think Senator Laxalt was duplicating by the fact that he repeated the same things. I did not view that as duplication.

The CHAIRMAN. I think he was trying to clear up what Senator Kennedy did. We will now take a 10-minute recess.

[Recess.]

The CHAIRMAN. The committee will come to order. The distinguished Senator from Ohio.

Senator METZENBAUM. Thank you, Mr. Chairman. Mr. Justice, I think it is important that we put this show back on the right track, because my distinguished colleague from Nevada got into the issue of whether there was harassment, intimidation, or whether all you did was challenge, which is legal.

I want you to understand that this is not the issue. The issue before this committee, in this Senator's opinion, is whether or not Justice Rehnquist appeared before the committee in 1971 and stated the facts, and whether you are being factually accurate today in representing what those facts are.

Now the question of whether it was harassment, or intimidation, or challenge, is really irrelevant, because in 1971, you wrote: "In none of those years did I personally engage in challenging the qualifications of any voters."

And so the issue then is: did you take any action that either was challenging, and harassment and intimidation would certainly be over and beyond that? I think it is a fact that you told the committee, in 1971, that you spent most of your time on election day in 1962 at party headquarters, only going to precincts, quote, "where disputes had arisen, in an effort to resolve them." Do you remember that?

Justice REHNQUIST. I do not presently recall it that accurately, but if that is what I said in 1971, I certainly stand by it.

Senator METZENBAUM. Did you ever approach any voters during this period about which we are speaking, in the polling booths, and speak to them regarding their qualifications to vote?

Justice REHNQUIST. No. I do not believe I did.

Senator METZENBAUM. Did you ever ask a voter any questions regarding his, or her, qualifications to vote?

Justice REHNQUIST. In the process of challenging them?

Senator METZENBAUM. In the matter of being in a voting booth. In a voting booth, around a voting booth.

Justice REHNQUIST. No, certainly not in a voting booth.

Senator METZENBAUM. Did you do it at any time?

Justice REHNQUIST. Not that I can recall.

Senator METZENBAUM. Now, as I understand it, this man, Charles Pine, was the Democratic chairman at that time. You have no recollection of ever having met him, or ever having known him?

Justice REHNQUIST. It certainly does not come back to me at this time, in 1986.

Senator METZENBAUM. There is a man by the name of Arthur Ross, now a deputy prosecutor in Honolulu. He told the FBI that he saw you, and others, in 1962, with a card which had on it a constitutional phrase, asking prospective voters to read from it before entering the polls. Do you have any recollection of ever having done that? Did you ever do it?

Justice REHNQUIST. Did I ever ask a voter to read from a card? No. I do not think I did.

Senator METZENBAUM. I am told that I used the word polling booth before instead of polling place. Would your answer have been any different, if I had used the word polling place?

Justice REHNQUIST. To what question?

Senator METZENBAUM. With respect to whether or not you had asked people concerning their qualifications, being qualified to vote?

Justice REHNQUIST. My answer would be the same.

Senator METZENBAUM. Did you ever ask a prospective voter to read from any text, whether the Constitution, or otherwise?

Justice REHNQUIST. Not that I recall.

Senator METZENBAUM. Nelson McGriff filed an affidavit with the committee, stating: "I remember a challenger at the Bethune precinct some years back. I went in to vote, and there was this man challenging people to vote. As each person in front of me would give their name, this man would say 'I challenge you' to some of the people. He would stop them in line and give them a card to read about the Constitution. I think there was a fight, as this man looked roughed up. He was taken to a police car. I have now seen pictures of this man in the newspapers, and if this isn't the man, William Rehnquist, who is running for the Supreme Court, then it was his twin brother." That man's wife filed an affidavit saying: "I saw two policemen taking a man out of the voting place. The two policemen escorted him to a car. No other challengers were at the polls when I voted. I have now seen a picture of this man. It just looked like the man they were taking out of the polling place. This picture is of William Rehnquist and he does look like the same man I saw at Bethune precinct."

Are they wrong?

Justice REHNQUIST. They are certainly wrong, yes.

Senator METZENBAUM. Jordan Harris filed an affidavit, stating: "I was present as a deputized challenger for the Democratic Party in Bethune precinct, a predominantly black precinct. I met the party challenger for the Republican Party, Mr. William Rehnquist, because I noticed him harassing, unnecessarily, several people at the polls, who were attempting to vote. He was attempting to make them recite portions of the Constitution and refused to let them vote until they were able to comply with his request. I know that this man was Mr. Rehnquist because the election board introduced me to him as a challenger for the Republican Party." Is he wrong?

Justice REHNQUIST. Yes.

Senator METZENBAUM. Finally, Mr. Robert Tate submitted an affidavit, stating: "I was present at Bethune precinct, a predominantly black precinct. Mrs. Miller had come to cast her vote at Bethune precinct. She was encountered within the 50-foot line by William Rehnquist and requested to recite the Constitution. Mrs. Miller came to me crying, stating that Rehnquist wanted her to recite the Constitution. I looked around and saw William Rehnquist and Mr. Harris, struggling. I now remember him from pictures I have seen, lately, in the papers, as the same one involved in the above incident at Bethune precinct. He did not at the time, however, wear glasses."

Are all of these people stating untruths?

Justice REHNQUIST. The ones that you have referred to, yes.

Senator METZENBAUM. Did you ever personally confront voters at Bethune precinct?

Justice REHNQUIST. Confront them in the sense of harassing or intimidating?

Senator METZENBAUM. No. I mean in the sense of questioning them, asking them about their right to vote, asking them about the Constitution, asking them to read something, asking them questions having to do with their voter eligibility?

Justice REHNQUIST. And does this cover Bethune precinct for all years?

Senator METZENBAUM. Yes. Did you ever personally confront a voter?

Justice REHNQUIST. I do not believe I did.

Senator METZENBAUM. Would you categorically say you did not?

Justice REHNQUIST. If it covers 1953 to 1969, I do not think I could really categorically say about anything.

Senator METZENBAUM. Do you think at some time you did personally confront voters at Bethune precinct?

Justice REHNQUIST. No. No, I do not.

Senator METZENBAUM. Well, then what do you mean when you qualify your answer?

Justice REHNQUIST. Well, to the best of my recollection. You are talking about something in 1953; it would have been 33 years ago.

Senator METZENBAUM. Mr. Justice, I am not talking about your being able to remember where you were on the third day of June 1952. I am talking about whether you ever confronted people and said to them: "Can you read this Constitution?" "What educational background do you have?" Challenge them in their right to vote. And you are saying that you do not remember. And I am saying to you, is it possible that a man as brilliant as you, could not remember if he had done that?

Justice REHNQUIST. Senator, challenging was a perfectly legitimate thing.

Senator METZENBAUM. But you told the Senate that you never challenged anybody.

Justice REHNQUIST. I believe I told the Senate, Senator, in 1971, over a given period of years, I did not think I had challenged some, and I stand by that testimony. I think you are broadening it to go way back into the early 1950's.

Senator METZENBAUM. You said in none of the years between 1958 to 1968 did I personally engage in challenging the qualifications of any voters. Did you do it before that? Did you challenge voters before that?

Justice REHNQUIST. I do not believe I did, no. Again, I point out that that is 30 years ago.

Senator METZENBAUM. A person who is identified only as a Phoenix lawyer, is quoted in the Washington Post as stating that he visited a minority precinct in 1962, and that:

> We walked up a flight of steps to a schoolhouse. Bill had a camera and he took a picture of us as we came up.

The Post story also says:

> The lawyer said that Rehnquist acknowledged he had been taking similar pictures all day. The attorney said that they asked whether this amounted to harassment of voters. Rehnquist reportedly laughed and said there was no film in the camera.

Did you ever have a camera at a voting place?

Justice REHNQUIST. I do not think so, no. I cannot imagine why I would have had one. I have no recollection.

Senator METZENBAUM. That attorney is misstating, 100 percent misstating the facts?

Justice REHNQUIST. I think he is.

Senator METZENBAUM. Mr. Melvin Murkin, an attorney in Phoenix, told the FBI that he recalled seeing you give instructions to challengers in a polling place, and that voters in line began to leave as a result.

He said he confronted you and told you that people did not want to be embarrassed like that. Is he being untruthful as well?

Justice REHNQUIST. As to the first part, Senator, if he saw—he certainly could have seen me giving instructions to challengers in a polling place. As to the second part, would you read that again.

Senator METZENBAUM. He said he confronted you, and told you that people did not want to be embarrassed like that. And he also said that voters in line began to leave as a result of your having given instructions to challengers.

Justice REHNQUIST. I have no recollection of that, no.

Senator METZENBAUM. And what instructions did you give to the challengers?

Justice REHNQUIST. We gave instructions to challengers generally the night before the election, or maybe two nights before the election. Read the statute to them, told them what could lawfully be done, what could not lawfully be done.

Senator METZENBAUM. But Mr. Murkin is saying that he recalled seeing you give instructions to challengers in a polling place.

Justice REHNQUIST. Well, I think I said in my 1971 statement to the committee, Senator, that on one occasion, in some polling place—and I do not think I specified it then, and I certainly do not remember it now—I came upon one of our challengers exercising challenges in what I thought was an unlawful manner, and told him to stop.

Senator METZENBAUM. You told the committee in 1971 that you recruited lawyers to work on a lawyers committee on election day in 1960. What were your activities in connection with that committee and what was the committee?

Justice REHNQUIST. I have only the most general recollection now, and I think I stated, in more detail, in 1971. I think it was a committee to assist in the poll watching and challenging process in the 1960 election.

Senator METZENBAUM. Mr. Ralph Staggs, who was Republican county chairman, has stated that he established a committee of 12 lawyers, with you as the chairman, to oversee the challenging of voters during the 1962 election. Did the challengers take their instructions from you?

Justice REHNQUIST. I would think that we probably had some sort of a challengers' school at which one of the lawyers spoke. At this passage of time I could not say whether it was me, or somebody else.

Senator METZENBAUM. Do you know Charles Hardy?

Justice REHNQUIST. Yes.

Senator METZENBAUM. He is a Federal judge now?

Justice REHNQUIST. Yes.

Senator METZENBAUM. And he described the Republican challenger program in Phoenix, in 1962, in a letter to Senator Eastland. He stated:

> In 1962, for the first time, the Republicans had challengers in all of the precincts in this county which had overwhelming Democratic registrations. At that time, among the statutory grounds for challenging a person offering to vote, were that he had not resided within the precinct for thirty days preceding the election, and that he was unable to read the Constitution of the United States in the English language. In each precinct every—and that every is his emphasis, he underlines it—every black or Mexican voter was being challenged on this latter ground, and it was quite clear that this type of challenging was a deliberate effort to slow down the voting so as to cause people awaiting their turn to vote to grow tired of waiting, and leave without voting. In addition, there was a well organized campaign of outright harassment and intimidation to discourage persons from attempting to vote. In the black and brown areas, handbills were distributed warning persons that if they were not properly qualified to vote, they would be prosecuted. There were squads of people taking photographs of voters standing in line to vote and asking for their names. There is no doubt, that these tactics of harassment, intimidation, and indiscriminate challenging were highly improper, and violative of the spirit of free elections.

Yet despite your leadership role in that area, you stated in 1971: "The practices described by Judge Hardy to the extent that they did in fact obtain did not come to my attention until quite late on the day of the election in 1962."

Now you have already told us that you were head of some of these committees, that you may or may not have been giving the instructions to the challengers.

How do you reconcile Judge Hardy's comments concerning what the challengers were doing, and what you, Justice Rehnquist, were doing at that time, since they seem to be inconsistent with each other?

Justice REHNQUIST. I did not detect inconsistencies.

Senator METZENBAUM. Well, you indicated that you were only advising them what the law was, that you had only explained the law to them, and that you had tried to help resolve issues.

Judge Hardy indicates that there was a deliberate effort of harassment, intimidation and indiscriminate challenging.

Justice REHNQUIST. Those challenges that Judge Hardy described were not following the instructions that they got from the lawyers group.

Senator METZENBAUM. Did you know about it at the time?

Justice REHNQUIST. I think I said in the affidavit that you just quoted that I learned about it late in the day.

Senator METZENBAUM. What action, if any, did you take?

Justice REHNQUIST. I do not remember it.

Senator METZENBAUM. Let me ask you some other questions.

When you were a Supreme Court Clerk—how much time do I have left?

Mr. SHORT. Approximately 4 minutes.

Senator METZENBAUM. When you were a Supreme Court Clerk, you prepared a memorandum regarding the *Brown* v. *The Board of Education* case. The memorandum recommended to Supreme Court Justice Jackson that he vote to uphold segregated schools by upholding the old separate but equal doctrine.

Now you told the Senate in 1971 that this memo was not a cause for concern because it represented Justice Jackson's views, not yours.

I must say that, in reviewing the record, I have a hard time accepting that statement. I should also say that although I am concerned about the views you held as a Clerk 30-years ago when you were a Clerk, I am more concerned about what you told the Senate during your confirmation hearings to be on the Supreme Court. At that time, you wrote, "It was intended as a rough draft of a statement of his"—that meaning Jackson's views at the Conference of the Justices—"rather than as a statement of my views."

Now, the first point that troubles me in this memo is that this memo is simply not written as if it is supposed to be someone else's views. It does not say Justice Jackson, in such and such a case, you said this, and in another case, you said that. Instead, it uses the pronoun "I" several times. And it concludes by saying, "I realize it is an unpopular and nonhumanitarian position. I think *Plessey* v. *Ferguson* was right and should be reaffirmed."

Again, Mr. Justice, we now not only have the question of your point of view, we have the question of the accuracy of your representations to the committee at that time that is of concern to this Senator and, I would guess, to a number of other members as well.

Does not the memorandum that was written, that you wrote, does it not have language that would indicate that you were indicating your views, not Justice Jackson's views?

Justice REHNQUIST. Yes, I suppose one could read it either way. The "I's" in it certainly could have been mine rather, just looking at it as a text, rather than Justice Jackson's.

Senator METZENBAUM. Well, there were other memos. As a matter of fact, Justice Jackson had different views on the case and then joined the decision to strike down the separate but equal doctrine, did he not?

Justice REHNQUIST. He did in the second argument. Chief Justice Warren, however, says that in the conference after the argument in December 1952, that the views Justice Jackson expressed were contrary to what he ultimately came up with.

Senator METZENBAUM. This is your memo. I believe that the memorandum was prepared by me as a statement of Justice Jackson's tentative views for his own use at conference. The informal nature of the memorandum and its lack of introductory language made me think, and then it goes on.

What concerns me is that thereafter you represented that it was not your position. You had a perfect right to have that position. Nobody would argue about that. What would concern me and others is that if that was your position, why did you indicate to the committee that it was the position of Justice Jackson?

We have other memos of yours where you marked as a section, "Your ideas," referring to Jackson.

And how do you explain the fact that here is one that talks about I, I, I; others say your ideas, and then you come back and say to the committee I think those were Justice Jackson's views? How do you explain that to us?

Justice REHNQUIST. Justice Jackson was a great believer in the idea of whatever you want to call representative democracy, the Court having made mistakes in the past by reading its own moral views into the Constitution. And much of the theme of the one and a half page memo is along those ideas that the Court has run afoul in the past by reading into the Constitution what it felt were the morally right views, only to find that it had made a mistake. And this apparently was an effort to apply those ideas to the *Brown* case.

Senator METZENBAUM. But you said to the committee in 1971, "I am satisfied the memorandum was not designed to be a statement of my views on these cases."

Senator HATCH [presiding]. Senator Metzenbaum, your time is up.

Senator METZENBAUM. I have not had a minute.

Mr. SHORT. No. It blinked a few seconds.

Your time is up.

Senator HATCH. I did not realize I was presiding.

Senator METZENBAUM. I have difficulty in understanding why you said it was "my views," and then you make this distinction with Justice Jackson's views, and then say to the committee that those were Justice Jackson's views and not yours.

Nothing in the memo would seem to confirm that at all.

Justice REHNQUIST. Is that a question, Senator?

Senator METZENBAUM. Yes.

Justice REHNQUIST. I have tried to explain that the theme of the memo, the failures of the Court in the past was a very strongly held value of Justice Jackson.

Senator METZENBAUM. I will reserve the balance of my questions until later.

Senator HATCH. Thank you.

Mr. Justice Rehnquist, let me just clarify the record to a degree, because Judge Charles L. Hardy, whom Senator Metzenbaum has just mentioned, of course, is a lawyer in charge of the Democratic Party Committee which served as an arbitrator of voter challengers and disputes in the 1962 election.

In his letter to the Judiciary Committee back in 1971, Judge Hardy unequivocally states that you, Mr. Justice Rehnquist, were

not involved in the Bethune precinct incident. And specifically he stated this, and this is a Democrat, the leader of the Democrats in that State at the time on this issue:

I can state unequivocally that Mr. Rehnquist did not act as a challenger at the Bethune precinct. Because of the disruptive tactics of the Republican challenger at that precinct, I had occasion to be there on several occasions. About 4 p.m., after a scuffle, this Republican challenger was arrested and removed from the polling place by sheriff's deputies. Thereafter, there was no Republican challenger of Bethune. Challenging voters was not a part of Mr. Rehnquist's role in 1962, or subsequent election years, nor did he have anything to do with the recruitment of challengers or their assignments to the various polling places.

I think pretty good language to show backing by those who were partisan basically differing from you, though what you have been saying here is correct. Matter of fact, in his interview with the Federal Bureau of Investigation, Judge Hardy made it very—I will just cite the conclusion that he made. He said, Judge Hardy stated that he and Justice Rehnquist are politically opposite, but that there is no question in his mind as to Rehnquist's legal ability and qualifications for the position for which he has been nominated. So that the record needs to show that.

Second, there was a comment that Senator Goldwater had voted for the 1964 Civil Rights Act. He had not. He voted against it. Just so the record is clear on that.

Now, on this last point, Mr. Cronson, one of the points Senator Metzenbaum was making, is it not true, to your knowledge, that Mr. Cronson said in a 1971 New York Times article, that "Both of us personally believe that Plessey was wrong." And that he further said in a 1971 telegram that, "It is probable that the memorandum is more mine than yours?"

Are you familiar with both of those quotes?

Justice REHNQUIST. I am familiar with both of those quotes, yes.

Senator HATCH. Are they not true quotes to the best of your knowledge?

Justice REHNQUIST. They are certainly true quotes in the sense that I am sure that Don Cronson said them.

Senator HATCH. Well, that is what I am concerned about.

Now, it seems to be most important that both people present at the time the memo was drafted agreed that you were not expressing your own views in that document. Cronson's explanation was that you were assigned to write one side of the issue and that the memo was a joint product which may have been more his thoughts than yours.

Now, your remembrance is that Mr. Justice Jackson wanted the memo to reflect his own views in conference, but both agree that the views were not your own in that memorandum. Is that correct?

Justice REHNQUIST. I think it is, Senator.

Senator HATCH. All right. Now, with regard to being the lone dissenter, there has been some criticism that you have been in dissent quite a few times on the Court. I personally find no problem with that. I think the dissenters in the courts—on the Supreme Court sometimes turned out to be the greatest Justices of all. Mr. Justice Holmes is probably one of the all time great dissenters is a good illustration.

But you are not the greatest sole dissenter on the present Court. Mr. Justice Stevens has dissented many more times during the period in which your terms have overlapped. For instance, Stevens had 51 merit dissents and you had 40 and full opinions over the last 10 years. I might add that Justices Brennan and Marshall remain the greatest dissenters on the present Court together, dissenting alone together hundreds of times over the last few years in particular.

In the last 2 years, they dissented all by themselves many more times than you, who have dissented only seven times during that same period of the last 2 years. In fact, you wrote only 75 dissents in the 5-year period, from 1980 to 1984, as compared to 106 for Justices Brennan and Marshall, or should I just say just for Brennan, and 145 for Justice Stevens during that same period. I just think the record has to show these things because I think it has been misconstrued by some of my colleagues.

Now, total dissenting votes which would measure who was on the losing side show that over the last 5 times, that is from 1980 to 1984, you dissented in 152 cases, as compared to 245 cases for Mr. Justice Brennan. And I find no fault with Mr. Justice Brennan for doing that. I think when you disagree and think the law is incorrect, as enunciated by the majority, you ought to dissent. And you have had the courage to do that. You could go on and on.

Let me just ask you a couple of questions about the *Brown* decision. Because you have had some questions on that in the last while.

Your 1952 state of mind, when you were working as a law clerk to Mr. Justice Jackson, was not unusual. We have to remember that the Court itself struggled with this case as it had struggled with no other in recent memory. And I think we have to remember, No. 1, that the Court ordered a reargument on that case. No. 2, the Court ordered a separate hearing on remedy. And, of course, the records of the Court show that.

It seems to me that the Court was very confused on that case and it was cautious, and it is understandable to me that a clerk would be similarly cautious. For instance, you said on March 3, 1985, in a New York Time magazine article, entitled "The Partisan," that your views on *Brown* have probably changed since 1952. You stated repeatedly that your co-clerk thought and agreed that you thought plus he was wrong in 1952. In other words, you never doubted that State-sponsored discrimination or segregation ought to be held unconstitutional. That is true, is it not?

Justice REHNQUIST. Yes.

Senator HATCH. You have always held that position?

Justice REHNQUIST. Yes.

Senator HATCH. There is nonetheless a perfectly reasonable argument the other way, as cited by your Partisan article, the article was called a Partisan article.

We sometimes forget that in 1952, the Court had struggled greatly with the *Brown* case. For instance, I have the notes here, Justice Jackson's notes from that conference in his own handwriting. And those notes show that from the first 1952 conference on Brown, they indicate that then Chief Justice Vinson stated that he was not sure what to do to resolve that case. It was not Chief Justice

Vinson, according to the notes. He noted that there were 60 years of precedent behind the *Plessey* decision, and the Congress had itself passed no statute to the contrary, which was a matter of great concern to him, at least from these notes of Mr. Justice Jackson. In fact, as he pointed out, Congress had affirmatively acted to segregate the District of Columbia schools even after the Harlan dissent in Plessey, which did not refer to schools at all, as you know.

In other words, even the Chief Justice, the then Chief Justice made an argument before his colleagues that it was "perfectly reasonable to argue the other way."

So I just want to point that out, that it was not unusual for any sincere person to be concerned about the massive change in law that that was going to bring about, that your position has never been inconsistent, even then against the *Plessey* decision.

Is that correct?

Justice REHNQUIST. Yes.

Senator HATCH. All right. Now, your 1952 state of mind is important also because, as I reviewed the cases, I found that you have supported and cited the *Brown* v. *The Board of Education* decision as you have supported the *Brown* decision in 34 cases since you have been a Justice on the U.S. Supreme Court.

Are you aware of that?

Justice REHNQUIST. I am, Senator. And I made an excerpt here of a case in which I joined the Chief Justice's opinion in a case called *Milliken* against *Bradley*.

Senator HATCH. Right.

Justice REHNQUIST. Where the Court said—this was not just kind of citing Brown as authority—here is what the Chief Justice's opinion said in that case.

Ever since *Brown* v. *The Board of Education*, judicial consideration of school desegregation cases has begun with the standard, and this is a quote from Brown, "In the field of public education, the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal." And the Chief's opinion goes on to say this has been reaffirmed time and again as the meaning of the Constitution and the controlling rule of law.

Senator HATCH. Now, there is no question that you have stood very firmly behind the *Brown* decision, and I find it a little reprehensible that people come in here and try to say that you have been against civil rights when you actually supported at least 34 cases, citing Brown as the reason for that support.

I might say, in the first place, I think it is important to establish that there is nothing extreme about your views on civil rights. And I think that term has never been abused as much as it was yesterday and probably will be throughout the remainder of these hearings. Nonetheless, I think it might require a little bit of time here to show that you are in the mainstream.

To start with, let us look at the constitutional issues. In the *Wygant* case, you joined the plurality opinion written by Mr. Justice Powell, is that correct?

Justice REHNQUIST. Yes. Yes, I did.

Senator HATCH. All right. In other words, you joined in opinion with four of your other colleagues which stood for the proposition

that a school board could not give racial preferences to some teachers when deciding who to lay off.

Justice REHNQUIST. Senator, I am not sure there were four other colleagues on the opinion. I think there might have been just a total of four people, maybe even a total of three people on Justice Powell's.

Senator HATCH. All right. But I understand that case, in that case the school board was using race in its lay-off decisions to retain proportional representation on the faculty. And as I recall that decision, the plurality decision in which you joined, agreed that strict scrutiny applies to racial classifications, but concluded that there was not sufficient evidence to justify the conclusion that there had been prior discrimination. That is what the plurality decided, is that correct?

Justice REHNQUIST. To the best of my recollection, yes.

Senator HATCH. All right. In the absence of a showing of discrimination, "societal discrimination without two or more imposing a racially classified remedy."

Now, do you recall if there were any dissents in that case?

Justice REHNQUIST. Yes. I have a feeling that as to whether the judgment of the court of appeals should have been affirmed or reversed, there were five to—I am not sure. But the more I think about it, it seems to me it came out 5 to 4, but I could be wrong on that.

Senator HATCH. Well, it seems to me that there were dissents, of course, and that the Senators who find your views extreme on this particular issue or this type of a case are only upset because their preferred view was not the one which prevailed in the Court. They wanted the dissents to prevail, but they did not.

Now, their dissents, as I recall, wanted quotas to be used in layoffs, in these layoffs, even if there was no showing of past discrimination. Is that correct?

Justice REHNQUIST. That is certainly the best of my recollection, Senator. But I want to state that it was a fairly complex fact situation——

Senator HATCH. It was.

Justice REHNQUIST. Of course, the opinion itself would be the authoritative statement of what the facts were.

Senator HATCH. All right. But if that were true, then it seems to me that winning quotas to be used as an extreme position in civil rights law.

Let me just go to another case, and that is the *Fuller-Love* case. You were joined in dissent on that case by Mr. Justice Stewart, who I think has been a very fine Supreme Court Justice before he died.

Justice REHNQUIST. I certainly agree with you 100 percent on that, Senator.

Senator HATCH. He was a wonderful man. I knew him well.

In other words, you were not alone or even the lead opponent or adherent of this point of view, although it was, I think, a commendable point of view.

Justice Stewart based his dissent to the Court's decision to uphold a racial setaside on Harlan's dissent in Plessey, which begins, "Our Constitution is color blind."

Now, it was Stewart's opinion which you joined that "except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the Government from taking detrimental action against innocent people on the basis of the sins of others of their own race."

Now, that sounds pretty mainstream to me. You seem to be saying, and certainly Mr. Justice Stewart seems to be saying, that when racial discrimination is proven, it should be remedied swiftly. You believe that?

Justice REHNQUIST. Yes, I do.

Senator HATCH. Otherwise, the Government ought not to presume to use quotas or other race-conscious remedies unless discrimination is first established.

Justice REHNQUIST. I draw back a little bit at paraphrasing there, Senator, because we had the *Wygant* case and we had a couple other cases up there, and your summary may be entirely accurate. But I'm loath to subscribe to it unqualifiedly without a better recollection.

Senator HATCH. Well, I'm not trying to put you on the spot, but I am trying to say there was a good reason, or there were good reasons, for your dissent in that particular case, because here were racial set-asides that were preferentially made, without a showing of real discrimination, or discrimination at all, other than statistics, and they don't, in and of themselves, prove discrimination.

There is a considerable body of law, and there are considerable legal advocates, who would sustain throughout this society your particular position. In fact, there are some who say we shouldn't have discrimination in any form, whether it's in forward gear or reverse gear. I just wanted to make that point.

In the *Bakke* case, which concerned the impact of title VI, in a special admissions program, you joined the opinion of Justice Stevens.

Justice REHNQUIST. Yes, I did.

Senator HATCH. Now, Mr. Chief Justice Burger and Justice Stewart were also joiners on that opinion as I recall.

Now, the argument of you four Justices was that exclusion of any individual on the basis of race would violate the plain language of title VI of the Civil Rights Act of 1964.

Once again, it seemed to me you were right in the mainstream of the Court. Incidentally, Bakke was admitted to the school. In title VII cases, we could start with the *Weber* case. That was a case upholding the collective-bargaining agreement which contained a hiring quota, as you know. You dissented, in an opinion again joined by the Chief Justice; is that right?

Justice REHNQUIST. Yes, I did.

Senator HATCH. Once again, I would note that no one here I think can assert that Chief Justice Burger is out of the mainstream. Your dissent, as I recall, once again maintained that a quota is, per se, violative of the notion of equality and that title VII does not permit that interpretation.

Again, it seems to me that this is not something that could be called extreme because, again, your logic prevailed in the famous *Stotts* case, when the Court held that court-ordered preferences based upon the color of a person's skin, solely on that basis, vio-

lates section 706(g) of title VII. That case decided that court-ordered relief was to provide "make whole" relief only to those who have been actual victims of discrimination.

Do you see the *Stotts* case as beneficial to a policy of nondiscrimination for all Americans?

Justice REHNQUIST. Senator, that's an issue that was before us in the *Stotts* case; it was again before us in *Wygant* and a couple of other cases. It is going to come before the Court again, I'm sure. It's a very critical issue right now.

Senator HATCH. So you would rather not comment on it?

Justice REHNQUIST. If you would forgive me, I think I would prefer not to comment on it.

Senator HATCH. Well, all I'm saying is, anybody who thinks about it can see that there are two legitimate sides to these arguments. You're not extreme because you might take one side or the other. There are good arguments to be made here.

I think you could go on to note that in the *Stotts* case, that *Stotts* was not applied to court decrees entered with the consent of the employer. For instance, in the *Firefighters* v. *Cleveland* case, just decided this year, you were amongst the dissenters in that limitation and in the *EEOC* case decided the same day. The *Equal Employment Opportunity* case said that court-ordered relief need not be limited to actual victims but must be narrowly tailored to correct past discrimination.

So, in summary, all I'm trying to bring out here with this line of remarks and questions is that you interpret the Constitution, as I see it, to protect all individuals from racial discrimination.

Justice REHNQUIST. I'm glad you see it that way, Senator, and I agree with you.

Senator HATCH. In other words, the engines of discrimination are just as insidious, whether—as I have said before, whether they run in forward gear or reverse gear. Reverse discrimination is maybe just as insidious or invidious, to use the Supreme Court term, as forward discrimination.

Now, it seems to me this utter distaste of yours for discrimination is a mainstream position. You may differ on these points, like many great constitutionalists do. But you, like most Americans, believe that the Constitution is color blind and I, for one, want to compliment you for recognizing that and I personally resent you being called an extremist because you don't always agree with one point or the other with regard to civil rights law, which is complex, difficult, and, of course, very controversial in every debate we have on the Judiciary Committee and in every debate you have there.

Justice REHNQUIST. Thank you, Senator.

Senator HATCH. I think, Mr. Chairman, that's all I will take for now.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman.

Justice Rehnquist, we have had a lot of affidavits read to you from people who have said you were involved in challenging and abusing voters and what have you in 1962 and 1964. As the Senator from Utah pointed out, Judge Charles Hardy stated in his recent statement to the FBI that he knew there were incidents which occurred in the Bethune precinct in 1962 or 1964. He has been active

in the Democratic Party for a long time. He said it is no doubt that Republicans were engaged in a deliberate attempt to discourage minority voters for a period of several election years—that being the Judge's statement.

Were you involved in any way to discourage minority voters in 1962 or 1964?

Justice REHNQUIST. Only in this very possible way, which I would not think would be a correct answer to your question. But if you say you were discouraging minority voters by putting a challenger in at precincts which were heavily Democratic and which certainly had a number of minority voters voting at them, in order to lawfully take advantage of the State law which permitted observing the election board functioning and challenging as provided by law, one could say, I suppose, that that did discourage minority voters. But not lawful minority voters.

So if you would just amend your question to say lawful voting by minorities, I could answer unqualifiedly "yes".

Senator DECONCINI. You were not involved, then, in discouraging, from your standpoint, in discouraging lawful minority voters?

Justice REHNQUIST. No.

Senator DECONCINI. Now, Judge Hardy goes on to say that he does not recall seeing Rehnquist at the precinct; he has heard others say Rehnquist was there, but he did not see him. We have seen the letter that was written.

Now, I want to read to you something of one other prominent Democrat at the time—his name is Judge Thomas Murphy. Judge Murphy was interviewed this month. He was presiding president of the Young Democrats in Phoenix, AZ during the 1960's. He says he did not recall the incident during either of elections, and he described the 1962 election as not that exciting. He did become chairman of the Democratic County in 1964, so the record has it, and as that County Chairman, Murphy describes the Republican observers as "nice ladies", and thought the allegations being made about William Rehnquist were "a bunch of crap." Murphy described William Rehnquist as a man of the highest integrity, a gentleman, a fine lawyer, et cetera.

The reason I get into this, Justice Rehnquist, is because I would much prefer to have Mr. Hardy here, Mr. Pine here, Mr. Harper, Mr. Brooks, Mr. Smith and the others who have been quoted here, indicating that you acted improperly. As long as we're going to get into that game here, I think it's important that those who felt you acted properly during that time should also be on the record.

Your involvement as a challenger, can you tell us for the record, in those days I was a challenger also for the Democratic Party in Pima County those very years. Can you tell us what that amounted to as far as your interpretation of what a challenger was?

Justice REHNQUIST. In the years that we are talking about in the 1971 affidavit which I think is 1958 through perhaps 1968 or something like that, and I think I stated that I was not myself, I did not myself challenge during that time.

Senator DECONCINI. You never were a challenger?

Justice REHNQUIST. I cannot say going back way further into the 1950's that I was not, and one of the reasons it is hard to say is because to even watch an election counting in a precinct where you

did not have someone on the election board, the only way to get in, perhaps you recall or maybe the law was changed by the time you younger people came along, was to send someone in as a challenger.

Then they would frequently let the person stay to watch the counting of the ballots, but in the years that we are talking about in the 1971 affidavit and conflicting testimony and so forth, I stated as fully as I could on the basis of my recollection in 1971 what I had done in each of those years, summarizing on the basis of a much fainter recollection now.

I think my activity was primarily that of a member and perhaps 1 year a chairman of a lawyers committee that tried to tell the challengers in advance what they could do and then one biennial election—I cannot remember which it was—I know that Charlie Hardy and I made rounds on occasion to try to settle——

Senator DECONCINI. You are in the position, Judge, as a lawyer or the head of the committee advising challengers, what were the specifics as you can recall that a challenger could do? What could a challenger do that was legal?

Justice REHNQUIST. I cannot recall from memory now what a challenger could do. But I notice Senator Metzenbaum and Senator Kennedy said that a challenger could challenge on the basis of reading the Constitution in English and failing to reside at the place where you claim to reside for 30 days before the election.

I do not vouch for that. That rings a bell with me. I think perhaps that is the way it was.

Senator DECONCINI. Do you recall giving that type of advice to Republican challengers?

Justice REHNQUIST. I certainly gave that type of advice, reading from the statute probably. I cannot remember exactly what was in the statute.

Senator DECONCINI. What exactly was the committee that you headed up 1 year or part of? Was this a lawyers committee to give advice on call or something?

Justice REHNQUIST. Well, it sounds perhaps a little more glorified than it was. It was lawyers who would volunteer a couple hours on election day to come over to county headquarters perhaps or sometimes work out of their offices in case legal disputes arose, you know, some question was raised by someone on the county committee somewhere else as to some election practice, and we wanted a lawyer handy to give a legal answer.

Senator DECONCINI. You are familiar with Ralph E. Staggs?

Justice REHNQUIST. Yes, I am.

Senator DECONCINI. He was, I think, county chairman in 1962 for the Republican Party. He indicates that he was responsible in January 1961 and he organized the challenging committee in preparation of the 1962 general elections in November.

He goes on to say that he was advised that the Democratic Party was very strong during the early 1960's. The Republicans were concerned about challenging any and all fraudulent voters in the 1962 elections.

Staggs advised he organized a committee of 12 lawyers to oversee the challenging of unqualified voters and he appointed William Rehnquist chairman of that committee. Is that accurate?

Justice REHNQUIST. I would have no reason to doubt it certainly. I cannot presently think back and say yes. But I have no reason to doubt that.

Senator DECONCINI. He goes on and says that he himself sent two precinct committeemen to voters precincts in the Bethune School in Phoenix. One of the committeemen was named Wayne Benson. Do you remember that name?

Justice REHNQUIST. I remember that name, yes.

Senator DECONCINI. Do you recall that Mr. Benson, as Mr. Staggs says here became embroiled in a confrontation in which he displayed a card with an excerpt from the Constitution and asked various voters to prove their literacy by reading the excerpt aloud?

Justice REHNQUIST. I think I might have heard about it on the phone the day it happened, and I think that I read about it in the paper the next day.

Senator DECONCINI. And some of the voters happened to be black—this is according to Staggs—and other minorities and several became discouraged from voting. Staggs suggested that one of the reasons these voters did not vote was because they were aware that their illegal status had been discovered by Benson and other poll watchers.

He, Staggs, advised that he dispatched Rehnquist from the Republican county headquarters, located at 32d and Oak Street, to go to the Bethune School, clear up the disturbance involving Benson.

Do you recall that that he dispatched you?

Justice REHNQUIST. No, I do not.

Senator DECONCINI. You do not recall him asking you to go?

Justice REHNQUIST. No, I do not.

Senator DECONCINI. He goes on and says that Staggs advised he also sent Harold Musgrave to replace Benson as a poll watcher for the Republican Party. Do you remember Harold Musgrave?

Justice REHNQUIST. Harold, I could not give you a face, but certainly the name Harold Musgrave sounds familiar.

Senator DECONCINI. Stagg emphasized that Rehnquist was not involved in any direct challenge to any voter at the poll. He added that Rehnquist's roll was merely to serve as a peacemaker and resolve a dispute between Benson and officials of the Democratic Party.

Staggs said that Rehnquist returned about an hour and a half later to Republican county headquarters. Staggs could not recall any explanation by Rehnquist concerning the Benson confrontation.

So you do not remember this incident at all even being asked by Staggs or——

Justice REHNQUIST. No, I really do not.

Senator DECONCINI. Do you recall the committee of 12 lawyers?

Justice REHNQUIST. I recall a committee of lawyers. I could not tell you if there were 12 of them.

Senator DECONCINI. As part of that committee of lawyers and being the chairman of it, is that something that you probably would have been doing at the request of the chairman if there was a confrontation at a precinct?

Justice REHNQUIST. It certainly could have been, yes.

Senator DECONCINI. I mean, was that not what the committee was supposed to do which is go and resolve matters or disputes?

Justice REHNQUIST. If trouble came up, it was our job to go out and see if we could solve it.

Senator DECONCINI. When you and Judge Hardy, the quote I think you said "made some rounds", is that what you were doing then?

Justice REHNQUIST. Exactly. Troubleshooting.

Senator DECONCINI. You say "troubleshooting". You were seeing whether or not challengers on either side of the political aisle were involved in any disputes that needed to be observed by the party officials?

Justice REHNQUIST. Yes. Our problem, as I recall, was usually getting our challenger into the election place and the Democrat on occasion has complaints about the qualification that our challenger would have.

Senator DECONCINI. Do you recall what a challenger had to do? Did you have to submit this challenger's name to get him in there before the election?

Justice REHNQUIST. Again, I do not have a very clear recollection.

Senator DECONCINI. I remember, I would hate to be asked what I did on challenging in 1962 and 1964 in Pima County, because I was a challenger and a legal observer for the Democratic Party, but I can't remember which precincts I went to. But I was on call, as apparently you were, Judge Rehnquist.

According to Staggs, there were "the good old days", we Democrats' days, back in 1962. The Democratic Party was very strong during the early 1960's. Things have changed a bit in our State.

Let me turn to something else because I have a feeling, Judge Rehnquist, we're going to revisit this question of this particular subject matter probably time and time again. There have been witnesses asked to come, and I hope they do come, including Judge Hardy, perhaps, to testify in this matter, and those that have reported to the FBI and signed affidavits regarding your alleged improprieties back in 1962 and 1964, so we're going to have this subject matter before us for another day or two.

I would like to turn to another subject matter which has been touched on, Justice Rehnquist, and that is, as the Chief Justice, you are the Chief Justice of the United States. You head up the—you are the Chairman of the Judicial Conference and other administrative powers.

One of the interests that I have had a long time is the judicial branch of enforcing judicial discipline, and there has been some legislation passed back in the late 1979's which I authored, but I was very disappointed what we finally put through, mainly I might say because of the objections of judges around the country.

I wonder if you have a knowledge of the Judicial Tenure Act that was passed, whether or not you think that the circuit judges should complete the work of that act and/or whether or not you think they have, what could be done to see that the circuit judges, in accordance with that act, set up their procedures for reviewing complaints about judges?

Justice REHNQUIST. Senator, I realize that is very much the prerogative of the Chief Justice to keep abreast of matters like that.

But I must confess that I am much less abreast of it than I would like to be.

I know that the act was passed and that it gives the judicial council, the collective judges of the various court of appeals some disciplinary powers over other judges. And I have a couple instances in mind where I have a feeling that those powers have probably been exercised.

But I simply have not made enough of a study of it, and I am not familiar enough with just what each circuit council has done to be able to give an informed answer to your question.

Senator DECONCINI. Let me just quickly review title 28 of the Judicial Discipline Act. Section 372 says, and I quote, "Any person alleging that a circuit or other judge is engaged in conduct prejudicial to the business of the court may file with the clerk of the court of appeals a complaint." It goes on to say, "Complaints are to be reviewed by the chief judge of that circuit."

Section 372 says, goes on to detail the process, including the formation of a special committee to investigate the facts and allegations in the complaint.

As the Chief Justice of the United States, do you care to comment of your views of this act and what you intend to do if in fact it has not been implemented in all of the circuits?

Justice REHNQUIST. Well, I would certainly think that was something that would merit the serious attention of the Judicial Conference of the United States which has the sort of administrative capacity to see whether the various circuit councils were doing what they were required to do under the law.

Senator DECONCINI. Can I take from that that you indicate an interest in that yourself, and you intend to be involved in the implementation of that act?

Justice REHNQUIST. Certainly. Certainly.

Senator DECONCINI. I just want to, as one member of this committee, encourage that. Justice Burger has done some great things on the Judicial Conference, including setting out some guidelines for this. I know he has been very busy, and I hope the new Chief Justice, which I think is going to be you, would take a careful look at this and see that these circuit courts have implemented this act. And I think the personal attention of the Chief Justice would have a lot to do with that coming about.

Mr. Justice, we are constantly besieged here and told about the crisis in courts. Justice Burger justified the need for the intercircuit panel by emphasizing the crisis nature of the Court's caseload.

Do you believe that we are in a crisis level and that the caseload is too heavy for the Supreme Court?

Justice REHNQUIST. Senator, I do not believe that the current caseload is too heavy for the Supreme Court, as I indicated to Senator Mathias. But I respect the Chief Justice's contrary view. He is following Justice Frankfurter's idea, I think, that ideally when you are dealing with very important cases that take a lot of thought and have a lot of arguments, pro and con, maybe a nine-judge court would do better to take 100 cases a year rather than 150.

My own feeling is that all the courts are so much busier today than they have been in the past, that there would be something almost unseemly about the Supreme Court saying, you know, ev-

erybody else is deciding twice as many cases as they ever have before, but we are going to go back to two-thirds as many as we did before.

I think that we can manage to decide 150 and do a reasonably competent job.

Senator DECONCINI. Do you believe that we should consider or pass the intercircuit panel?

Justice REHNQUIST. I believe very strongly that you should pass that.

Senator DECONCINI. How do you believe those judges ought to be appointed? Do you think they should be appointed from the circuit, from the Supreme Court, or the President? Do you have an opinion?

Justice REHNQUIST. I have an opinion which I think may disappoint you to a certain extent, Senator.

The Chief Justice proposed in his bill or draft, suggested that they be appointed either by the Chief Justice or the Supreme Court. And I do not regard this as terribly desirable because the Supreme Court as a body, I do not just think it is very good at administrative tasks like that.

I believe your bill calls for appointment by the circuit councils?

Senator DECONCINI. Correct.

Justice REHNQUIST. And I share some of the Chief's misgivings about that. They were not expressed the same way I think he expressed them, that it could make the new court a kind of a United Nations where each of the circuit judges is primarily loyal to his circuit or her circuit and the doctrine of that circuit rather than being an independent member of the new court.

I think in time and, goodness knows, it is obviously going to take time to ever get the intercircuit tribunal passed, we are going to have to recognize it as a new court with judges appointed by the President and confirmed by the Senate, and not as a borrowing proposition.

Senator DECONCINI. Is it your belief, Judge, that that court should be a totally separate court of other judges or should it be—I mean new appointees, or should it be existing circuit court judges appointed to that by the President?

Justice REHNQUIST. It is my view that in the long range it ought to be new judges appointed. The judges of the Court of Appeals for the Second Circuit did some careful thinking, and I remember reading their submission to—I do not know whether it was your committee or Congressman Kastenmeier's committee. And they came up with what I thought some very reasonable objection to the proposal as they understood it. And one of them was if the court is just temporary, the court is never going to establish the sort of reputation for excellence that would make its decisions followed by the courts of appeals. And it is going to be controversial with the courts of appeals anyway.

I think that is a valid point, that we are going to have to set up an institution that does have prestige and the dignity of brand new judges.

Senator DECONCINI. You think this is worthwhile doing it on a temporary basis to see whether the need is really there?

Justice REHNQUIST. I think that would be a perfectly sensible way to approach it, Senator.

Senator DECONCINI. I thank you, Justice.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

I think we will take a 10-minute break now. We will be in recess for 10 minutes.

[Short recess.]

The CHAIRMAN. The committee will come to order.

The distinguished Senator from Iowa.

Senator GRASSLEY. Thank you, Mr. Chairman.

Justice Rehnquist, you stated in your confirmation hearings when you were up here to be Associate Justice, and that was back in 1971, that you would be able to separate your personal views from your role as a Justice when interpreting the Constitution. Now that you have been on the Bench for quite awhile, do you think that personal philosophy and judicial decisionmaking can be separated?

Justice REHNQUIST. I do not suppose they can be entirely separated, Senator, since judges are human beings like everybody else. But certainly one mark of a good judge is the extent to which he is able or she is able to separate personal philosophy from judicial decisionmaking.

Senator GRASSLEY. OK. To that extent, do you believe that you have been successful in separating these roles as a Supreme Court Justice?

Justice REHNQUIST. Yes, I think I have.

Senator GRASSLEY. On another point dealing with the legislative veto, I happen to be chairman of one of the subcommittees of this committee, and I have long been interested in issues dealing with the powers delegated to Federal agencies by the Congress and the extent, of course, to which Congress ought to be able to review regulations issued pursuant to that delegation of power. And I speak specifically then of the veto and an important means this is for Congress to check overreaching administrative agencies.

Now, you dissented in the *Chadha* case, though you did not join, as I understand it, Justice White's dissent for he generally defended the use of the legislative veto.

Now, I do not expect that you would respond to the constitutionality of specific legislative proposals pending before the Congress, and I appreciate your reluctance to discuss past cases as well. But I would like to ask you, if I could, along this line what your personal opinion of the concept of a legislative veto is and do you find anything repugnant in it?

Justice REHNQUIST. Senator, I have some reservations about answering that question, and let me tell you what they are.

I think that when you have a nominee here who has not much of a prior judicial record, so that it is very difficult to figure out what their judicial philosophy would be. Perhaps the only way the committee has of getting at the nominee's possible judicial philosophy is to ask about personal views on things, thinking that no judge is going to completely succeed in separating personal views from the way they vote.

But, in my case, I have been on the bench for 15 years. As you point out, I voted in the *Chadha* case. I did not join the Chief Justice's opinion. I dissented. But, likewise, as you point out, I did not join Justice White's opinion.

I am very loath to give you, and I think I feel perhaps constrained that I cannot give you at the present time, but I think I did work with it when I was in the Office of Legal Counsel before I ever went on the bench, and I remember thinking at that time, as something that had kind of been worked out between Congress and the executives in a way that, you know, might raise considerable legal questions, but it struck me that, as a practical matter, it worked quite well.

Senator GRASSLEY. Well, do you personally feel it is a responsible way for Congress to deal with perceived unaccountability of agencies?

Justice REHNQUIST. Senator, I do not feel I can answer that now in view of the *Chadha* case.

Senator GRASSLEY. OK. Thank you. I respect your position that you are in, and so let me go on to something else.

Some jurists have suggested that the legislative history of a law is to be given little weight in interpreting the respective law.

Generally, how much weight should legislative history be given by the courts when interpreting law?

Justice REHNQUIST. I think the cases that have come down since I have been on the Court have pretty well established a general approach that, first, you look to the works of the statute that Congress enacted. And if those words are clear beyond per adventure of a doubt, in applying to the particular fact situation before you, you do not go to the legislative history to support any contrary claim.

But if there is ambiguity in the application of the words Congress used to these, then you can go to the legislative history to try to clear up the ambiguity.

Senator GRASSLEY. During his tenure, Chief Justice Burger spoke out frequently on judicial administration issues, such as lawyer advertising, frivolous lawsuits, and the quality of lawyers admitted to the bar.

What issues are you as Chief Justice going to take a leadership role on in your public pronouncements as head of the Federal judiciary?

Justice REHNQUIST. Well, Senator, I like to think when I do make those pronouncements, I will know more about those issues than I do now. Just because I have not been Chief Justice and have not really organized my thinking. But I think one of the most critical things in American society today is the cost of litigation, and the implementation in some places, but not everywhere, of alternative means for dispute resolution, the tremendous delays that people encounter in getting a dispute settled.

I think back to the time when I was in practice, when things were not nearly as congested and the courts were more accessible in the sense that you could get a case tried in 5 or 6 months if you filed it. And some of my clients, we were in a four lawyer firm, and some of our clients were quite small people. And I think to say a material man's lien claimant, a person who put some—either some

labor or some material on a construction job, the contractor does not pay. So he has got a claim for $15,000 or $20,000 against the contractor.

You walk into any good sized law firm nowadays and they will tell you no, we just cannot handle your case. It would cost you more than $20,000 to have us litigate it.

Now, some people have kind of scoffed at alternative dispute settling means as kind of a denial of access to the courts. But I know from some of the clients I had back in practice, they wanted their disputes settled. They would have even accepted a negative decision sometimes. But the idea of paying nearly as much as what is involved in order to get a judgment was what really angered them. And, you know, I think that is a real concern that I hope to look into as Chief Justice.

Senator GRASSLEY. Well, those are very worthy areas to work in. And if you can accomplish some progress in that area, you will be making a very real contribution.

Let me ask a little bit about the workload of the Court and some suggestions that have been made for maybe reducing that workload.

Would you favor legislative changes in the statute on diversity jurisdiction as a way to reduce the Court's workload?

Justice REHNQUIST. I am reluctant to comment on statutory things except in the area that you picked out, which seems to be so closely related to the way the courts function, that I could not be criticized for responding.

I have mixed feelings. I think analytically diversity jurisdiction ought to be repealed. It exists solely by reason of the fears in the early days of the United States that a State Court judge in Iowa could not be fair to a litigant from Missouri. And I simply do not think that there is much ground for that any more.

But I have talked to people around the country, and the Bar Associations in the West, I was looking up for Senator DeConcini, because I think the Arizona Bar Association and many of the Bar Associations in the small Western States have taken the position they do not want diversity repealed. Perhaps Iowa has too. And when you start asking them why, they like the option of having two courts. And they generally have the feeling that because the State Court judges are paid less than the Federal judges, that the Federal judges, by and large, are going to be somewhat better judges.

And I have also talked to a number of the judges in the lower Federal court, the courts of appeals, and the District Courts, and a lot of them, although they concede analytically diversity jurisdiction should be repealed, they said I would rather try a diversity case than a title VII case, or some other kind of a statutory case because it is more interesting. Or it is the only chance I have to see 90 percent of the lawyers that come into my court is diversity jurisdiction, because that is the only kind of cases that most lawyers in the State have.

So I am not sure that you can just say analytically it ought to go contrary to the wishes of a lot of the judges and a lot of the people who think they are benefitting from it.

Senator GRASSLEY. At the very least, I hear you saying it does not serve the practical purpose it did at one time in our history.

Justice REHNQUIST. I do not think it does, although people have argued with me about that too.

Senator GRASSLEY. Some Supreme Court historians have criticized the Burger Court for failure to establish a common body of law in many areas. They might pick out criminal procedure and affirmative action as a couple.

The criticism is that the Supreme Court has qualified its holdings too much to fit the specifics of each fact intensive situation.

How important do you believe it is that the Court attempt to lay down bright line rules?

Let me follow up with whether or not you would be steering the Court down such a path in your position as Chief?

Justice REHNQUIST. I do not think I would have much success in steering the Court down any path that my colleagues did not agree with me on.

And on the bright line rules, there is no question but what the typical practicing lawyer, the typical trial judge is going to get more satisfaction out of a case enunciating a bright line rule than out of a case which has a lot of ifs, ands and buts in it. And yet when a case comes to our Court, in some cases we will find we have laid down a bright line rule that sounds great. Then it comes back on slightly different facts, and some of the people who joined it before say, well, gee, if I had known it was going to be this kind of a thing, I would not have subscribed quite that broad language, and it ends up qualified.

I think that, Senator, is the nature of the judicial process.

Senator GRASSLEY. Reportedly you have said that you agree with Chief Justice Burger that the Supreme Court has built too high of a wall between separation of church and State.

Is this an accurate characterization of your views on this aspect of the First Amendment?

Justice REHNQUIST. It is an accurate characterization of the views I expressed in my dissenting opinion in *Wallace* against *Jaffrey* last year, yes.

Senator GRASSLEY. OK. Now, referring to the *Jaffrey* case, you stated that the establishment clause should extend no further than the prohibition on establishing a State religion.

In your personal view, what exactly are the boundaries of the establishment cause in regard to religious activity in State-controlled institutions?

Justice REHNQUIST. Senator, with all respect, I feel that since this is a case that—the kind of issue that constantly comes before the Court, I must respectfully decline to answer.

Senator GRASSLEY. And do not smile when I refer to the ninth amendment. I would like to focus on that or the protection of unenumerated rights for just a minute.

No specific right is actually mentioned in that amendment, as you obviously know.

Exactly what specific rights do you think the framers intended to protect under this amendment?

Justice REHNQUIST. Senator, you are going to find me obnoxious, I am sure, because there was at least a concurrence, I think, in one of the contraceptive cases that said there was a penumbra of rights that perhaps flowed partly from the Ninth Amendment, and just

because we recently had a case of *Bowers* against *Hardwick,* I forget whether the ninth amendment was directly involved, but it was the same type of case.

I just feel I can't answer as to my personal views because I have participated in some cases and they are bound to come again.

Senator GRASSLEY. Well, do some unenumerated rights exist that have not yet been defined?

Justice REHNQUIST. Certainly—that have not yet been defined?

Senator GRASSLEY. Yes.

Justice REHNQUIST. I think the only correct answer to that is that it may develop, as future decisions come down from the Court, that just what you suggest will happen. But it simply can't be predicted one way or the other profitably now.

Senator GRASSLEY. What is your view on what the framers intended when they drafted article III, section 2, where the Supreme Court has appellate jurisdiction, where it says "with such exceptions, and under such regulations as the Congress shall make"? In other words, do you think that it was intended for Congress to have authority to actually restrict Supreme Court jurisdiction?

Justice REHNQUIST. I know there have been bills to that effect pending in Congress. There is a case decided right after the Civil War, and let me think——

Senator GRASSLEY. The *McCardle* case.

Justice REHNQUIST. Correct, right, ex parte *McCardle*—where the Court seemed to say that Congress did have that power. In fact, it didn't seem to say it; it said it, I think.

But then there has been a great deal of, I think, quite hostile criticism of the *McCardle* case, not from our Court, I don't believe, but from scholars and commentators. And just because that kind of bill has been pending here, again, I don't feel I can express a view on the authority of Congress under article III, section 2.

Senator GRASSLEY. What is your opinion of television coverage of the Supreme Court?

Justice REHNQUIST. Under television coverage in the Supreme Court, if the lights shine in the eyes of the lawyers, the way these lights shine in my eyes, for the sake of the lawyers I would be against it.

I have a feeling—and I thought about that, Senator, because I sat back there for a couple of hours this morning, and if I were a lawyer arguing before the Supreme Court, with these sort of lights on me, trying to make contact in my argument with nine Justices, I would be kind of unhappy.

If I were convinced that coverage by television of the Supreme Court would not distort the way the Court works at present, I certainly would give it sympathetic consideration. But if it meant a whole lot of lights that would disturb the present relationship between lawyers and judges and arguing cases, I don't think I would be for it.

Senator GRASSLEY. Do you support television coverage of Court proceedings?

Justice REHNQUIST. I participated in the *Chandler* decision that the Chief Justice wrote a number of years ago, saying that where Florida had provided that, there was nothing in the Federal Consti-

tution that prevented it. So I suppose you would say from that that each State is free to chose for itself.

Senator GRASSLEY. I'm done with my questioning, and I see we have a vote on.

Mr. SHORT. Yes, sir, if we could recess.

Senator GRASSLEY. Do you want me to recess?

Mr. SHORT. If you would, please.

Senator GRASSLEY. We will recess the committee meeting until the chairman returns after the vote on the floor of the Senate.

[Whereupon, the Committee was in recess.]

The CHAIRMAN. The committee will come to order.

The distinguished Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman. I appreciate the chairman's indulgence while we had to go and vote.

Judge Rehnquist, we discussed earlier the fact that you spend part of the year in my own State of Vermont—that's in Greensboro, VT, is it not?

Justice REHNQUIST. Yes, it is, Senator.

Senator LEAHY. And am I correct that you have—that you and Mrs. Rehnquist actually have a summer home there?

Justice REHNQUIST. Yes, we do.

Senator LEAHY. When did you purchase that?

Justice REHNQUIST. In 1974, I believe.

Senator LEAHY. Justice Rehnquist, I am told that you have a warranty deed, the normal form of transfer in Vermont, and gave back a mortgage deed. But in the warranty deed there is this sentence: "No fee to the herein conveyed property shall be leased or sold to any member of the Hebrew race."

Are you aware of that covenant in your deed?

Justice REHNQUIST. Not at the time, Senator. I was advised of it a couple of days ago.

Senator LEAHY. Did you not read the deed that you got on your property?

Justice REHNQUIST. I certainly thought I did, but I'm quite sure I didn't note that.

Senator LEAHY. This is not a very lengthy document, is it?

Justice REHNQUIST. I don't recall, not having it in front of me. I relied on a lawyer in St. Johnsbury to close the title.

Senator LEAHY. You signed the mortgage deed back?

Justice REHNQUIST. I'm sure I signed whatever deeds were necessary to sign.

Senator LEAHY. Would you be surprised to hear that the deed is basically a boilerplate printed deed, but then the items of description of your property and this restricted deed are typed in?

Justice REHNQUIST. No, I wouldn't be surprised.

Senator LEAHY. And you do not recall reading that "No fee to the herein conveyed property shall be leased or sold to any member of the Hebrew race"?

Justice REHNQUIST. No, I don't.

Senator LEAHY. And you just heard about this 2 days ago?

Justice REHNQUIST. Yes.

Senator LEAHY. What was your reaction when you heard about it?

Justice REHNQUIST. I was amazed.

Senator LEAHY. As a lawyer, how do you feel about that language?

Justice REHNQUIST. Well, I think it's unfortunate to have it there. But it's meaningless in today's world, I think.

Senator LEAHY. Why is it meaningless?

Justice REHNQUIST. The covenant is unenforceable under Federal constitutional law and I think under Federal statutory law.

Senator LEAHY. I should note for the record that it is also illegal under—or it's invalid under Vermont law, title 13, section 1452, VSA.

So it is your opinion there is no legal effect of that being in your deed?

Justice REHNQUIST. Oh, certainly.

Senator LEAHY. Will you do anything to have that language removed from your deed?

Justice REHNQUIST. Did I do anything——

Senator LEAHY. No; would you—will you?

Justice REHNQUIST. I don't know exactly what the point of having it removed from the deed would be, other than to get rid of something that is quite obnoxious, because it's unenforceable now.

Is there some procedure under Vermont law where one could have it removed?

Senator LEAHY. I would assume you could go through a straw man and a quick claim back.

I mean, do you not see a question of appearance, if it is noted that the Chief Justice of the U.S. Supreme Court has a restricted deed in his property?

Justice REHNQUIST. Yes. Yes; I certainly do. And if there is a procedure under Vermont law where one could avoid it or get rid of it, I would certainly go through it.

Senator LEAHY. Thank you.

I must admit that I was also surprised to see that, because in my own experience of years of private practice, I never once saw a deed go through with a restrictive covenant. In fact, in our law office, I can't imagine even representing somebody who would want to put that in. But I appreciate and accept your statement that you would move to get rid of it.

Mr. Justice, in 1971, you gave a speech before the National Conference of Law Reviews, and you said you did not believe there should be any—and I quote—"judicially enforceable limitations on the gathering of this kind of public information by the executive branch of the Government." And "this kind of public information" you were referring to was the collection and storage by law enforcement personnel of public information about individual Americans.

Do you still hold that same view?

Justice REHNQUIST. You're talking about simply viewing people in public places?

Senator LEAHY. You said there shouldn't be any judicially enforceable limitations on the gathering of public information by the executive branch of the Government. I understood your speech to say that you could not think of any kind of judicially enforceable limitations, that I would assume there might not be any cases

where that would be possible, to have judicially enforceable limitations.

Justice REHNQUIST. Well, I think at that time I perhaps wasn't aware of a case that I later became aware of, and it must have been shortly afterwards, because I think a similar question was asked in my 1971 hearings. There was a case decided in the Federal court in Chicago, I think, that suggested that if there was an element of harassment about the information gathering, that that would be judicially enforceable. I certainly agree with that case.

Senator LEAHY. What about the advent of modern computer technology, this ability to prepare and collect and build up enormous, almost an Orwellian dossier on people; does that change your views in any way?

Justice REHNQUIST. Well, if we're talking about the Constitution, I'm not sure that it does. But it seems to me that's what we have to count on legislatures and Congress for, to regulate where regulation is necessary.

Senator LEAHY. At the Constitutional Rights Subcommittee hearings in 1971, when you were a witness for the Department of Justice, you may recall—there's been a lot of discussion since—about Senator Ervin discussing the incidents where Army intelligence officers are pretending to be photographers and took pictures of individuals at antiwar rallies and then compiled dossiers on them.

You testified at the time the activity was a constitutional stature, but you are saying that this activity, while perhaps wrong, did not violate the first amendment rights of those individuals at the rallies.

Do you still feel that way?

Justice REHNQUIST. Senator, I am reluctant to answer that question because we have had a couple of cases involving surveillance of people in public places come before the Court, the *Knotts* case and in the *Carroll* case. They weren't precisely in this context, but it seems to me that I really have to draw back there.

Senator LEAHY. Well, let me ask you this.

Suppose the person that is carrying out the investigative activity, instead of a member of the executive branch or elected official, rather than photographing antiwar protesters, he or she is photographing black voters entering a polling place, with voters claiming they're being intimidated by that activity. If the black voters brought a case in Federal Court, would there be a justiciable controversy under the 15th amendment in your mind?

Justice REHNQUIST. Senator, I honestly feel that I can't answer that question. It's the kind of thing that might come before the Court.

Senator LEAHY. Well, let me go into an area that did come before the Court and involved you, and that's the *Laird* v. *Tatum* case.

You had refused to recuse yourself in that case. At the time when you refused to recuse yourself, you acknowledged that you had served in the capacity of an expert witness for the Justice Department during congressional hearings that concerned, among other things, domestic military surveillance. During those hearings you made statements concerning the *Laird* case which was pending then in the court of appeals, and you said they were merely person-

al interpretations of the Constitution. I think I'm accurately describing the situation.

Now, here is a quote from the exchange with Senator Ervin. Senator Ervin said,

> You do take the position that the Army or the Justice Department can go out and place under surveillance people who are exercising their First Amendment rights, even though such action will tend to discourage people in their exercise of those rights?
>
> Mr. REHNQUIST: Well, to say that I say they can do it sounds either like I'm advocating they do it or that Congress can't prevent it, or that Congress has authorized it, none of which propositions do I agree with.
>
> My only point of disagreement with you is to say whether, as in the case of Tatum versus Laird, which has been pending in the Court of Appeals here in the District of Columbia, that an action allowed by private citizens to enjoin the gathering of information by the executive branch, where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

Were you saying at the time of those hearings that the *Laird* case presented a nonjusticiable controversy?

Justice REHNQUIST. Senator, the transcript of the hearings would certainly be the best version of what I was saying at the time. I don't recall it now, at the time, but I am sure the transcript you're reading from is accurate.

Senator LEAHY. Assuming that that is accurate, doesn't that say, in effect, that you are concluding that the *Laird* case presented a nonjusticiable controversy?

Justice REHNQUIST. The term "nonjusticiable" troubles me because it could be taken to mean something that, although there is a constitutional violation, the courts can't remedy it. I don't think that's what I was meaning to say.

Again, just trying to interpret portions of the transcript you read, I think it certainly could be interpreted to say that, under those circumstances, there was no constitutional violation.

Senator LEAHY. But weren't you saying, as an expert witness, the same thing that you then handed down or didn't vote on in the decision in *Tatum* v. *Laird* when it came to the Supreme Court?

Justice REHNQUIST. I want to make sure I understand your question. You're not talking about my remark about Tatum against Laird as a case during that hearing, but you're talking about the statement I made about the more general proposition?

Senator LEAHY. No; I'm talking about your statement about *Tatum* v. *Laird.* You discussed *Tatum* v. *Laird* in the Ervin hearings. You subsequently voted on or were the ruling opinion in *Tatum* v. *Laird*—in fact, it could be said that you or any of the five who were in the majority would be the swing vote in that case. You had been asked to recuse yourself and you said there was no need to recuse yourself, and yet you discussed it in the form of an expert witness before the Ervin hearings before.

What I'm saying is, had you not in those hearings, in effect, stated what would be the decision, your decision, in *Tatum* v. *Laird,* and if that was the case, should you not have recused yourself in *Tatum* v. *Laird*?

Justice REHNQUIST. Should I have recused myself?

Senator LEAHY. Yes.

Justice REHNQUIST. As you know, Senator, I wrote a fairly lengthy opinion explaining why I didn't think, under the law applicable then, I ought to have to recuse myself, because I didn't think the law required that simply the public statement of a view prior to going to the bench foreclosed one's consideration of the issue, even though the same view was involved in a litigated case.

I realize people might disagree with me, but that was the position I took in that case.

Senator LEAHY. Do you have any second thoughts about that position?

Justice REHNQUIST. I never thought of it again until these hearings, to tell the truth. I have gone back and read the opinion, and I think, under the statute as it was changed after *Laird* v. *Tatum,* I think there would be probably a very strong ground for disqualification. But I didn't feel dissatisfied with the way I had behaved under the statute as it then stood.

Senator LEAHY. In your memorandum you said that you felt you were not disqualified based on the statute then—in other words, prior to being amended, the action you just referred to. But you said also you would not give separate consideration to the ABA standards of judicial conduct, saying that you didn't read them as being materially different from the standards in the congressional statute.

But then, a couple of years later, and before the New York City Bar, you referred to those standards as being more stringent.

Justice REHNQUIST. Justice Stewart, who was a good friend of mine, I remember, after I wrote this opinion—you know, it may have been months afterwards—he had been on the drafting committee of the ABA standards, and he told me that in some respects he thought my comparison of the ABA standards and the statutory standards was incorrect and that the ABA standards had intended to be more stringent.

Senator LEAHY. Looking at the ABA standard, if that was what you had used as your guide, would you have recused yourself?

Justice REHNQUIST. I just can't put myself back in that position, Senator, not having the ABA standards in front of me. I really just can't answer.

Senator LEAHY. Let me ask you this. This would not be a subjective thing, but let me ask you an objective question:

Did you have personal knowledge of the disputed evidentiary facts in *Laird*?

Justice REHNQUIST. No.

Senator LEAHY. When you were in the Justice Department, did you have knowledge about the military's domestic surveillance policy?

Justice REHNQUIST. I had—if you would consider information obtained in the course of preparing for the May Day demonstrations, which did involve some military activity, I suppose you would say yes.

Senator LEAHY. But you deny, you were not aware of the evidenciary, or the disputed evidenciary facts?

Justice REHNQUIST. No.

Senator LEAHY. In 1975, Senator Ervin wrote a letter, saying that you should have disqualified yourself from participating in that

case because you had acted as counsel for the Defense Department in a hearing before the Senate Subcommittee on Constitutional Rights. Are you aware of that letter?

Justice REHNQUIST. No. I am not.

Senator LEAHY. I will ask staff to make sure a copy of the letter be given you. Once you have had a chance to read it, then I would ask, Mr. Chairman, to have unanimous consent to have the letter included in the record in connection with the testimony and my questions.

The CHAIRMAN. Without objection.

[The letter follows:]

United States Senate

WASHINGTON, D.C. 20510

Morganton, North Carolina 28655
June 26, 1975

LOUIS MENAND, III
ROOM 3-234
JUL 1 1975
file:
refer to:

Professor Louis Menand, III
Department of Political Science
Room 3-234
Massachusetts Institute of Technology
Cambridge, Massachusetts 02139

Dear Professor Menand:

This is to thank you for your letter of June 19, 1975, and the copy of your letter to the Senate Subcommittee on Constitutional Rights which accompanied it.

I have never been able to understand why Chief Justice Burger said so much about the destruction of the surveillance records acquired by the Army during its spying on civilians in his opinion in Laird v. Tatum. The only question before the Supreme Court in that case was the sufficiency of the complaint to state a cause of action. Four of the Justices combined with Justice Rehnquist, who ought to have disqualified himself from participating in the case because he had acted as Counsel for the Defense Department in the hearing before the Senate Subcommittee on Constitutional Rights, held the complaint to be insufficient.

Solicitor General Griswold argued the case for the Defense Department, and repeatedly invoked affidavits which had been offered by the government in the District Court in opposition to a motion of the plaintiff for a temporary restraining order although these affidavits had no relevancy whatsoever to the point being considered by the Supreme Court, as I pointed out to the Supreme Court. Nevertheless, the Solicitor General got away with this, and Chief Justice Burger's opinion is based in large part on what the government said and not on what the complaint alleged.

The suit was a suit for an injunction to prevent threatened injuries. The Chief Justice treated it as if it was a suit for damages, and held that the plaintiff could not maintain the suit unless he could show he had suffered an injury -- instead of the threatened injury which was sought to be averted. I am glad that you have asked for an investigation.

Sincerely yours,

Sam J. Ervin, Jr.

Sam J. Ervin, Jr.

SJE:mm

Senator LEAHY. Justice Rehnquist, on another area, the Chief Justice is known for his adamant coverage to television coverage of Supreme Court proceedings. Knowing what it has done to the cave of the winds over here, now that we have had it for a few months in the Senate, I can somewhat understand some of his feelings.

But let me ask you: As Chief Justice, what would your view be of television coverage of arguments, or proceedings before the Supreme Court?

Justice REHNQUIST. Senator, I responded to Senator Grassley a little——

Senator LEAHY. I am sorry. I missed that.

Justice REHNQUIST [continuing]. That if the lights came down in the face of the lawyers in the Supreme Court, the way the lights come down on the face of the witnesses here, I would have real reservations about it. Because our operation is a fairly small one; it is fairly intimate between the lawyers and the judges.

If television coverage would not distort the way the Court now operates, I would certainly give it sympathetic consideration.

But if it turns out to be just to make it a totally different ballgame, I would have real reservations.

Senator LEAHY. So that you would not have any objection to it if they are able to put, some way of putting the coverage in there in an unobtrusive fashion without these lights?

Justice REHNQUIST. Yes. Unobtrusive, in the view not of the television people, but of the Justices.

Senator LEAHY. That is what I mean. Having come here and seen how these lights work, I now have more sympathy for some of the people who had a chance to meet me in less than favorable circumstances, when I was a prosecutor, in lineups. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. The distinguished Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman. Mr. Justice Rehnquist, the relay questioning which you have been subjected to here today, is somewhat reminiscent of some Supreme Court decisions, *Ashcraft* v. *Tennessee.* I think it may be that defendants in proceedings have more rights than nominees, even if they are Associate Justices of the Supreme Court. The questioning has gone on by relay, longer than I think the Supreme Court precedents would permit that kind of drilling by district attorneys or by police detectives. But we are proceeding to try to move ahead as fast as we can.

Let me start with the very basic proposition that I believe you have already responded to, but one that I think is important to put on the record. And that is the binding precedent of *Marbury* v. *Madison,* 1803. That the Supreme Court of the United States is the final arbiter, the final decisionmaker of what the Constitution means.

Justice REHNQUIST. Unquestionably.

Senator SPECTER. So that if the Supreme Court has ruled on a legal issue, the executive branch, the legislative branch, have a responsibility to observe the decisions of the Supreme Court of the United States on a constitutional matter?

Justice REHNQUIST. Yes. I think they do.

Senator SPECTER. Let me now turn to the subject of the jurisdiction of the Court, a question which is of great concern, and it bears upon the first issue as to the binding authority of the Supreme Court of the United States to interpret the Constitution.

There may be some effort to undercut the final authority of the Supreme Court by saying that the Court has no jurisdiction on a given issue. If the Court cannot interpret the Constitution or apply a remedy, then the Court realistically is unable to carry out the function of constitutional interpretation, as I think *Marbury* v. *Madison* requires.

Do you think that the jurisdiction of the Court can be limited, for example, on the first amendment right of freedom of speech?

Justice REHNQUIST. Senator, as you know, I am sure, as well as I, there was a case right after the Civil War, ex parte McCardle, that held that Congress could limit the jurisdiction of the Supreme Court; even require that a case which had already been submitted to the Justices for decision, be dismissed.

Since that time, there has been a lot of scholarly criticism, criticism from commentators, something along the lines I think your question suggests. That this thing cannot just be allowed to sweep away the power of the Court to finally adjudicate cases.

I know there have been bills pending here, in the last 2 or 3 years, testimony as to their constitutionality, and I feel I cannot go any further than that, for fear that that sort of issue will come before the Court.

Senator SPECTER. Well, Mr. Justice Rehnquist, I am very sensitive to the issue as to commenting on matters which may come before the Court. It seems to me, however, that when you deal with the issue of the ultimate authority of the Court to interpret the Constitution, which is bedrock in our society—I do not think you can find a more fundamental principle—that if you can undercut the authority of the Court, by saying that there is no jurisdiction, then *Marbury* v. *Madison* is really meaningless. As a lawyer of some 30 years standing, I think it is very important for the committee—and I think for the whole Senate—to really get an idea as to your judicial approach on an issue which is that fundamental, and that important.

Justice REHNQUIST. Senator, as you can imagine, I would like to oblige, but the fact that the issue is fundamental, and important, does not make it any less one that could well come before the Court. And I think that the approach I have to take is, in a case like that, I ought not to attempt to predict how I would vote in a situation like that.

Senator SPECTER. Well, suppose the issue of *Marbury* v. *Madison* comes before the Court again. Suppose there is a challenge made by the President of the United States; that he asserts that he is separate but equal, and does not have to obey the decision of the Supreme Court of the United States. Have you already foreclosed that situation?

Justice REHNQUIST. Well, I think this type of question, like most other questions that lawyers and judges deal with, has elements of degree about it. Whether Marbury against Madison is good law is something that—no one has challenged Marbury against Madison,

it seems to me, for a century, perhaps, you know, nearly two centuries.

I do not think that the question you pose is quite the—in light of the *McCardle* case, is quite as totally free from doubt as Marbury against Madison.

Senator SPECTER. Well, what is there to *Marbury* v. *Madison*, which says the Supreme Court makes the decision on constitutional issues, if the Congress can say the Court has no jurisdiction over a constitutional issue?

Justice REHNQUIST. Well, there would certainly be some loggerheads there. It might put Congress at loggerheads with—I suspect it would—with the Court.

Senator SPECTER. Well, that is easy. If the Congress is at loggerheads with the Court, the Court wins, as long as *Marbury* v. *Madison* is the law of the land.

Justice REHNQUIST. Well, perhaps it is easy, Senator, and I realize the arguments you advanced are persuasive ones, but even if the question is easy, I do not think that permits me to indulge in speculation about its outcome.

Senator SPECTER. Well, Mr. Justice Rehnquist, I am sensitive to the issue about your not being asked to comment on cases which may come before you. But it seems to me, with all due respect, that a nominee for the Supreme Court should be willing to give his or her views on something which is as fundamental as the authority of the Court to decide constitutional issues.

Justice REHNQUIST. Senator, I understand your position, and I honestly feel that I must adhere to my view that it would be improper for a sitting Justice to try to advance an answer to that question.

Senator SPECTER. Well, let me carry it just a moment or two further. Beyond McCardle, in the case of *United States* v. *Klein*, decided in 1871, so it is an old case, the Supreme Court of the United States held unconstitutional a particular congressional statute limiting the appellate jurisdiction of the Supreme Court and the original jurisdiction of the Court of Claims.

And I realize, Mr. Justice Rehnquist, that notwithstanding your extraordinary record of scholarship, that you cannot have all the Supreme Court cases in your head. Would the doctrine of *United States* v. *Klein* perhaps settle the question of the jurisdiction of the Court, making clear that the Congress could not take away the jursidiction of the Court, or do you still feel it is an open question which might come before you?

Justice REHNQUIST. Well, when I say open question, Senator, I do not mean one that is 50–50, or something like that, that are equally plausible arguments on both sides. Just it is a question not settled totally by a precedent, that could very easily come before us.

Senator SPECTER. Well, between now and the time of my next round, if it is tomorrow, or if it is today, I am going to go back and do some more research on the issue of appropriate questions to ask, because this matter is of great concern to this particular Senator.

In effect, you say there is an open question as to whether the Congress can limit the jursidiction of the Court to decide a first amendment question of freedom of speech or freedom of press. Is that a fair statement?

Justice REHNQUIST. Yes. I think it is.

Senator SPECTER. Well, I would find that of considerable concern, if the Congress can do that. The Congress did——

Justice REHNQUIST. Well, I would find it of considerable concern, too, Senator. But that does not make me feel that because I would feel it was wrong, or mistaken, that one would automatically come to the conclusion that it was unconstitutional.

Senator SPECTER. Well, there are certain principles which, at least in my view, are so fundamental as to require a statement, or an understanding as to where a person stands. I understand the competing consideration of not asking you to discuss or comment on cases which may come before the Court.

Justice REHNQUIST. I would certainly, you know, reconsider my answer—I do have the feeling, and I may be wrong, that Justice O'Connor, in her confirmation hearings, was asked similar questions, and I believe she took much the same position that I am taking.

Senator SPECTER. I do not believe she was, but I will check it. I was present at Justice O'Connor's confirmation hearings, although not for as long as Justice O'Connor was present during her own testimony. I am concerned about this issue because there is a move, through the route of limitation of jursidiction, as I see it, really, to undermine *Maibury* v. *Madison.* That is why I pressed it to the extent that I have, and I would ask you to reconsider it. We will take a look at Justice O'Connor's testimony and we will take a look at some of the precedents on the appropriate scope of questioning in other proceedings, and follow up on it.

Mr. Justice Rehnquist, on the issue of the incorporation doctrine, that is, the extent to which the 14th amendment of the U.S. Constitution, through its due process clause, picks up prohibitions within the Bill of Rights, I have noted your opinion in *Trimble* v. *Gordon,* where you express some doubt as to the first amendment being fully incorporated in the due process clause of the 14th amendment.

And I would ask you, if you recollect the case, what your position is on that issue?

Justice REHNQUIST. I do not recall it in *Trimble* against *Gordon* but I remember writing to that effect in a couple of other cases: the *Buckley* against *Valeo* case, and I think the *First National Bank of Boston* versus *Valati.* And the position I took there, and I think I took it without any support from my colleagues, but it was following a view held by the second Justice Harlan and by Justice Jackson, for whom I clerked, and I think by Justice Holmes at one time—was that the freedom of speech and press clauses were directed against—by their terms, directed against Congress. And that the 14th amendment carried over the general prohibitions of those clauses against the States, but not with, necessarily, the same specificity.

And in *Buckley* against *Valeo,* I wrote it, a partial dissent from a rather small part of the opinion, because I expressed a view there, that whereas the States had, if there were going to be elections at all, there had to be State regulation of the ballot process, when you vote, how you get on the ballot, and that sort of thing. And there were precedents from our courts saying that there was a fair

amount of latitude on the part of the States to favor a system which favored the two major parties—the Democrats and the Republicans at the expense of splinter parties.

And the position I took in Buckley was that that was perfectly good for the States who had to regulate ballots, but that the Federal Government was more restricted by the first amendment, because if there were going to be elections the States had to step in and establish the process. The Federal Government did not have to regulate the things it regulated in Buckley, in order for elections to take place at all. And so I felt that the Federal statute—and expressed the view in the dissenting opinion—discriminated, unconstitutionally, in favor of the Republican and Democratic Parties against the splinter party.

Senator SPECTER. Well, Mr. Justice Rehnquist, as to the scope of the due process clause—of course the due process clause of the 14th amendment says nothing about freedom of speech. I have read your statements on the issue, where you have said that it is a matter of trying to reconstruct the intent of the framers at the time. And it is a very difficult job, obviously, to undertake that.

But how do you, in interpreting the breadth of the due process clause, come to that kind of a delineation, when you are seeking the intent of the framers of the 14th amendment? How can you separate off first amendment speech rights, how can it really be severable?

Justice REHNQUIST. Well, if you are looking at the language of the due process clause, as I recall it, Senator, it says: "No State shall deprive any person of life, liberty or property without due process of law."

And the question then becomes, you know, as you know perfectly well, what is included under liberty, or, what provisions from the Bill of Rights are carried over by that language? And I would say that, from the language itself, it is not evident that any particular provisions are carried over, not inexorable; but if you look at the word liberty, and you wonder what kind of liberty are they talking about, surely one liberty was freedom of speech, freedom of the press.

So, it seems to me it is quite natural to carry those over. But I do not know that the language of the due process clause, nor necessarily, what I happen to recall about the debates, and that sort of thing, necessarily indicates that the full rigors of the first amendment as applied to Congress, necessarily were to be applied to the States.

Senator SPECTER. Well, the difficulty with that, it seems to me—and I am just probing to get your line of reasoning on it—is that it is so speculative. If you are picking out a portion of the first amendment, the freedom of speech—if you seek to avoid putting your own personal views, as they arise in a case, which I know you have testified in the 1971 proceedings, that you are very much opposed to—how can you really separate the various aspects of something as fundamental as speech?

Isn't it really all in there? Once you say that the due process clause incorporates freedom of speech under the first amendment, isn't that all there is to it? How can you separate any of it out as not incorporated?

Justice REHNQUIST. Well, if you say that the due process clause incorporates and makes applicable against the States, the first amendment in haec verba, so to speak, the question is answered. If it does that, it does carry it over in precisely the terms that it is applicable to Congress against the State.

But I think the argument on the other side, is that—and I think this is made very well in Justice Jackson's dissent in the *Beauharnais* case—is that there was a good deal of understanding of what freedom of speech meant at the time the Constitution was adopted, that was undoubtedly applicable against the States, but that there were perhaps slightly more latitude allowed to the States than were allowed to the Federal Government.

Justice Harlan took that position in his opinion in the *Roth* case. That the States could proscribe certain kinds of obscenity but that the Federal Government could not.

Senator SPECTER. Mr. Justice Rehnquist, at the risk of asking questions which may come before the Court, I think these are pretty well established principles, but, there is considerable concern on the part of this Senator about the applicability of the due process clause of the 14th amendment to certain fundamental liberties, as embodied in the first 10 amendments.

And I would like to ask your view as to the inclusion of the free exercise of religion in *Cantwell* v. *Connecticut.* It was a unanimous opinion. Does that matter rest, so far as you are concerned?

Justice REHNQUIST. Most certainly, yes.

Senator SPECTER. And the establishment clause in *Everson* v. *Board of Education?*

Justice REHNQUIST. No. I think I criticized the *Everson* case in my dissent in Wallace against Jaffrey, not for the result it reached at all, but for its use of the term "wall of separation between church and state," which I felt was simply not historically justified.

Senator SPECTER. Well, the red light is on. May I have leave to ask one final question, Mr. Chairman?

The CHAIRMAN. Yes.

Senator SPECTER. And I will come back to this line later. And this is somewhat less philosophical or constitutional than the matters I have been discussing with you, but there are some people very interested in this in Pennsylvania.

Mr. Chief Justice Burger said that he would take the Supreme Court for a sitting in Philadelphia in 1987, where the Supreme Court once sat, probably still should. My question to you, Mr. Justice Rehnquist, is whether you would honor that commitment?

Justice REHNQUIST. I would certainly make every effort.

Senator SPECTER. Thank you. Thank you very much, Mr. Justice. Thank you, Mr. Chairman.

Senator BIDEN. Delaware was the first State, Mr. Chief Justice. We would like to talk to you about that.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. Several, or two have questioned you about TV in the Supreme Court. You mentioned the lights. I would suggest that you go down and look at the Supreme Court of Alabama and see how they have arranged the lighting in regards to TV coverage. I do not think you have any conflicts of fair trial, free press issues, that would arise with an appellate court argument, and I think

that sometimes maybe the U.S. Supreme Court can learn from the State courts.

I think it might be interesting to see how it has worked there. It has worked quite well.

I want to pursue a little bit more about this issue that has arisen: the role of the first amendment as opposed to the role of an Associate Justice, that we have outlined either through questions to you, or to other witnesses relative to that role.

The leadership on the Court is one, and the leadership of the entire judicial system is another area. On the Court, there has been a good deal written about a consensus builder, the first amendment and the Chief Justice as a consensus builder.

I have read with interest a speech that you made, which is published in Constitutional Commentary, the summer issue of 1985, that was at the University of Minnesota Law School, where you were the jurist-in-residence there in October 1984, entitled, "Presidential Appointments to the Supreme Court."

In it you trace somewhat the history of various Presidents as they had the opportunity to appoint a good number of the members of the Supreme Court, and, in doing so, attempted to appoint Justices of their philosophy and ideology.

Two come to mind from reading it: Lincoln and Roosevelt. There were a number of factors that took place. For example, with Roosevelt, a number of deaths took place, so really, they did not live to fulfill what he perhaps had as his desire to the way they would interpret the Constitution and the statutes that were passed by Congress.

Then in your article, you say that a second series of centrifugal forces is at work within the Court itself, pushing each member of the Court to be thoroughly independent of his colleagues.

The Chief Justice has some authority that Associate Justices do not have, but this is relatively insignificant compared to the extraordinary independence that each Justice has from each other Justice. And it goes on in the article, and then, in the closing paragraph, you indicate that, "An appointment to the Supreme Court is immediately beset with institutional pressures," which you had described, and he identifies more and more strongly with the new institution of which he has become a member, and he learns how much store is set by his behaving independently of his colleagues.

I believe these institutional effects, as much as anything, have prevented even strong Presidents from being any more than partially successful when they sought to, quote, "pack in," unquote, the Supreme Court.

Now those unusual pressures that are within the Court to push a member of the Court to be independent of other Justices, would you elaborate a little bit more on that?

Justice REHNQUIST. Yes. I will try to, Senator. One occasionally, looking back at times where the Chief Justice has changed, whether it was Hughes to Stone in 1941, or Stone to Vinson in 1946, and you will read press accounts, that the new Chief Justice is expected to "harmonize" the Court and resolve the disputes. He will clear up these five to four decisions, because he is a great negotiator, and that sort of thing.

Most predictions have just never come true, for the very reasons, I think, that you stated. That if——

Senator HEFLIN. Well, they are really what you stated. I was quoting you.

Justice REHNQUIST. Well, OK, what I stated, Senator. If the President appoints a Cabinet member, the President has a great deal of authority over the Cabinet member. If the Cabinet member does not do what the President likes, the President can fire the Cabinet member.

But the authority of the Chief Justice over the Associates is just very, very minimal, and you get no kudos from the people who are watching your performance—the law reviews, the bar associations, and that sort of thing—for voting with the Chief Justice.

There is just nothing ever said about, you know, let's get one for the Chief.

Senator HEFLIN. Do one for the Gipper. For old Burger, do one.

Justice REHNQUIST. The Chief does not correspond to the Gipper, at least in the eyes of Associate Justices, except in those rare situations like Brown, or the Nixon tapes case. And there I think there is a little of that.

But generally, each Justice wants to be regarded as totally independent, and you are praised in law reviews, if you are regarded as quite independent of everybody else, and if people vote together.

You know, there is the Minnesota twins, or something like that, or the Arizona twins, or something like that. It is regarded as something of a stigma to vote regularly with someone else. My own opinion is it should not be, but nonetheless, the fact that it is perceived that way produces those sort of pressures. Not to join up with any alliance, not to be regarded as carrying water for the Chief Justice, or any other Justice, but just being totally your own person.

Senator HEFLIN. Now there is the other role of the Chief Justice, his function as a leader of all of the judicial systems in the United States. As a leader of the State judicial systems, that is more as a symbol. But nevertheless, I think Chief Justice Burger has been of great encouragement to the State judicial systems to improve.

He also has been instrumental in calling for the creation of certain organizations and bodies. One is the National Center for State Courts, which he advocated, I believe in a speech at Williamsburg in 1971 when the president was at Williamsburg at a first conference of the judiciary.

Chief Justice Burger also was instrumental in calling for the creation of an institute of court management, which has trained court executives, whom now you have in the Federal judicial system, certainly at the circuit level—Court administrators.

He was instrumental in what Congress finally passed as the State Justice Institute, which is to be of some assistance to State courts. There is the work that the Chief Justice has done by encouraging judicial education among all judges and all supportive personnel in the State justice systems, particularly the National College on the Judiciary and the American Academy of Judicial Education. He has encouraged and spent a lot of time on some of these organizations, visited various State courts, and also developed or encouraged State organizations like the National Conference of

Chief Justices, the National Conference of State Court Administrators, and others like it. So he has had an impact on the State judicial systems, and has been, in my judgment, very beneficial to them; and they have, as a result, been very helpful.

While this is not a statutory duty, it is rather, an extraordinary effort on his part, to try to improve the system of justice. To me this is an area that, I hope, if you are confirmed, or whoever is the new Chief Justice of the United States, will endeavor to carry on, and to do those things because they are extremely important in my judgment.

Justice REHNQUIST. I unreservedly agree with you, Senator. I do not think the State courts or State court judges have ever had a better friend in the Office of Chief Justice than the present incumbent. I like to think that while perhaps not having all the innovative capacities that the present Chief Justice has, I am not sure that there is need for those with all the institutions that he founded. If I am confirmed I will at least follow in his footsteps, and see to it that those institutions work.

Senator HEFLIN. In addition to being the Chief Justice of the Supreme Court, and the internal workings of that Court—and I do not endeavor to minimize that—but I think, in directing this, you are being nominated for Chief Justice, regardless. Whether you are confirmed or not, you will still be on the Court. So I think that there is some distinction, and I hope we have brought that distinction out and focused on that issue.

You, of course, will also be the head of the Judicial Conference of the United States, which is in effect a body that has certain rulemaking power, certain powers of recommendation pertaining to legislation, and reviewing legislation that affects the courts.

The Chief Justice appoints the chairmen, members of the committees, including the administration of criminal law, court administration, operation of the jury system, rules of practice and procedure. The Chief Justice oversees the administration of the bankruptcy system, judicial ethics, administration of the magistrates system, and others.

In addition to this, the Chief Justice also chairs the Federal Judicial Center which is largely the research, training and educational arm of the Federal court system. The administrative office works under the direction of the Judicial Conference. Then there is the role as the building manager of the Supreme Court building.

Now what is your intention relative to these types of endeavors? Are you interested in trying to work in these capacities, with an idea of improving the Federal system of justice, and the various duties that are called for by those specific functions and specific responsibilities?

Justice REHNQUIST. Senator, I am interested in working in those areas but I do not think perhaps all of them equally. I certainly would have to find out a great deal more about it.

The Miller Center, I know that you know this, Senator, at the University of Virginia, did a very substantial study on the Office of Chief Justice, and there are something like—I forget—50 or 60 statutory responsibilities that the Chief Justice has, which the Associate Justices do not have.

So I certainly do not know these by experience at all. I think one of the suggestions that was made by a number of the people who participated in this program at the Miller Center, was that the Chief Justice ought to give serious consideration to delegating some of these responsibilities and perhaps ask Congress to authorize delegation in some situations. Now I know that you introduced a bill a few years ago to provide for a chancellor, who would perhaps correspond partially to a 10th Justice or a Justice for administration, and I believe the provision was that that person would be a delegate of the Chief Justice to preside over the Judicial Conference. Certainly, I think that is an idea well worth exploring.

I have a feeling that the consensus of these people in the Miller study seems to be so heavily on the side that there should be some delegation, that the Chief should not keep it all in his own hands. But I would give the most serious consideration to that, hoping that it would enable me to devote time, selectively, to the things that it seemed to me that I could not delegate.

Senator HEFLIN. I believe Chief Justice Burger has advocated a 10th Justice of the Supreme Court, which you would call an Administrative Justice, which we called in the bill that we had, the chancellor. That chancellor would have been a permanent member of a group, sort of like in a circuit tribunal, as a permanent judge.

But now, this raises another question, which is a question that concerns me, and I think it should concern all members of the judiciary and Congress, which is the relationship of Congress and a Chief Justice, on the improvements in the machinery of justice. There is a certain feeling on the Court and feelings by Chief Justices that Chief Justices do not lobby, and there is a feeling up here that Chief Justices or Justices should not lobby for legislation. But there is a void as to how the needs of the courts and the opinions of those that are mostly concerned with it, how they are made known to Congress, and how Congress should respond to them.

And in some court systems in the States, they have had a legislative liaison, in effect, that represents the court or represents the Chief Justice in making known and following legislation. Of course, the Chief Justice has an administrative assistant, but there is still a great reluctance in this field because of the separation of powers. It is an area that is not clearly defined; it is an area that is blurred. To me it is an area that needs some clarification, because certainly, we do not want the Court or the members of the Court or the Chief Justice to do anything that would interfere with their independence; and at the same time, there is probably some feeling that there ought not be lobbying over here in that sense, or to demean themselves in that manner. But still, at the same time, there is that area of how do you get things done for a judicial system? To me, I think that in my observation here, that there is a terrible void in this, and there needs to be some leadership and trying to improve the machinery of justice through congressional activity.

We have had the Williamsburg Conferences and that sort of thing. It may have been fairly well-attended for a while, and then I do not believe we had one this year. But, if you become Chief Justice, would you be prone to be willing to sit down with the chairman of the committee here and attempt to work out some type of

machinery by which the overall court system and its needs would be given attention as to how we might try to take care of the needs of the Court?

Justice REHNQUIST. I would regard it as a high priority, Senator. It seems to me there is a great deal of mutual interdependence, whatever you want to call it, between the Congress and the Federal courts. And that does not mean that one should obviously be lobbying the other for things that are not properly lobbied for, or that there be lobbying in reverse.

But just the concept of judicial machinery that I think you told me was covered at the Williamsburg Conference—I think Senator Specter also said something like that—I do not think Congress with all of its other responsibilities and the Judiciary Committees of the two Houses, with all of their other responsibilities, are going to necessarily know in detail the problems of the Federal courts, or at least the problems that the judges of the Federal courts see to be those things, unless someone from the Federal courts comes and tells them about them. I would think the logical person to do that would be either the Chief Justice or some recognized delegate of the Chief Justice that the Judiciary Committees had confidence in.

Senator HEFLIN. Well, I know right now we have this question of the issue, and you have been asked previously about this Inter-Circuit Tribunal, and of course, it has been around now for a long time on the national court of appeals, starting with the Fraun Commission back in 1973, and then the Hruska Commission in 1973–75, I believe, making its reports, and the problems. You have outlined it pretty clearly with your analogy of the 150 cases over the history of the Supreme Court that we have, and that that is about the limit, but that we do it.

Now, do you have any particular preference that you would like to express on what you might like to see concerning the organization of some type of relief structure for the Supreme Court, pertaining to conflicts and its heavy load?

Justice REHNQUIST. Senator, I think it was Arthur Vanderbilt that said, "Judicial reform is no sport for the short-winded." And I think the Inter-Circuit Tribunal is proving to be that. Since the idea was first advanced more than 10 years ago, many respected students of the subject still have substantial reservations about it. And I have no doubt at all that if Congress would prefer to see a temporary Inter-Circuit Tribunal put in that that is the way it ought to go, rather than have no reform.

But ultimately, and I think if Congress could be persuaded, not ultimately but very presently, there ought to be a new national court, frankly recognized as such, with judges appointed by the President and confirmed by the Senate, who would act as something of a junior chamber of the Supreme Court, to hear primarily statutory cases about which there are presently conflicts in the circuit.

It seems to me that this new junior court, or national court of appeals, poses no threat at all to the Supreme Court, because the kind of cases that I envision the Supreme Court referring to them are not the controversial, highly-charged constitutional issues upon which the Supreme Court has staked out positions, but statutory cases where I think most of us would trust five or seven competent

judges to reach the same result as any other five or seven competent judges, with some differences, naturally. But it would not be doing the kind of, what I think of as the five-to-four work, five votes to four, that our Court often comes up with.

I think the sooner that kind of a tribunal is in place, the better off the country will be.

The CHAIRMAN. The distinguished Senator from Wyoming.

Senator SIMPSON. Mr. Chairman, I thank you, and let me yield to my patient colleague from Kentucky who has been here and would do something bad if I did not yield to him. [Laughter.]

The CHAIRMAN. The distinguished Senator from Kentucky.

Senator MCCONNELL. Nothing other than faint. Never have I been sorry to see the Senator from Wyoming show up.

Mr. Justice Rehnquist, harking back for a moment to the line of questioning by Senator Leahy with regard to *Laird* v. *Tatum,* during your 1971 confirmation hearings, were you questioned about prejudgment of issues as grounds for recusal?

Justice REHNQUIST. Senator, I have been over the testimony of those hearings, and I am honestly trying to think whether I was or not. I think I was. I am not positive.

Senator MCCONNELL. Were you questioned during your confirmation hearings about your testimony before Senator Ervin's Subcommittee on Constitutional rights, testimony which touched on the issues later involved in *Laird* v. *Tatum*?

Justice REHNQUIST. I think I may have been, but I am not positive.

Senator MCCONNELL. Didn't you address your comments in *Laird* v. *Tatum,* in the memorandum in *Laird* v. *Tatum,* to the propriety of judges participating in cases over which they had formed some prejudged opinions on constitutional issues?

Justice REHNQUIST. Previously stated positions, I think, yes.

Senator MCCONNELL. Didn't you state in that memorandum that it would be extraordinary if Justices came to the Supreme Court without at least, quote, "Some tentative information that would influence them in their perception of the sweeping clauses of the Constitution and their interreaction of one another"?

Justice REHNQUIST. Yes, I did.

Senator MCCONNELL. Didn't you also say that, quote, "Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of Constitutional adjudication, would be evidence of lack of qualification not lack of bias"?

Justice REHNQUIST. Yes, I did.

Senator MCCONNELL. As I read it, yesterday's New York Times article that suggested you had not even mentioned your prior testimony on recusal and your participation memo in *Laird* v. *Tatum* is incorrect. It is my understanding that you did generally refer to prior congressional testimony in your memorandum as one source of prior experience that does not require recusal. Is that correct?

Justice REHNQUIST. I believe it is, Senator.

Senator MCCONNELL. Moving on to another subject, Mr. Justice Rehnquist, in a 1974 ABA Journal article entitled, "Whither the Courts," you called attention to an explosion in constitutional litigation. Mentioning several possible solutions, none of which you found acceptable, you concluded that, and I quote you, "Frankly, I

do not know what the solution is, but I have enough evidence, enough confidence in the genius of our country's institutions to think that it will be found."

It seems to me that 12 years later, this litigation explosion has ventured well beyond constitutional law and has permeated virtually every facet of the law.

I am curious to know what, 12 years later, you believe to be the role of the judiciary in general and the Supreme Court in particular in grappling with the runaway litigiousness of our society.

Justice REHNQUIST. The judiciary is kind of fettered by many restraints, many put on it by Congress. Congress has a propensity to create new causes of action every session, and each one of them by themselves may be utterly unobjectionable, perhaps beneficial. But gradually the same thing is happening to the Federal court system as the environmental people saw was happening to Lake Erie 25 years ago. We have a system that has only a finite capacity, and more and more is being expected of it. And it is quite understandable that the system cannot perform quite the way it did in the past and that there are real problems ahead. I think that Congress is going to have to in the near future ask itself, do we repeal diversity jurisdiction. Repeal of diversity of jurisdiction—and I remember looking at some statistics when I went down to Lexington and spoke at the University of Kentucky 3 or 4 years ago; I think the Federal courts in Kentucky have a great deal of diversity jurisdiction, cases based on diversity of citizenship. Now, that would help the district courts a great deal. It would help the district courts in States like Kentucky and the less populous States more than it would help some of the very popular States, where I think there is a smaller percent of diversity jurisdiction. It would help the courts of appeals some, but it would not help them as much as the district courts, because a lot of the diversity cases are strictly demands for money judgment, the kind that can be settled on appeal. Whereas, if you are talking about some more personal claim, a constitutional claim, it is much more difficult to settle that case after you have won a judgment in the district court and are talking about appealing to the court of appeals.

Repeal of diversity jurisdiction would not help the Supreme Court of the United States at all, because we never grant certiorari in diversity cases. So that diversity would help at the trial level of the Federal court system; repealing that would help a great deal. It would not solve our problem, the Supreme Court's problem.

The national court of appeals situation would help the Supreme Court most of all and not give great benefit to the other courts.

What type of help the judges of the courts of appeals feel they need to handle this mounting explosion is something I think they are probably far better to speak up about than I have, and very likely they have spoken.

Senator MCCONNELL. Let me ask you, in your opinion, about the frivolous lawsuits problem—you hear a lot about that these days. Under the Rules of Civil Procedure, there are supposed to be some penalties for bringing frivolous lawsuits. Do you think that is a problem, and if it is a problem, are the penalties not adequate, or are they not being enforced? What is your view about that?

Justice REHNQUIST. Senator, I think that a lot of times, Supreme Court Justices are thought to have a far greater grasp of the facts of the professional world and the legal world than they do. It has always seemed to me that the provisions of the Federal Rules of Civil Procedure, the affidavit of bona fides required under rule 11, the provisions for assessment of costs for frivolous motions, that the tools are all there for any district judge who wishes to use them to dispose of frivolous lawsuits the way they are supposed to be disposed of.

On the other hand, it may be that there are some judges who do not take advantage of these rules. I cannot think of anything now that comes to mind from what I know as a Justice of the Supreme Court, which does not cover the whole waterfront by any means, that would lead me to think significant changes are necessary to solve the problem of frivolous lawsuits.

Senator MCCONNELL. A frivolous lawsuit does not make it to your level——

Justice REHNQUIST. Well, do not kid yourself, if I might use that rather familiar term to a U.S. Senator. Because of the in forma pauperis rules, litigants in our Court can file petitions for certiorari without paying costs, and they can file petitions for rehearing when their petitions for certiorari are denied. And a substantial part, not a major fraction, perhaps not a large minor fraction, but a significant minor fraction of the petitions for certiorari we get in our court each year are people who just are outside—to talk about outside the mainstream, they are really outside the mainstream of litigation. They have started a lawsuit in a trial court somewhere, they have lost it, so they bring another suit, and they now name the judge who ruled against them as a defendant. And then they appeal the decision against them to the court of appeals; the court of appeals says no, there is nothing to it. They petition for certiorari; we deny it. They petition for rehearing. And then they start all over again, adding everyone who has decided against them along the way as defendants.

Now, this is not a major problem. The courts know how to handle this thing. But I did want to correct the impression perhaps that lots of people share with you, Senator, that frivolous lawsuits do not make it to our Court. They are not granted, but there are efforts made.

Senator MCCONNELL. In your view, then, could or should judges do more to enforce or impose the penalties that are currently available for the bringing of frivolous lawsuits?

Justice REHNQUIST. I have a feeling that that might be desirable, Senator, but again I do not know. I would want to know more about what is going on in the various district courts, the various courts of appeals before I simply leap to kind of a facile conclusion yet.

Senator MCCONNELL. Is that the sort of thing that you feel might be appropriately addressed if you become Chief Justice?

Justice REHNQUIST. I think that is something that might be very appropriately addressed by a committee of the Judicial Conference which would represent people from different circuits, different parts of the country, perhaps district court and courts of appeals

judges, who would have more hands-on feeling for how this thing is working than, frankly, I would.

Senator MCCONNELL. You mentioned the transaction cost a while ago; the cost of litigation is obviously enormous these days. And you mentioned an example of a type of case that a firm of some reasonable size might not even accept because the fee could be greater than the amount of money involved.

I have not given a whole lot of thought to this, but in regard to the whole area of alternative dispute resolution. I am wondering if you think that it provides some opportunity for relief in the future to further promote alternative dispute resolution as another way of settling disputes.

Justice REHNQUIST. I think it does, Senator. I was up at an Allegheny County, PA Bench Bar Conference early in June and talked to several lawyers and a couple judges up there. And it sounds to me that in Pennsylvania they really have a system working that requires arbitration before you go to court, given certain jurisdictional limits and certain other facts. I am obviously not familiar with the details. But my impression, talking to people up there, it is a success, it is well-regarded by lawyers and laymen alike, and the limits have been steadily raised so that now the limit is much higher before you can go directly into court without going through court-attached arbitration.

Senator MCCONNELL. Some of the lawyers at home tell me that one of the problems they have experienced with ADR is that the party who is disappointed in the outcome is inclined to go back and start the process all over again. I am guessing you will not answer this, but I am wondering, and I will ask it anyway, if you see any constitutional problems with the following kind of approach: (a) that the lawyers for all the parties would have to certify to the court within a certain period of time that they had apprised their clients of the various alternative dispute resolution techniques available, and (b) if the parties signed off on that and agreed to an alternative dispute resolution approach that the option to go back would then be waived; that if all the parties agreed to ADR as a way to settle a dispute, they would thereby waive their option to go back through the court system.

Would you see some constitutional problem with that?

Justice REHNQUIST. So there would be no hearing in any court?

Senator MCCONNELL. They all waived it; they all signed off on an agreed alternative dispute approach; they would in effect waive their right to go back through the court system.

Justice REHNQUIST. Well, that is not Marbury against Madison, when I was talking to Senator Specter a while ago. To me, that is not so clear that I feel free to answer it.

Senator MCCONNELL. I thought you might not want to do that.

Let me ask just one other general question, Mr. Chairman, and I will be through.

We talked about caseload in general. Is there anything else that you can think of beyond the points that you have made that you could do as Chief Justice to help lessen the Federal caseload beyond the suggestions that you have made?

Justice REHNQUIST. I think the present Chief Justice's proposal of some sort of an impact statement requirement for committees of

Congress which propose bills which create Federal causes of action might be useful if Congress thought it were useful. That is, if you are going to have a new cause of action created, or a new right to sue in Federal court, let us try to figure out how many cases are expected to be brought, and might they be concentrated in one part of the country rather than the other; is this going to take new judges.

Certainly, it is always Congress prerogative to create those. But what so often happens is that the causes of action are created, and then the new judges are not forthcoming.

Senator MCCONNELL. Thank you very much.

No further questions, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. I thank you, Mr. Chairman.

Mr. Justice, there should be no question about your endurance after today, if nothing else. I noticed when we arrived this morning, there were long lines in the hallway to get in here. The lines have disappeared; the audience has virtually disappeared. But we are still here.

You have discussed your ideas on the position of Chief Justice. Let me just ask one other question in that connection. Chief Justice Burger has, in the area of funeral reform for example, spoken out in a very healthy way and made a real contribution to the Nation. Is there any area like that that you have thought about in which might contribute something special to the Nation?

Justice REHNQUIST. Senator, I would certainly want to give some thought before coming up with a conclusive answer. But I think the business of alternative dispute resolution that I have mentioned to several of your colleagues is probably as important a concern to me as penal reform is to the Chief.

Senator SIMON. Well, I would welcome a contribution in that area.

Then, let me discuss some of my concerns. There is no question in my mind about your ability, no question about your integrity. I guess I do have questions about your sensitivity in the area of civil liberties and your ability to function as the kind of symbol for everyone which I think a Chief Justice must be.

Let me go back—this is a White House tape. John Ehrlichman is talking to President Nixon July 24, 1971. The President complains: "Nobody follows up on a 'blank-blank' thing. Do you remember the meeting we had when I told that group of clowns we had around here, Wrenchburg and that group—what's his name?"

Ehrlichman responds: "Rehnquist."

Anyway, you at that point had headed this classification group, and I believe one of the people who was working for you was David Young. Is that correct?

Justice REHNQUIST. Senator, I knew David Young. But I am not sure I was head of any classification group. I was part of a project in the Office of Legal Counsel to recommend revision in the classification regulations. It might be that David Young worked with me; if he did, I do not remember it.

Senator SIMON. That is the group I am referring to. The document I have indicates you were named chairman of that group.

Justice REHNQUIST. Yes, then that is it.

Senator SIMON. And David Young, and you may or may not—Egil Krogue, do you recall him working?

Justice REHNQUIST. Oh, certainly, yes.

Senator SIMON. And Mr. Hunt—I forget his first name already—Howard Hunt?

Justice REHNQUIST. Was he on that?

Senator SIMON. He apparently worked for the committee, according to the document I have, yes, for that group.

Justice REHNQUIST. I certainly do not recall it. If that is what it says, maybe that is the way it was.

Senator SIMON. And Gordon Liddy?

Justice REHNQUIST. He worked for the group, too?

Senator SIMON. That is correct.

Justice REHNQUIST. And I was chairman of it? [Laughter.]

Senator SIMON. Yes. And I do not know that they worked full-time or anything like that, but they were doing some work for it, according to the documents we have now. But that leads to a question—and I am just probing here on September 4, 1971, Ellsberg's office was burglarized. Since they were at least working part-time on a project that you were involved in, did you have any knowledge of this, were you in any way involved in it?

Justice REHNQUIST. No, I was not.

Senator SIMON. And you had no knowledge of that in advance at all?

Justice REHNQUIST. No.

Senator SIMON. In probing this whole area of sensitivity on civil liberties, we dig out things that people write and say. We could pull out some things that any of us have said that we would probably not be exactly proud of. But at one point, you wrote a memo to Justice Jackson, referring to "some outlandish group like Jehovah's Witnesses," and there was the decision, the Jehovah's Witnesses decision, in regard to Indiana, the Buddhist Prison decision.

Now, I recognize that neither Buddhists nor Jehovah's Witnesses are particularly popular groups in our country, but I think it is important that we defend the liberties of the most isolated, unpopular groups.

Justice REHNQUIST. I agree with you.

Senator SIMON. I know you declined to answer any questions from Senator Grassley on the Establishment Clause, but do you have any reflections on the important role that you have to take as a Justice of the Court in defending the most unpopular causes? And incidentally, I differ with some of my colleagues, as I indicated yesterday; I think your willingness to be "the lone dissenter" is, a plus rather than a minus. But do you have any reflections on that without getting into areas that I should not be getting into or where you feel uncomfortable or would be improper.

Justice REHNQUIST. No, I have no reluctance at all to defend either the Establishment Clause or the Freedom of Religion Clause.

Now, I have in my opinions read the Establishment Clause more narrowly than some of my colleagues. For instance, last year in the Wallace against Jaffrey case which, as I recall came out 5 to 4, as to whether the Establishment Clause prevented the moment of silence in Alabama, and I think a majority of our Court held it did, for different reasons, and I and several others felt it did not. Now,

obviously, the four of us in dissent took a somewhat narrower view of the Establishment Clause than the five who said it prevented the moment of silence that Alabama had enacted. And I suppose in that sense you could say the person who is in dissent there is not as sensitive to the Establishment Clause as the person who voted to expand it.

But I also think, Senator Simon, that these are almost questions of degree and that there is not a tremendous amount of difference there as to the broad principles of the establishment clause are uncontroverted, and those kinds of cases do not get up to us because they are pretty well settled. It is these kinds of frontier-type cases that come up and reflect divisions among us—and I certainly have read the establishment clause more narrowly than some of my colleagues.

Senator SIMON. I think you are correct in saying these are questions of degree. There are some of us—I include myself among them—who think we have to be very, very careful as we look to history, not only our own history, but the history of other nations, so we maintain that freedom of religion and do not get Government involved unnecessarily.

Let me turn to another aspect of this. I questioned the two representatives of the Bar Association on this subject. As I look at your record—and I have read all 47 dissents as well as a few of the other opinions you have written, and incidentally, I am a journalist by background, and I appreciate someone on the Court who writes using the English language and who writes clearly—but as I look at your decisions and at the background, including the Phoenix, not what happened at the precinct, but the letter to the editor of the Phoenix newspaper, and the decisions through the years, I guess I do not see someone who is a champion of justice for all citizens, for the minority, for women, for people who need a champion and who may not have one.

Am I misreading that record?

Justice REHNQUIST. I would say partly but not entirely. I mean, I do not think any person who studied my record would have any question as to my fairness or lack of bias toward any litigant or any cause appearing before me. But I think that certainly, groups who are going to have litigation insofar as a broad reading of the equal protection clause are going to see in me not a champion, but someone who more frequently votes against them than someone who would read the equal protection clause more broadly than I would. And in a sense, therefore, you have a spectrum where the person who appears as the champion, perhaps a real champion to women's groups or to minorities, is going to appear as a good deal less of a champion to the citizens of a community who vote and pass a legislative act which is held to be limited by the equal protection clause, because I think, Senator, there are two sides—in fact, it is almost trite to say it—in almost every one of these cases where the equal protection clause, which I think is the main clause, is claimed under and often decided in favor of the people whom you refer to. Every time the equal protection clause is invoked, it means that an act of some State legislature, or an act of Congress, is struck down.

Now, certainly, it was intended that the Bill of Rights and the other restrictions on Congress and State legislatures be applied in just that way. But occasionally one gets the sense that it is a victory for the Constitution every time a court invokes a constitutional provision to strike down a law. I do not subscribe to that, and I do not think most people who approach it from that direction would think so, either, because you know, every bit as much as the Bill of Rights are protecting the rights of the individual in this country, we certainly also believe in representative democracy where a majority can make rules that bind the rest of them unless they do conflict with some provision in the Bill of Rights.

All I am saying is that more often than one might think sometimes, there are really factors to be weighed on both sides.

Senator SIMON. Using the office of Chief Justice as a symbol, which you really are in addition to fulfilling a very important function in our society—in the same way the Statue of Liberty is a symbol—do you think you can be an effective symbol of justice for all?

Justice REHNQUIST. Yes, I think I can, Senator. And if I thought in order to do that that I would have to change the philosophy, or the judicial philosophy evidenced in 15 years of decided cases, I do not think that would be a proper thing for me to do, except perhaps where there are constraints that there ought to be a court opinion rather than a plurality opinion. Those are not the principal things I am sure you are asking about.

But I think the Chief Justice as symbol has so many nonadjudicative functions—you know, whom he speaks to, whom he works with and that sort of thing—there, believe me, my door would be open as wide as anyone else's door in that office.

Senator SIMON. One of the other charges that is made about you, Justice Rehnquist is, as I read the literature—and that can distort the view of any of us; I read about myself once in a while and I do not recognize myself—but one of the charges is that you are not open-minded, that you in a sense have made your mind up, and have fit the facts to that rigid ideology and to that preconceived notion. How would you respond to that?

Justice REHNQUIST. I would respond to that by rejecting it quite emphatically. You know, that is not to say that I do not have ideas, which I certainly have followed; I have a sense of what I think the Constitution means. But it certainly is not a sense that is, fixed in concrete at all. I am one of the few members of our Court who can present both exhibit A and exhibit B in support of open-mindedness. On two separate instances since I have been on the Court, I have written opinions for the Court overruling earlier opinions that I have written, which certainly is some testimony to open-mindedness.

Senator SIMON. One——

Senator BIDEN. Excuse me. What were those opinions? I am just curious, if the Senator would not mind—not to explain them, but just name them.

Justice REHNQUIST. *United States* v. *Scott,* overruled Jenkins; and either Davidson or Daniels this past term, overruled a significant portion of *Parratt* against *Taylor.*

Senator BIDEN. Thank you.

Senator SIMON. One other question. I do not want to get into any past health problems or anything like that. But Justice Powell has been very open about his difficulties. We had a situation that was not a good situation during the final months of Justice Douglas' tenure, before he died. What about the Chief Justice in the future if, 3 years from now, 5 years from now, health problems arise? Do you intend to deal openly with the public on that kind of matter? Have you thought about that?

Justice REHNQUIST. Well, I have thought about it, frankly, since I called on you and you mentioned it to me. And I think there is a tendency—I think judges have much more of a tendency to—I cannot think of the expression—something about "pulling the wagons around" or something like that—than people in public elective life, the way Senators are. Just because—particularly on our Court, where there are only nine seats, the health of every individual Justice is an endless subject of speculation. You know, is he sick, or really sick? And I went through that when I was in the Justice Department in 1971, when Justice Harlan was ill in the hospital, and Justice Black was ill in the hospital. Some of the calls I got from people I knew in the press were almost goulish. And perhaps that is it partly, that I have brought with me a sense that so long as I can perform my duties, I do not think I have any obligation to give the press a health briefing.

But I also see the point you made when you and I talked, and particularly in the office of Chief Justice, I think I would have to approach it differently.

Senator SIMON. Thank you, Mr. Justice. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

The distinguished Senator from Wyoming.

Senator SIMPSON. I look at my colleague Senator Broyhill. Have you had your day yet in the one round?

Senator BROYHILL. No.

Senator SIMPSON. You were here before I was, but let me then just shorten; I just have a very few remarks and questions, and then I will yield to Senator Broyhill.

Thank you, Mr. Chairman. I have been informed of the proceedings and have been watching some, and I am very interested in the questions and your responses. It has been very important that you have addressed each and every issue that has been presented, and I think you have responded fairly in the circumstances.

I would come back to a thing I dabbled in a little yesterday, and that is the issue of ballot security issues. I think that I would really be intrigued as to how many young lawyers who decide to go into politics, or become involved with a party, do not find that one of the first things you seem to get into is, first of all, to be a precinct committee man or woman, which is a ghastly experience in many ways. And then to go canvassing, which is another remarkable process which you really did not believe you had to do when you got to be the precinct committee man or woman.

But then when the county chairman would tell you to go to this precinct where they vote all these Republicans all the time—or where they vote all these Democrats all the time—and check it out, that was always an interesting ritual

In my county, rather loaded with those of the Republican bent, they used to have ballot security checks. The Democrats would do that to see that all was appropriately done, and then the Republicans would do that, too.

It was called ballot security, and each State has its own differing laws on that, and I know, at least in my State of Wyoming, each party selects a person. They actually can go to the polling place to challenge or to review the voting to be certain that it is carried out appropriately. In those former days, you could also present whatever the law of that State was before those who were preparing to vote.

So I just come back to that briefly about your activities concerning the polling places in 1968. We went through that before in the hearings of 1971, where you responded that you were not engaged in any sort of poll-watching, and that accusation involving 1968 was dropped.

Other allegations were made regarding the alleged personal challenging of voters in 1962, and those were found to be "wholly unsubstantiated and totally unfounded." The same was true in 1964; a charge was made and disproven.

In rereading the committee report, I see that other unrelated charges were also raised and then disproven and dropped. And so it is interesting to me to see those comments, that alleged misconduct, accusations, come up today, 25 years later, inconsistently.

I fully realize we are talking of that time ago, and you have given us your best recollection. Anyway, you testified in 1971 that you believed that, in your capacity as chairman of the Republican Lawyers Committee, that you visited these certain polling places in 1960 and 1962, and that is a correct statement, is it not?

Justice REHNQUIST. If that is a quote from my testimony, it certainly is.

Senator SIMPSON. In 1971 you testified that in 1960 and 1962 you went to those precincts where disputes had arisen, it being part of your duty as chairman to attempt to negotiate for your side in resolving such disputes.

Justice REHNQUIST. Again, yes; if that is what the statement says, that is correct.

Senator SIMPSON. And in other testimony, you stated in 1962 you witnessed a Republican challenger engaging in what you considered to be harassment and intimidation, and that you advised that challenger to cease and desist.

Justice REHNQUIST. Yes.

Senator SIMPSON. Do you recall that?

Justice REHNQUIST. I do not recall it now, but I recalled it in 1971, I think.

Senator SIMPSON. But that at no time did you yourself engage in the harassment or intimidating activity?

Justice REHNQUIST. That is correct.

Senator SIMPSON. I just wanted to review that again. That seems to come back like an old saw—and it does seem old to me. But to comply with my statement so I can yield to the fine Senator from North Carolina let me recognize the presence of Senator Heflin.

I have come to have great respect and admiration for him in his work as a lawyer, and chief justice. He was chief justice of the Ala-

bama Supreme Court, and he has some very fine approaches toward modernizing the courts' review systems.

He is most serious about that, and I have heard him ask some questions about that. Would it be your intent as Chief Justice to be accessible—and I think you already addressed this—to the Judiciary Committee, to the young lawyers, to the law schools, to the students?

That is not to say that Chief Justice Burger has not, but would that be your intent to let people know that this is not the Chief Justice sequestered; but that this is the Chief Justice, the human being, the person you can visit with, to have seminars with? As I say, Justice Burger has done that. What would be your intent about that?

Justice REHNQUIST. Senator, if I am confirmed, I think I perhaps ought to sequester myself for a short period of time until I understand the job better, and then I certainly propose to behave just as you suggest.

Senator SIMPSON. You have traveled a great deal and made yourself accessible as Associate Justice, have you not?

Justice REHNQUIST. Yes, I have. I think I have visited, you know, a great number of law schools. As you well know, I visited the University of Wyoming Law School in Laramie last year.

Senator SIMPSON. And you would intend to continue that communication with the bar and the young lawyers and with students?

Justice REHNQUIST. Yes. I have the feeling—I enjoy that, and I certainly hope to, if it is possible. But I have the feeling from some of the concerns expressed by the Senators and some of my own feeling that there is probably work to be done in the sense of the Brookings-type meetings at Williamsburg and some of the other duties that the Chief Justice has that are not going to enable me to enjoy that sort of thing as frequently as I did when I was an Associate Justice.

Senator SIMPSON. Well, I was one, along with Senator Heflin, who attended those quite regularly. They were good, and we had a fine relationship with the Supreme Court Justices, the Judiciary Committee of the House, the Judiciary Committee of the Senate. I like those; I wish I could get to more of them, and will hope to do so in the future.

But I just wanted to briefly inquire on those issues, then when you get to the issue of how you are as a Justice—what is your position as a dissenter or a nondissenter—I guess there are as many Court watchers as there are Congress watchers.

Rating systems—I am always fascinated by those; dissent dissectors. And we all get rated, scored. I understand that there is not any area that we do not get examined on, and then they have the scorecard and the flunk test, and we get that.

Obviously, you have groups watching the U.S. Supreme Court doing that, and I am always fascinated by that. So we will not try to peg you as to where you are.

Senator Simon has read more opinions of the Supreme Court now than I did when I practiced law. [Laughter.]

He said he read all 49 dissents

Anyway, I would hope you would continue as your predecessor, Chief Justice Burger, in being accessible to the bar and telling

them things they really do not want to hear, sometimes. For example, about responsibility and greed and where the profession is going if it just is dedicated to how much money you can scratch together in the course of practicing law, without ever doing the pro bono and the other things that make me proud as a lawyer.

I hope you will be doing that as Chief Justice, and I hunch you will from what I know of you and about you.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

The distinguished Senator from North Carolina.

Senator BROYHILL. Thank you very much, Mr. Chairman, and I know the hour is late and I appreciate your patience and your stamina as you have stayed here all day and have answered articulately all of these questions.

I am, of course, the last of the questioners as a result of the fact that I am a new member of this committee and a new member of this body, only having joined this body 2½ weeks ago.

Both of my predecessors, however, who occupied the seat that I now occupy in the Senate were both members of this committee, Senator John East and Senator Sam Ervin. Thus, it is a high honor for me and a privilege, a nonlawyer, to occupy this seat on this committee at this time in history.

I do not pretend to be a constitutional scholar. I am not going to really ask you a lot of fine points of constitutional law. But I know one thing I have learned around here in my 23½ years' experience in the Congress of the United States. Every day the Congress is faced with deciding issues that at one time in our history were decided at the State or the local level.

They were decided by school boards; they were decided by city councils, county commissions, or State legislatures. And it is also sad to say that we often find that these local and State officials are here urging us to assume an even greater role.

I am not asking you to talk about that, but as a member of the Supreme Court, of course, you do deliberate from time to time on this issue of division of powers in our system of government, and you have a reputation as one who is a champion of the right of local government to govern themselves.

I wonder if you would, for a moment or two, at least, give us your general views as to the proper division of powers in our Federal system.

Justice REHNQUIST. I will certainly try, Senator. I think I said some time earlier today that since the Supreme Court has so expansively construed Congress' power under the commerce clause, that how power actually is divided between the States and Congress is now very much a matter for Congress to decide and no longer that much of a constitutional question.

And as to how Congress exercises that power, certainly that is not a judicial question in the ordinary sense. But my personal preference has always been for the feeling that if it can be done at the local level, do it there. If it cannot be done at the local level, try it at the State level, and if it cannot be done at the State level, then you go to the national level.

And I suppose much of the difference in how many Federal laws, how many State laws we have depends on how people think how

well the local and State governments are doing. But I certainly share the concerns you expressed, and I think that the decisions our Court has handed down in the area are an effort to fairly divine the intent of Congress to whether a Federal law shall prevail or where a State should prevail when the two conflict.

And that, really, I think is about the extent of the function of our Court in that area.

Senator BROYHILL. One other area. You know, there is a great deal of criticism I hear from time to time about what I think is called judicial activism. Of course, our Constitution is celebrating the 200th anniversary of the writing of that document, and it is a remarkable document.

I think that those who wrote it intended it to be a framework where men and women could govern themselves and not necessarily have someone at a central place governing them. The criticism, of course, is that the Federal judiciary is making law; that is, not interpreting, but, through their decisions, actually making laws.

I wonder if you would elaborate for the committee your views on the proper role of the judiciary in our democracy.

Justice REHNQUIST. Well, certainly, it is a fundamental principle that it is the legislative bodies that make the law and the courts that interpret the law. But when you get to some of the broad phrases of the Constitution, you know, what does due process of law mean; what does equal protection of the law mean.

When the constitutions are drawn in those phrases, you are drawing them in a way that necessarily is going to give the judges some authority to—some latitude to construe them, just because their meaning is not self-evident at all.

And I think the general differentiation in that area between judicial activism is perhaps seeking to cure a social evil by an expansive construction of the Constitution. And I think my record of 15 years on the bench reflects that I do not subscribe to that view.

I think that it is—the meaning of the Constitution is best possibly found from relevant materials that you have got to be guided by, even though it does not lead necessarily to the solving of the social evil.

But in other areas, we have real problems of determining intent because Congress—I will be frank to say that I think Congress does not legislate as carefully now as it did 30 or 35 years ago, perhaps, when I was a law clerk, when I was in law school.

Perhaps it is because the bills are 200 pages long, and that sort of thing. And frequently we get cases where I must say that it looks like the proponents of the bill have been given the right to draft section 1 and the opponents of the bill have been given the right to draft section 2, so that the result is you read one section of the statute and it seems to mean one thing; you read another section and it seems to mean another thing.

And there, again, it is not really a matter of judicial activism. It is a question of trying to find out what Congress meant, but often being quite unsure about it.

Senator BROYHILL. Well, in a way, it related—Congress over the years has added and given more and more power and authority to various administrators, as well as independent groups that, actually—you know, they are appointed by the President; some are inde-

pendent; some are subject to their continuing in office by Presidential powers.

But they are given tremendous powers to write rules and regulations that have the force and effect of law; in fact, in some cases have even the effect of overturning State law. And, also, they do have the powers to impose sanctions in many cases; that is, to impose fines, the judicial power.

Now, I have worked for a number of years to try to get some more control over this rulemaking or regulatory power of these independent agencies or the independent rulemaking powers of these administrators.

In fact, a bill was recently passed out of this committee that would, in part, give the Congress the right to look over their end work products.

Now, I wonder if you could articulate your feelings as to how far constitutionally the Congress should be going, or how far they have gone. Perhaps you have articulated opinions on this issue.

Justice REHNQUIST. Senator, I do not think I ought to address a specific question of how Congress could go in regulating this, in view of the separation of powers. I would like to address myself to a point you made in your question and something that I have expressed concern with in an opinion I filed a couple years ago—I think there were only two of us on the opinion—and that is the authority that is given to agencies to preempt State laws, as opposed to Congress.

There is no question, Congress, under the commerce power, can preempt as much State law as it chooses to do so. But I have always felt it was another kettle of fish, if not jurisprudentially, at least practically, for the agency to say, well, now, we are preempting the law, the State law, where perhaps Congress has not specifically given them the authority at all.

I think that is an area we are going to see more of, and in my de la Cuesta dissent, I think I expressed some of the concerns that you are questioning.

Senator BROYHILL. One final expression of concern that I hear—one of the ones that really is more often expressed to me than others—is that the courts, in their zeolous guarding of rights of those who have committed crime, sometimes overlook the right of the victims of crime.

While the rights of criminal defendants are vital to our system of criminal justice, of equal importance, it seems to me, is the right of the law-abiding citizens to have safe streets and safe neighborhoods.

I wonder if you would give us your views on this balancing of rights, as you have viewed them in your past decisions.

Justice REHNQUIST. That is exactly the word I would use, Senator, is balancing. And just as I said to Senator Simon about the equal protection clause in that area, the constitutional rights of the defendants are essential and vital.

But they also stand against the right of society and limit the right of society, in the traditional view of criminal law, to apprehend the guilty and exonerate the innocent.

And, obviously, it was intended that the Bill of Rights have this restrictive function, but I have expressed the view in my opinions

that this endless expansion of constitutional rights for defendants by judicial construction is not a welcomed thing because it does tend to impair in a way that the Constitution did not intend to have it impaired, the right of society to fairly and justly administer criminal law, with proper respect not just for the defendant, but for the victim and for the social interest in seeing the law enforced.

Senator BROYHILL. I thank you very much for your patience, and I thank you very much for your responses to my questions and comments.

The CHAIRMAN. That now completes round one for all the members of the committee. I want to announce that tomorrow we will meet at 10 in executive session. We have a few matters to take up before we go back to the hearing. We will try to get back to the hearing about 10:15, or as soon after that as we can.

So if you will be here tomorrow at 10:15, Mr. Justice.

Justice REHNQUIST. Certainly, Mr. Chairman.

The CHAIRMAN. Senator Hatch may have some statement he wants to make. I see him sitting here.

Senator HATCH. No. I would just like to say, Mr. Justice Rehnquist, I think you have done very well today. And it has been very difficult for you and it is a tough process, but we appreciate the patience, forebearance, good humor, and I think the intelligent way you have answered all of our questions.

Justice REHNQUIST. Thank you, Senator.

Senator HATCH. Thank you so much.

The CHAIRMAN. We now stand in recess until tomorrow at 10 o'clock.

[Whereupon, at 8:10 p.m., the committee was adjourned, to reconvene at 10 a.m., Thursday, July 31, 1986.]

NOMINATION OF JUSTICE WILLIAM HUBBS REHNQUIST

THURSDAY, JULY 31, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee convened, pursuant to adjournment, at 10:20 a.m., in room SD-106, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias, Laxalt, Hatch, Grassley, Specter, McConnell, Broyhill, Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Byrd, and Denton.

Staff present: Duke Short, chief investigator; Frank Klonoski, investigator; Dennis Shedd, chief counsel and staff director; Cindy LeBow, minority chief counsel; Melinda Koutsoumpas, chief clerk, Mark H. Gitenstein, minority chief counsel, and Christopher J. Dunn, minority counsel.

The CHAIRMAN. The committee will come to order.

Is Justice Rehnquist here yet?

Mr. SHORT. He is on the way down now.

The CHAIRMAN. While we are waiting for him, if there is no objection, there are two Congressmen here who want to just take a couple of minutes on this Rehnquist nomination, Senator Stevens and Representative Rudd. If you gentlemen would come forward, we will hear you right now while we are waiting on the Justice to come.

You may proceed, Senator Stevens.

STATEMENT OF HON. TED STEVENS, U.S. SENATOR, STATE OF ALASKA

Senator STEVENS. Thank you, Mr. Chairman and members of the committee.

I had asked to appear the other day, and I had just returned from an overnight flight from Alaska, and I am sure you understand that that was a difficult appearance to make.

The CHAIRMAN. We are glad to have you with us.

Senator STEVENS. I ask that you place my statement in the record in its entirety, if you would.

The CHAIRMAN. Without objection, the statement will be placed in the record.

[The statement follows:]

STATEMENT OF SENATOR TED STEVENS ON BEHALF OF JUSTICE WILLIAM HUBBS REHNQUIST

Mr. Chairman, I consider William Rehnquist a good friend. He and I first came to Washington as young lawyers in the early 1950's. I was greatly impressed by his legal skills and enjoyed our many discussions about the law. I also enjoyed the more light-hearted talks that we shared.

Since those days, our careers have moved in different directions. Unfortunately, this has meant that our paths now rarely cross. I have, however, followed his career with interest. It was a pleasure to participate in the confirmation of his nomination as an Associate Justice of the Supreme Court in 1971. Now, on the occasion of his nomination to be Chief Justice of the United States, I am appearing before you to reaffirm my belief that he is a fine judge, and a great man.

You must decide whether Justice Rehnquist is qualified to serve as Chief Justice of the United States, the head of the Federal judiciary. After reviewing his record as a judge and an individual, there should be no doubt in anyone's mind that he is an appropriate choice to be our Nation's next Chief Justice. In fact, he is a superior choice.

The Chief Justice is responsible for the administration not only of the Supreme Court but also of the entire Federal judicial system. I believe that William Rehnquist's personal demeanor and ability to work well with individuals with whom he does not always agree will enable him to discharge these administrative duties with ease.

The fact that it is a pleasure to know and work with Justice Rehnquist, while important to the administration of the Federal judiciary, is just a part of the question before the committee. Posterity will be interested more in his decisions and his leadership on substantive legal issues than in his record on administrative matters.

Justice Rehnquist's legal philosophy is clear and consistent. During his 15 years on the Court as an Associate Justice, he has written opinions of uniformly high quality, well-known for their sharp legal reasoning. Those opinions are an important contribution to American jurisprudence.

At a time when the Supreme Court often speaks with many voices, the importance of well-reasoned and well-written opinions, even in dissent, goes beyond the merits of the particular case. Those opinions guide the lower courts and shape the future consideration of an issue by the Supreme Court. Justice Rehnquist produces exactly this sort of opinion. I have not always agreed with his conclusions, but Justice Rehnquist leaves no room for doubt of where he stands and what he believes.

It is important to put Justice Rehnquist's overall performance on the Court in perspective. He is not a loner, alienated from the legal mainstream. The man whom Justice Rehnquist would succeed as Chief Justice, Warren Burger, has voted more often with him than any other Justice for 11 of the 15 years Rehnquist has been on the Court.

Justice Rehnquist is also a strong believer in the Federal system. He recognizes that there is no need for the national government to constantly intrude into the governance of the individuals States. That is a principle that some find hard to swallow. I believe, however, that it is a basic principle of our Nation's Constitution.

If Bill Rehnquist succeeds in reinstilling a respect for judicial restraint during his tenure as Chief Justice, his ascension to that office will be counted one of President Reagan's greatest achievements. I look forward to the consideration of his nomination by the full Senate.

Mr STEVENS, Mr President, I rise in support of the nomination of Mr William H. Rehnquist to the U S Supreme Court. It is my strong believe that Mr Rehnquist has the intelligence, integrity, legal experience, understanding of the Constitution and qualities of fairness and impartially which are so important in a nominee to the High Court My respect for the Court and its vital role in our system of checks and balances would not permit me to vote for a person who does not possess these qualities

Mr Rehnquist's legal scholarship and experience are unassailable After graduating first in his class from Stanford University Law School, where he was elected to the Order of the Coif and was a member of the board of editors of the Law Review, Mr. Rehnquist served as law clerk to Associate Justice Robert H. Jackson of the U.S. Supreme Court Those who are familiar with our system of legal education and training know that an appointment to a Supreme Court clerkship is one of the most sought after positions available to a graduating law student. Moreover, Justice Jackson, for whom Mr. Rehnquist served from February 1952 until June 1953, is one of the most respected Justices in the history of the Court. I knew Bill Rehnquist personally during this period as I was a young lawyer here in Washington.

From the completion of his clerkship and until his appointment as Assistant Attorney General, Mr. Rehnquist engaged in private practice in Phoenix, Ariz His outstanding legal ability and achievements are reflected in positions which he held during this period Thus, he served as president and a member of the board of directors of the Maricopa County Bar Association in Phoenix, as chairman of the Arizona State Bar Continuing Legal Education Committee, as a member of the National Conference of Commissioners of Uniform State Laws, and on the Council of the Administrative Law Section of the American Bar Association.

During the Senate Judiciary Committee's consideration of the Rehnquist nomination, many strong endorsements of his legal scholarship were received These expressions of support are well documented in the hearing record and committee report, and I will not dwell upon them now, except to mention two which I believe to be of special significance First, the Honorable Lawrence E. Walsh, chairman of the American Bar Association's Standing Committee on Federal Judicuary, stated in a letter to the Judiciary Committee that:

The Committee is unanimous in its view that he is qualified for appointment to the Supreme Court A majority of nine is of the opinion that he is one of the best qualified available and thus meets high standards of professional competence, judicial temperament, and integrity

Commenting on Mr Rehnquist's legal abilities, Dean Phil C. Neal of the University of Chicago Law School wrote

Rehnquist was a student of mine at Stanford Law School He was not only the top student in his class, but one of the best students in the school over a number of years

I have abstracted certain information which is especially revalatory of Mr. Rehnquist's openmindedness and approach to constitutional issues. With respect to the first matter, I would like to quote again from a letter written to the committee by Dean Neal·

I am confident he is a fair minded and objective man Any suggestions of racism or prejudice are completely inconsistent with my recollection of him . . . I believe he would be an independent judge and that he would bring to the Court an unusual capacity for understanding and responding to all dimensions of the difficult problems the Supreme Court must confront In my judgment, his appointment would add great strength to the Court.

In the same vein, U.S District Judge Walter Craig, former president of the American Bar Association, testified before the committee as follows.

I believe this man has a humanity about him and a human warmth that would make him, if anything, more sensitive to the needs of people (and the necessity) of improving their life and their society.

Mr Rehnquist's regard for individual freedom and the Bill of Rights is best summarized in his own words:

I think specifically the Bill of Rights was designed to prevent . . . a majority, perhaps an ephemeral majority, from restricting or unduly impinging on the rights of unpopular minorities.

Regarding the procedural protections in the Bill of Rights, he observed last August:

These procedural guarantees of individual liberty would be regarded by most people as every bit as important to our kind of society as representative institutions are thought to be

Not only does Mr. Rehnquist recognize the importance of individual rights, he has a keen understanding of the relationship of these rights to society as a whole. In view of the deep concern felt by many Americans that the Supreme Court has lost sight of the proper relationship between individual rights and a free society, I believe that his observations in this area are especially important. Thus, Mr. Rehnquist has stated:

We all assume that under our philosophy of government, the individual is guaranteed the freedom of sanctity of his person—in short, the "right to be let alone" One aspect of freedom is, of course, freedom from unwarranted official detention or other intrusions on one's physical being But another aspect of this notion is surely the right to be free from robberies, rapes and other assaults on the person by those not occupying an official position A government which does not restrain itself from unwarranted official restraints on the persons of its citizens would be a menace to freedom, but a government which does not or cannot take reasonable steps to prevent felonious assaults on the persons of its citizens would be derelict in fulfilling one of the fundamental purposes of which governments are instituted among men A society as a whole has a right, indeed a duty to protect all individuals from criminal invasions of the person.

In my opinion, this statement and many others which Mr. Rehnquist has made evidence a responsible approach to the Bill of Rights, which was designed by the Founding Fathers to insure the protection of individual rights within the context of a larger and ever changing society, and is worthy of a nominee to the Supreme Court.

Moreover, I am convinced that Mr. Rehnquist has an understanding and awareness of the needs and aspirations of minority groups Thus, he stated during the hearings that he has come to realize "the strong concern that minorities have for the recognition of these (civil) rights." In answer to a specific question posed by the Judiciary Committee, he said that he had come "to appreciate the importance of the legal recognition of rights such as this without regard to whether or not that recognition results in a substantial change in customs or practice "

Mr. President, I have known Mr. Rehnquist for many years. During this time, I have been impressed with his character, human warmth, and legal scholarship As a lawyer, I am fully cognizant of the importance of the Supreme Court in our democratic form of Government and believe that Mr. Rehnquist is eminently qualified to fill the position of Associate Justice and to make an important contribution to the tradition of judicial excellence which has characterized the efforts of many Justices who have served before him.

Senator STEVENS. Mr. Chairman, I would like for you and the members of the committee to know that I have known Justice Rehnquist now since the early fifties. I knew him then as an honest, decent and very sensitive but very brilliant young lawyer. We were part of a group that came here right after we got out of law school, and I had many discussions with him in those days. As a matter of fact, I think we even had one night when we went out on a double-date together. We spent time together as young men.

The CHAIRMAN. So you worked together and dated together; is that it?

Senator STEVENS. That is right.

Senator BIDEN. But not one another.

Senator STEVENS. He was not my date, Mr. Chairman. [Laughter.]

I was pleased when his name was submitted in 1971 to become an Associate Justice, and I supported it then with a statement on the floor, which I will be pleased to put in the record again here today.

But I want the committee to know that I have been appalled at some of the things I have heard here. I have known this man for many years, and I am, I think you all know, a person who prides himself in believing that we have been part of a generation that has brought great change to this country, and Bill Rehnquist has been part of that change. And he has been a very steady member of the Supreme Court. And I would urge that you report his nomination to become Chief Justice. As Senator Biden has said, he is going to be on the Court in any event. He has been a good member of the Court; he has been a very steady member of the Court. And I think he will use his brilliance and his capability to be even a greater leader of the Court as Chief Justice than he has been as a member, as an Associate Justice. He has followed very closely, in my opinion, the lead of the current Chief Justice in recent years, and I consider Chief Justice Warren Burger as a close personal friend, and I have great admiration for him, too.

I think the President has made an admirable selection to be the Chief Justice of the United States, and I would like to go on record as completely supporting his nomination.

The CHAIRMAN. Thank you very much.

Are there any questions of Senator Stevens?

[No response.]

The CHAIRMAN. If not, you are excused, and thank you for your appearance.

Congressman Rudd, we are glad to have you with us.

STATEMENT OF HON. ELDON RUDD, MEMBER OF CONGRESS, STATE OF ARIZONA

Mr. RUDD. Thank you very much, Mr. Chairman.

I am very privileged to appear before this committee with this group of distinguished Senators and your distinguished committee. I thank you for giving me the privilege to come and testify before the committee.

The CHAIRMAN. If you have a statement, you can give it at this time.

Mr. RUDD. I would just like to say that I noticed my friend and late colleague from the other body, my body, is now a member of this great body—the newest member, and this committee. I note that Senator Broyhill occupies the last seat on the committee. Senator Broyhill is used to dealing from the front of the line rather than the back of the line, but he will get used to this in about 30 seconds, I think.

Mr. Chairman, Justice Bill Rehnquist is a thoroughly good person who has a distinguished, very scholarly judicial track record and has served our country very well in that regard. No one has been more upright, more dedicated, more sincere, more contributive to our Nation's highest court than has Bill Rehnquist.

There has been some note taken in the media recently of his possible prior affiliation with one of the two great political parties, but in doing so, the terms "liberal", "conservative", "left" and "right" have been used, terms that I do not use myself, although sometimes I am tabbed that way with one or the other. But the membership in question, I think, had to do with the Republican Party. And that is why I would like to just appear before you today, and I want to tell you that in May 1963 in this regard, which may be helpful, during the course of an impeachment proceedings, two Democratic Party members of the Arizona Corporation Commission, by a totally controlled Democratic Party Legislature in Arizona, the Arizona House of Representatives selected Bill Rehnquist to represent them in these proceedings. Bill's selection was inspired solely, only, because of his integrity, his reputation as a legal scholar, without any thought to his possible political affiliation. And I will tell you the impeachment failed in the Arizona Senate, I believe by one vote because of a failure to get a two-thirds vote in the body consisting of 28 members, 24 of whom were members of or affiliated with the Democratic Party.

The only current living member of that then body is, the Honorable Sam Steiger of Prescott, AZ. But I say that only to indicate that up to this point, no one has paid much attention to what his political affiliation may have been in that regard. And the confidence that the opposite party—and I am not even sure that he was a Republican at that time—but what has been termed "the opposite party" from what he was registered, took great pride in selecting him.

But Bill Rehnquist and his nomination by the President of the United States as Chief Justice has been heralded across the Nation as a most reasonable, a most laudatory action, and I sincerely urge this great committee to approve that nomination.

I thank you, Mr. Chairman, for permitting me to be here.

The CHAIRMAN. Thank you very much.

For those of you who do not know Congressman Rudd, he is from Arizona; he is a very able, hardworking, dedicated Congressman, and we are very pleased to have him make an appearance here.

Any questions?

[No response.]

The CHAIRMAN [continuing]. If not, thank you very much, Congressman.

Mr. RUDD. Thank you, Mr. Chairman.

The CHAIRMAN. We will now ask Justice Rehnquist to come back to the stand. And Justice Rehnquist, I wish to remind you again that you are under oath.

Justice REHNQUIST. I am aware of that, Mr. Chairman.

The CHAIRMAN. Now, yesterday, for the first round we announced we would allow 20 minutes. I think, today, we will go back to 10 minutes. We have 60 witnesses to hear from today so we had better get busy—or, at least 50, I believe, today, and 10 tomorrow.

So we have asked the members not to duplicate questions. If you listen, and the question has already been answered, there is no use going over and over again. We can save time by that. We want to cooperate in every way we can, but we must move on.

Mr. Rehnquist, I have several more questions here I did not quite finish yesterday, but to save time, we will now allow other members to question you.

We will now turn to the able ranking member, Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman.

Welcome back, Mr. Justice. I admire your physical constitution to sit as long as you did yesterday.

I spoke to my mother last night, and she said, "He did not get a chance to get up and leave, but you did. Are you going to keep him that long today?"

I want you to know, Mr. Justice, that the decision to keep you that long was totally the chairman's. [Laughter.]

And I want my mom to know that, too.

The CHAIRMAN. I might add, though, it was caused by long, drawn-out questions of some Democrats. [Laughter.]

Senator BIDEN. I might add for the record that you will find that there were more questions and more time absorbed by Republicans yesterday than by Democrats, as has been pointed out to me by two people in the press who kept a clock on. They pointed out every 20 minutes the bell went off for us; on an average, it was 22 minutes for you. At any rate, we do not want to talk about that.

The CHAIRMAN. Well, it is not very often, but sometimes the press is in error. [Laughter.]

Senator BIDEN. Mr. Justice Rehnquist, now that I have eaten up 2 of my 10 minutes, let me pick up where we left off, if I may, as I told you I would.

We talked—to bring you back in focus for a moment here with regard to the questions I was pursuing—about the role the Chief——

The CHAIRMAN. Excuse me just a minute. I noticed a long line of people out there that want to come to this hearing. Is there any reason they should not be brought in? Bring them in and fill up the chairs. They have got a right to be here if they want to. Fill every seat, and give them an opportunity to come in.

Senator BIDEN. We have got a couple empty ones up here.

Senator LEAHY. It depends if they are going to ask long questions or not, Joe.

Senator HATCH. We are willing to have them filled, of course.

Senator BIDEN. Do you think we might punch that clock again?

The CHAIRMAN. We will start over on the time.

Senator BIDEN. Mr. Justice, you and I spoke briefly yesterday about the role of Chief Justice Warren in the *Brown* case, and we ended, when my time was up, beginning to speak to the role of the Chief in the *Nixon* tapes case, which was as we both know—you, better than I—a different role; the Chief was in that case the one person that was slightly out-of-sync with the other eight Justices, according to historical—he ended up voting the same way, but the issue there was not the Chief bringing along a potential dissenter; the issue there was the Chief, who thought the tapes should be given up, having a rationale the same as the other eight Justices.

And I think it has been characterized by everyone as the Chief having compromised somewhat—not compromised in a bad way, but having compromised some to gain again total unanimity on the Court.

Is that your perception of how that occurred?

TESTIMONY OF HON. WILLIAM H. REHNQUIST, NOMINEE, TO BE CHIEF JUSTICE OF THE UNITED STATES

Justice REHNQUIST. I do not have any perception of how that occurred, Senator. I did not participate in the case. I do not believe I saw any of the circulations. And it is just, really, as if I had not been there.

Senator BIDEN. Well, in the book "Brethren," the following exchange allegedly occurred, the following episode. When Nixon heard the results, the President said he hoped there would be "some air" in the opinion. He was speaking to General Haig. And Haig told him it was unanimous, and Nixon said, "Unanimous?" and Haig said, "Unanimous. There is no air in it at all."

"None at all?" Nixon asked.

"HAIG. It is tight as a drum."

After a few hours spent complaining to his aides about the Court and the Justices, Nixon decided he had no choice but to comply, and 17 days later, he resigned.

Now, if that is correct, that Chief Justice Burger subsumed his view to the Court as a whole so that there would be a unanimous opinion on what we both had agreed yesterday was a critical decision, if that is true would you be prepared to do a similar thing?

Justice REHNQUIST. I think the Chief Justice probably has a greater obligation than anyone else on the Court in those very rare, great cases where it is apparent that unanimity would be highly desirable to not only try to get colleagues together by way of consensus, but to himself adapt some of his views.

Senator BIDEN. I appreciate that answer, Mr. Justice, because this, as I have told you, is a very important part of my decision here. As I said, you are on the Bench, and you are on the Court, and God willing, you will stay on that Court in good health for some time to come. So the issue for me is the role of the Chief Justice here.

Let me ask you, do you believe, had you been Chief, would there have been the necessity in any of your 8-to-1 decisions where you were the dissent that you think you could have changed? I mean, can you imagine having changed? Do any of those decisions rise to that level?