

You have shown judicial temperament, here, on this occasion during the hearing. You have exemplified a high sense of judicial temperament, which is so essential, I think, to a judge.

Then, too, you are an ardent supporter of our constitutional form of government, and you believe the Constitution says what it means and it means what it says. I feel the same way.

You believe in the separation of powers; you believe in the proper division of powers. Certain powers are delegated to the Union; others are reserved to the States. It is important that we remember that reservation to the States, that power is not delegated as part of the Constitution. You have shown that in your decisions, in your public life.

You were well qualified to start with. You served as a law clerk for 1 year; you were in private practice for over 16 years; Assistant Attorney General for 1 year. Then you were nominated to be Associate Justice by President Nixon and you served there 15 years.

I don't know of anyone anywhere that could be better qualified to be Chief Justice of the United States than you. We're proud of you and we're proud of your record. We're proud of what you stand for. I just want to tell you that, in my judgment, you will be confirmed. This committee will vote for you and the Senate will vote for you. You deserve that recognition and you'll get it.

Justice REHNQUIST. Thank you, Mr. Chairman.

Senator HEFLIN. Mr. Chairman, on behalf of the Democratic side here, there could be witnesses that would appear after which Justice Rehnquist himself might like to appear again. I think the reservation should be that, if something arises, Justice Rehnquist himself or the Democrats—or anyone on the other side—could reserve the right for recall.

The CHAIRMAN. Mr. Justice, tomorrow we are hearing some more witnesses. If you want to return after they have testified, we will give you that opportunity. It will be an option that you can exercise yourself.

Justice REHNQUIST. Thank you, Mr. Chairman.

Senator HATCH. Mr. Chairman, if the Justice needs to come back, it should only be on anything that might arise in the future. It should not be on any of the past items we have been over and over again. Let us at least have that understanding.

The CHAIRMAN. You are now excused and we thank you for your presence. We thank you for your testimony, and we wish you well.

Justice REHNQUIST. Thank you, Mr. Chairman.

The CHAIRMAN. We will be in recess for 10 minutes to get the other witnesses.

[The committee was in recess.]

The CHAIRMAN. Mr. Bolton, do you want to make a statement at this time?

STATEMENT OF JOHN R. BOLTON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE

Mr. BOLTON. Yes. Thank you, Mr. Chairman.

I regret that, due to the shortness of time, I do not have prepared remarks, but I do have a few things I would like to say.

Earlier today, reference was made to a memorandum from the President to the heads of executive departments and agencies, dated November 4, 1982. I would just like to begin by reading one sentence from that memorandum. I quote from the President:

The Supreme Court has held that the executive branch may occasionally find it necessary and proper to preserve the confidentiality of national security secrets, deliberative communications that form a part of the decisionmaking process, for other information important to the discharge of the executive branch's constitutional responsibilities.

Mr. Chairman, there has been a long history in this country, dating back to President Washington, of the importance of preserving the confidentiality of executive branch deliberations. By analogy, the judicial branch of Government preserves the confidentiality of the internal deliberations of our courts; Members of Congress preserve the confidentiality of their communications with their staffs. And, for the same reason, going to the fundamental basis of our Government, the executive branch must also have confidentiality in communication among top advisors to Cabinet heads and to the President.

There is no doubt, Mr. Chairman, of the importance of securing candid advice to ensure the proper functioning of the executive branch. If I could, to demonstrate the importance of this, I would like to read brief excerpts from two Supreme Court opinions. The first is the opinion of the Court in *Nixon v. Administrator of General Services*. I might say that the language I am quoting from is from Justice Brennan. I quote Justice Brennan who, in turn, quotes from the Solicitor General.

Justice Brennan said, "Nevertheless, we think that the Solicitor General states the sounder view and we adopt it." Justice Brennan quoting now from the Solicitor General: "This Court held in *United States v. Nixon* that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of fact and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure. The privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore, the privilege survives the individual President's tenure.

Now, the reasons for the privilege, the Court said in *United States against Nixon*, are plain—and I quote now from the opinion in that case.

"Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interest, to the detriment of the decisionmaking process."

Let me quote further from that opinion, if I may, Mr. Chairman. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions, and to do so in a way many would be unwilling to express except privately."

Mr. Chairman, executive privilege is claimed only after the most searching scrutiny. Not all documents qualify and, indeed, as I mentioned earlier today in response to the request from three Democratic Senators, certain documents were produced to the committee from the Office of Legal Counsel, that in our legal judgment would not qualify.

However, following the procedures laid out in the President's memorandum, from which I have quoted previously, I have been advised by the counsel to the President, Peter Wallison, on the advice of the Attorney General, the Assistant Attorney General for the Office of Legal counsel, and the Counsel to the President, that the President has authorized me to assert executive privilege with respect to the confidential memoranda, opinions, and other deliberative materials from the files of the Office of Legal Counsel from 1969 to 1971.

That concludes my remarks, Mr. Chairman.

The CHAIRMAN. That's it. Thank you very much.

Senator HEFLIN. Mr. Chairman.

The CHAIRMAN. Any questions?

Senator HEFLIN. Yes, Mr. Chairman. I think this witness is subject to being examined. In the normal course of events, I'm not sure how an executive privilege is entered, as to whether or not it is entered by an emissary like Mr. Bolton or, on the other hand, whether it comes through a written document or how.

I am not conversant with all of this information, as are several others, such as Senator Biden, the minority leader. Rather than delay it right now, I would suggest that we go to other witnesses and that Mr. Bolton be reserved. I understand that Senator Biden is on his way here, and when he arrives, if he has questions that he wishes to direct to Mr. Bolton, he would have that right. I think the courtesy is his and it is his right.

I would think, therefore, rather than delay, that we could go to some of the other witnesses and reserve Mr. Bolton's cross-examination until Senator Biden arrives. As I understand it, he is on his way.

Senator SIMON. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. I am obtaining materials, from the House Judiciary Committee, which contain many internal documents of the kind we're talking about, and not from an administration of some years ago but from the current administration. I had just a few of those reproduced here.

Here is a memo from Laurel Pike Melson, attorney-advisor; she is with the Office of Legal Counsel, and it's to Theodore P. Olson, Assistant Attorney General in the Office of Legal Counsel. It's dated December 6, 1982.

Here is another memorandum to Theodore Olson, within the Department. Here is a memorandum for the Attorney General from the Legal Counsel, dated May 30, 1984. Here is a memorandum from Legal Counsel to the Assistant Attorney General for Legislative Affairs.

There are half-a-dozen more here that I have had my staff xerox. It is fairly clear that executive privilege and a willingness to turn over documents has been part of the history of this administration

and is in line with the President's memorandum of November 4, 1982.

In that memorandum, incidentally, the President says "Executive privilege will be asserted only in the most compelling circumstances."

I don't know that we have such compelling circumstances right now, and clearly, what we are being told is appreciably different from the earlier pattern of this administration. I would hope that Mr. Bolton would take this message back to the Attorney General. If some of the documents really are, for some reason, very sensitive, that would be a good reason to use executive privilege. But it just sounds like we're being denied material that we ought to have. I hope that Mr. Bolton and the Justice Department will reconsider.

Mr. BOLTON. Mr. Chairman, might I respond to the Senator's remarks?

The CHAIRMAN. Yes, you may respond.

Mr. BOLTON. Senator Simon, I'm somewhat constrained because of the possibility of litigation still involving the documents to which you referred. But I can say that there is one clear distinction between the case to which you're referring and the present case, and that is that in that matter the President determined to waive executive privilege; in this instance he has determined to assert it.

Senator SIMON. I understand that the President is asserting it here. I guess I would urge you to think that over carefully. I would like to know a good, solid reason why in this instance executive privilege is being asserted.

Mr. BOLTON. Senator, as I testified earlier today, and as I tried to indicate in my remarks this evening, the nature of the Office of Legal Counsel in the Department of Justice, together with the Office of the Solicitor General of the Department of Justice, is really unique within the executive branch and our system of justice.

Because of the critical legal advisory role that those offices play for the Attorney General, the President's principal legal advisor, and the importance and the complexity and the sensitivity of the issues with which they deal, to open the files of those offices and reveal the documents, even under guarded circumstances, would gravely risk impairing and perhaps destroying the ability of those offices to provide the critical legal advice that the President and the Attorney General require to fulfill their constitutional mandate, to take care that the laws be faithfully executed.

Senator SIMON. We are not talking about today—and these documents, a whole host of them, are from this administration. We are talking about a decade-and-a-half ago.

If nothing else, can you provide an index or a list of the items you're withholding?

Mr. BOLTON. Senator, at this point, I would have to say that I believe the answer to that is "no", but I will certainly take that question under advisement.

The CHAIRMAN. I would like to say that in the President's order of November 4, 1982, certain procedures were outlined there. It provides that congressional requests for information shall be complied with, unless—and this is important—unless it is determined that compliance raises a substantial question of executive privilege.

A substantial question of executive privilege exists if disclosure of the information requested might significantly impair the national security—that's not the case here, but the next two are important—the deliberative processes of the executive branch, or other aspects of the performance of the executive branch's constitutional duties.

So, even if executive privilege was not claimed here, I feel that under the President's order here that the ruling as previously made was correct. But executive privilege has been claimed here and, so far as I'm concerned, that ends it.

If you wish to furnish other information or requests, we'll be glad for you to do it.

Mr. BOLTON. Mr. Chairman, if I could just make the record clear, parts or all of the documents in question fall under all three heads of the sentence which you read, and which I read earlier.

The CHAIRMAN. Are there any further comments?

The distinguished Senator from Massachusetts.

Senator KENNEDY. Mr. Chairman, I don't think one can reach any other opinion but that the administration is stonewalling on this.

Mr. BOLTON. Excuse me, Senator—

Senator KENNEDY. You'll have an opportunity to respond.

The administration is stonewalling on these requests. During the course of these hearings we have made requests with regard to memoranda on civil rights and civil liberties. I was on this panel at another time when we had this nominee for Justice on the Supreme Court. We were unable to get information at that time, and after the hearings were closed, we found out the allegations of intimidation of blacks and Hispanic voters down in the Southwest and we had to go back over that now many years later to get the direct response from the individuals who have, in many instances, sworn affidavits stating that this was the case.

We had difficulty in getting information back the last time, and then during the course of the deliberations of the Senate we find the memoranda allegedly written by Mr. Rehnquist, that indicated full support for *Plessy v. Ferguson*, that Mr. Rehnquist in testifying here says was to be presented for Mr. Robert Jackson, a distinguished jurist, whose closest confidants and people that know him consider it a sham and a disgrace.

We didn't have an opportunity at that last hearing to get information on this. We had to inquire some years later. Then, we hear Mr. Rehnquist say "Well, that's many years ago. I can't answer."

This is on the eve of Watergate, these activities. I was on this committee when Sam Ervin conducted the hearing about illegal wiretapping, where press men and women were being wiretapped in this country; loyal American citizens were being wiretapped. I was on this committee when we took remedial action with legislation to deal with that issue. I was on this committee when we were having mass demonstrations and we had proposals by the administration about mass arrests, involving first amendment rights, the right of petitioning their government, the right of free speech, the right of dissent.

There have been allegations and charges that Mr. Rehnquist was providing the legal guidance and advice on issues that affected the

first amendment, basic rights and liberties of individuals. That's an issue before our panel. It doesn't involve the security of the United States; it involves the security of the rights of the first amendment to the American people, and the most important right is the first amendment to the Constitution. That's what we're talking about.

This is the eve of Watergate, where we have the various plans and programs that provided the "plumber" plan that this committee was familiar with, the Houston plan, about how they were going to subvert individual rights and liberties, when we were having the CIA spying on American citizens.

I think we do a disservice to Mr. Rehnquist if he wrote a memorandum saying the first amendment rights were involved with these individuals, and the members of the administration ought to be restrained and respect those rights, and we don't see it. I think that would be enormously valuable.

There is only one other conclusion you could reach, and that is that kind of protection was not evident in the kind of memoranda that Mr. Rehnquist wrote.

In *Laird v. Tatum*, involved the use of military personnel to provide surveillance. To read Mr. Rehnquist's exchange with Sam Ervin on that, talking about whether there was a justiciable issue or not and indicating there wasn't, and then casually referring to that exchange in his memorandum opinion as a discussion of Constitutional law, when he issued his decision on that case, the effect of which was to deny discovery opportunities on governmental activities about which he was allegedly involved in advising the Justice Department.

I daresay, if we got discovery during that period of time, we may not have had a Watergate. We may not have had a Watergate, because those activities were being undertaken during that period of time.

So, it begins to tie up, Mr. Rehnquist. He indicated that he didn't think those individuals, those protesters, had a right, and then when he got to Court, which at the time this case was coming to Court, he cast the deciding vote. That delayed the opportunity for a full examination of the activities of the administration during that period of time. He was legal counsel guiding the Attorney General on first amendment rights, civil rights and civil liberties, what had to be respected and what didn't. It's all becoming very clear now.

I daresay, if you can find the justification under national security, under President Reagan's guidelines to withhold these documents you're a much better lawyer than anyone that I can possibly imagine.

I would just conclude with this, Mr. Chairman. Under President Reagan's order, congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises substantial questions of executive privilege. A substantial question of executive privilege exists if disclosure of the information requested might significantly impair the national security. That's the first line, national security, including the conduct of foreign relations. The deliberative branch of the executive branch, or other aspects of performance.

Mr. BOLTON. Mr. Chairman, could I respond to Senator Kennedy?
The CHAIRMAN. Yes; you may respond.

Mr. BOLTON. Very briefly, Mr. Chairman.

Senator Kennedy, you correctly stated that you were a member of the committee in 1971 when Justice Rehnquist was the nominee to be Associate Justice, and came before the Senate.

Our records indicate that, in 1971, no requests were made for any documents from the Office of Legal Counsel.

Senator KENNEDY. That's not the question. We asked for additional kinds of information, which this committee was not permitted to have until after the Committee had finished with the witness and had no opportunity to examine further.

What we are basically talking about is information. We are talking about information, and you've got it and you're not giving it.

Mr. BOLTON. Mr. Chairman—

Senator KENNEDY. That's the question. You've got it and you're not giving it, and it's involved with the questions that I asked about civil rights, with respect to civil rights and civil liberties, at a time when those fundamental values were probably as threatened in our society as at any time in recent history. Mr. Rehnquist wrote memoranda concerning these issues.

I think the American people, in whatever concerns they might have, would feel an enormous sense of relief to know that he was in the vanguard for protecting those rights and liberties. I think they're entitled to that kind of assurance.

But your response is "Oh, no, no, no, no, no, no. We won't be able to get qualified people that will ever come down and work in our office again because someone might release a memo." That is hogwash. That's hogwash. And President Reagan must understand it with his document on it.

Mr. BOLTON. Mr. Chairman, may I respond to that, too, please?

The CHAIRMAN. Yes; you may respond.

Mr. BOLTON. Let me say first, Senator Kennedy, that the subject matter of any of the documents that are withheld is not the reason for the withholding. The reason for the withholding is a principle, in my view, at least as important as the first amendment that you mentioned. That principle is the separation of powers. It is critical to the survival of the constitutional system that the Framers created that the branches operate with sufficient independence that they can fulfill their constitutional responsibilities.

Just as the Congress has constitutional responsibilities, just as the Judiciary has constitutional responsibilities, so too does the executive branch. I quoted from a Supreme Court opinion before you arrived which recognized the critical importance of candor, and of the need for an executive privilege.

Senator KENNEDY. Finally, in response to your earlier comment about information not being provided by the Office of Legal Counsel, Mr. Rehnquist was queried by Senator Bayh on just about all of these areas. His answer at that time was attorney-client relationship. But he didn't indicate that he was bothered by it, but when the time came again, when we asked the Justice Department to waive that particular issue, the answer was no. So, we were denied it then and we found the information that came out afterward.

We're being denied it tonight. And it isn't the committee. It's the American people. You're not saying it to Senator Thurmond, you're

not saying it to me, not saying it to any of these Members. You're telling the American people that at the time of greatest threat of individual rights and liberties and the civil rights of the American people, he wrote about these matters and expressed his view on those different questions, umpteen years ago, that they have no right to have the opportunity to view those materials—not national security, not dealing with nuclear weapons, not dealing with submarine capability. We're talking about questions of mass arrests; we're talking about surveillance of American citizens; we're talking about wiretapping; we're talking about rights of privacy; we're talking about the civil liberties of the American people.

And your answer is "no way" to the Judiciary Committee, "no way" to the American people. That's your answer.

Mr. BOLTON. With all due respect, Senator Kennedy, I don't think that's my answer. My answer is that the separation of powers—

Senator KENNEDY. Provide the information, then.

Mr. BOLTON [continuing]. On which the American people rely for the proper functioning of their Government dictates this result.

I might say, also, that the questions that were put to the Justice before he was excused were not questions that went to the substance of the deliberations; as has been held in any number of court cases concerning the attorney-client privilege, it is permissible to ascertain whether the communication was made, but it is not permissible to ascertain the substance of the communication.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Mr. Chairman, this has gone on more than enough. If you stop and look at it, the fact of the matter is you are not talking about the whole Department of Justice. You're talking about the Office of Legal Counsel.

In spite of all the bald assertions that Senator Kennedy has made here tonight about all of this stuff that you would find if you could get into these records, the fact of the matter is that he doesn't know what you would find. That is what you call a fishing expedition. Almost any court of law would be concerned about fishing expeditions under almost any set of circumstances.

The reason there is a desire to have a fishing expedition—and I think it is exemplified every time somebody on the other side gets excited about an issue like this—is that it is a Watergate issue. Let us be honest about it. The reason they are so excited about fishing here is because they really do not have anything to stop this nominee. And they have not been able to show anything to stop this nominee. And their assertions that he is an extremist have not been proven thus far, nor will they be proven. In fact, if anything, their assertions are extreme. That has been proven by the Justice who has sat here and tolerated the kind of abuse that he has taken from time to time.

It doesn't take any intelligence to understand that when you are talking about the Office of Legal Counsel, you are talking about the personal law firm of the President. You are talking about people who have to give very considered legal recommendations on all kinds of issues that involve confidential informants, national security issues, and all kinds of issues that require confidentiality.

Furthermore, your position on the separation of powers, being an important part of the Constitution is well taken. I have to agree with you, especially when the President asserts executive privilege, another right he has under the Constitution.

But you are right, Mr. Bolton. The separation of powers doctrine is an important doctrine. You cannot be bullied by political talk here from the Judiciary Committee, no matter how important the Senator may be, no matter what bald assertions he makes, no matter how long he has been here, and no matter how much they forgot to ask for these materials back in 1971.

But now they want them, after the man has served 15 solid years on the Supreme Court. Two hundred opinions have been gone through by the Bar Association. Sixty-five practicing lawyers, 180 judges, including State Supreme Court Justices from the various States, and 50 law deans and professors were interviewed. We have questioned the nominee for almost 3 days now. And we are going to hear from the other side on the ballot issue. We have FBI reports. We have a wealth of documents coming out of our ears. We have articles, we have memoranda. We are going to listen, I suppose, to more than 60 witnesses, an additional 10 that the other side has demanded. And now they are coming in here and asserting Water-gate.

Let us be honest about it. Some of the best and some of the worst "fishermen" in the world are on this committee. You make the choice which ones are the worst.

Senator SIMON. Would my colleague yield?

Senator HATCH. Yes; I would be happy to yield. I think he has made a set of very good constitutional points. I believe that it is time for us to realize that there may be some merit in what he is saying.

Senator SIMON. On the question of separation of powers, here I have four documents, rather substantial books, which contain all kinds of memoranda between people within the Department of Justice—

Senator HATCH. And given to other agencies.

Senator SIMON [continuing]. Legislative Counsel to the President and so forth, of this administration.

Senator HATCH. That is right.

Senator SIMON. And they turned those over to the House Judiciary Committee. Now we're asking for documents of 15, 16, 17 years ago, and all of a sudden there is a separation of powers problem.

Senator HATCH. Only because the President did not assert executive privilege. Had he asserted it, they would not have given those documents. Now, let us be honest about it. He is asserting it here. He has a right to and every reason to.

You are not talking about anybody. You are talking about a sitting Supreme Court Justice. You do not have to treat him like a tin can you can kick all over the street.

Senator SIMON. We're not talking—

Senator HATCH. We're not talking about you, Senator Simon. I do not think you are.

Senator SIMON. You were here when Justice Rehnquist said he had no objection to us receiving these documents.

Senator HATCH. He is not the one that determines that. He is not the President of the United States.

The CHAIRMAN. But the Attorney General didn't as a matter of principle.

Senator HATCH. That is right. He stated the principle.

Senator SIMON. A principle selectively applied.

Senator BIDEN. Would the gentleman yield?

Senator HATCH. That is a right the President has under the Constitution.

Senator BIDEN. Sure he does. But the Office of—the opinion of the Office of Legal Counsel are, in fact, released—

Mr. BOLTON. Certain opinions are released.

Senator BIDEN. Certain opinions are released, that's right, and you make the judgment opinions, right? As to whether or not they, in fact—for example, the fellow or woman who wrote the opinion, the memorandum opinion for Assistant Attorney General in the Criminal Division of Immigration and National Security, eluding inspection is a criminal offense is in venue, that person, the mere fact that that memo, which was written for the Attorney General, and he or she did not know it was going to be released, the fact that it's now released—it was John M. Harmon, Assistant Attorney General, Office of Legal Counsel—that's not likely to keep him from working for the office that you, without consulting him, released the memo, is it?

Mr. BOLTON. Quite the contrary, Senator. There are certain memoranda prepared by the Office of Legal Counsel with the full intention that they be published in books such as—

Senator BIDEN. Yeah; but all of them, every one in here?

Mr. BOLTON. No; that's exactly the point.

Senator BIDEN. So, what you do, you go through and you make a judgment based upon what can be released and can't be released, or should not be released, right?

Mr. BOLTON. No, sir; there are certain documents, as I mentioned earlier today, that are prepared by the Office of Legal Counsel and in some cases signed by the Attorney General and in some cases signed by the Assistant Attorney General for that office, that are intended as guidance for all or other parts of the executive branch, and for the public at large.

Senator BIDEN. Are they the only ones that are released?

Mr. BOLTON. They are the only ones published in volumes such as the one you're holding.

Senator BIDEN. They're the only ones published?

Mr. BOLTON. That's correct.

Senator BIDEN. So, there is no guidance for the Attorney General coming from Mr. Rehnquist at the time that all these phenomenal things were going on that Senator Kennedy spoke to that wouldn't, in fact, warrant being seen now? I mean, is it going to keep somebody from not working for the government because they're released now?

Mr. BOLTON. I believe, as I quoted from Justice Brennan's opinion a little bit earlier—and perhaps I could quote from it again since you arrived after that.

Senator BIDEN. Sure.

Mr. BOLTON. This is Justice Brennan, quoting and adopting the views of the Solicitor General in the case of *Nixon v. Administrator of General Services*:

The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure. The privilege is not for the benefit of the President but for the benefit of the Republic. Therefore, the privilege survives the individual President's tenure.

Senator BIDEN. I don't disagree with that. All I'm trying to figure out here is this. It seems to me we could settle this real easily. Why don't you all go down, make up a list of all the memoranda that are involved. Go down and look at the memoranda. If you conclude that each memorandum would, in fact, if released, do what Justice Brennan is worried about, then tell us. If not, if they're like many of these memoranda that are in here which, in fact, are pretty straightforward, and would not only be something bad to be released—for example, you already sent us one. You sent a memorandum that, ironically, was written by Justice Rehnquist to the President, defining the executive privilege. You sent us that one up.

Mr. BOLTON. That legal advice had already been made public, as I understand it.

Senator BIDEN. Oh, that's the reason. I got it.

So, that whoever made it public before—I mean, why can't you use the same test that was used before? I mean, can't you just go through them and figure out whether or not they really are—I mean, why are you doing this so that now you're going to have people saying "well, I don't know if I can vote this . . ." Why can't we just go in the back room—I'm serious; I'm not being smart—sit down and go through them.

Senator Hatch and I could sit down with you, and you say: "Look, I can't show you this one; I can show you this one. I can't show you this one, but I can show you this one." That's what we have always done before. But you're making this blanket exception.

Mr. BOLTON. Senator, each of the documents that was produced or withheld was subject to exactly the kind of consideration that you've just asked for.

Senator BIDEN. You went through every document?

Mr. BOLTON. I didn't personally. They were gone through by attorneys within the Department of Justice.

Senator BIDEN. I see. And every single thing that William Rehnquist wrote at that time falls into this category?

Mr. BOLTON. No; all of those things that were responsive to the request in the letter of July 24th—

Senator BIDEN. Everything that had to do with civil rights, every memorandum he ever wrote on civil rights—

The CHAIRMAN. Senator, we've got to get on with it.

Senator BIDEN. I know we do.

The CHAIRMAN. We've got 40-odd witnesses here. Let's get through with this thing.

Senator BIDEN. Can you tell us how many there were? You know, you acknowledged it's OK to ask for—that the separation of powers, in fact, when you cited the analogy of the attorney-client

privilege, you said you can have permission to ask if communications were made but not what the communication was.

Can we ask you how many communications were made?

Mr. BOLTON. Senator Simon made a similar request before. I told him my view at this point was that the tentative answer to that would be "no," but we would take that under advisement.

Senator BIDEN. I just think you all are making a big mistake, I really do.

Mr. BOLTON. Senator, could I respond to that, because—

Senator HATCH. Mr. Chairman, may I ask a question?

The CHAIRMAN. Yes.

Senator HATCH. Let me ask you one question.

Has this committee ever received any documents upon request from the Office of Legal Counsel of this nature before?

Mr. BOLTON. To my knowledge, Senator Hatch, this committee has never received any internal deliberative OLC memoranda before.

Senator BIDEN. Have we ever asked for any?

Senator HATCH. Excuse me—

Mr. BOLTON. The committee did not for certain on Justice Rehnquist's first confirmation hearing in 1971, and not that I know of before.

Senator BIDEN. We're asking now.

Senator HATCH. Let me finish, if I could.

Mr. Bolton, as I understand it, throughout the history of the committee we have asked for various documents and we have received documents from other parts of the Justice Department, but we have really either never asked for them or we certainly haven't ever gotten them from the Office of Legal Counsel?

Mr. BOLTON. I believe that's correct.

Senator HATCH. And that is why you are taking this principle position?

The CHAIRMAN. Let's move on. The decision has been made. If you wish to take it up, let us know tomorrow. We're going to move on with these witnesses now.

Senator METZENBAUM. Mr. Chairman, I haven't had an opportunity to be heard, and I came over especially. I left the floor because I was very disturbed, because to me, the whole issue concerning Justice Rehnquist has become one of credibility and integrity, and he's not a party to this particular decision.

Mr. BOLTON. That's correct.

Senator METZENBAUM. I do not lay this on him, but the fact is, what we have now is a deliberate coverup. Simply stated, it's a coverup. You, Mr. Bolton, may try to give it a higher profile, that it has to do with the separation of powers, but that just doesn't fly. Because the President of the United States specifically said that Congress could have the information.

You came here this morning saying we couldn't have the information. And then somebody said to you, that's not true unless you invoke executive privilege. So, you ran back to the office. Somebody decided to invoke executive privilege. That didn't make it right, because we're entitled to know what the facts are.

Now, let me ask you, Mr. Bolton, who decided to submit this matter to the President?

Mr. BOLTON. It was the recommendation of Mr. Cooper, myself, the Attorney General, and the Counsel to the President.

Senator METZENBAUM. Then it was all of you, a group of you, that made the recommendation; is that right?

Mr. BOLTON. You could call it that.

Senator METZENBAUM. But it included the Attorney General?

Mr. BOLTON. I wouldn't put myself on the same plane with the Attorney General. I was—

Senator METZENBAUM. I'm not concerned about that. But it included the Attorney General?

Mr. BOLTON. That's correct.

Senator METZENBAUM. Now, what I don't understand ties in with things that my colleagues have said, and that is, what is so secret? Why are you unwilling to make this information available? If there were an issue of separation of powers, then the President wouldn't have issued his memorandum of November 4, 1982, which spelled out a procedure and said: "Give the information to Congress."

What is there in these documents that you don't want us to—

The CHAIRMAN. He said "unless," and then he set out—

Senator METZENBAUM. That's right. But none of those three things are covered.

The CHAIRMAN. Oh, yes.

Senator METZENBAUM. Mr. Chairman, I didn't interrupt you. If you please, if you please, I didn't interrupt you.

The CHAIRMAN. Go ahead.

Senator METZENBAUM. All right. Thank you.

There is certainly no national security issue. There is certainly nothing about the deliberative processes of the executive branch, because this is a matter of 15 years ago. I can't have anything to do about those deliberative processes, or other aspects of the performance of the executive branch's constitutional duties. I see no way that those can be involved.

So then you drop down in this particular memorandum to the point of the Department having the right to ask the President to do it, and the President invokes executive privilege. Nobody denies the fact he has the right to do it—I don't deny the fact; others on the committee may. But he has the right to do it.

But I question the judgment, I question the propriety of doing it. I question whether it should be done when we have before us the confirmation of a Chief Justice who himself says let the information be made available. "I don't object to it."

Mr. Chairman, I believe that what you have here is a situation where you have drawn a blanket over a part of the Chief Justice's background, in a period of time that was extremely important, as spelled out by Senator Kennedy. What concerns me is why he would do this. What logical reason?

Separation of powers does not fly, Mr. Bolton. You can hang it on that, but it does not fly, since the President's memorandum very carefully takes care of that.

The CHAIRMAN. Where is this?

Senator METZENBAUM. Where is what?

Mr. BOLTON. Mr. Chairman, could I respond, if Senator Metz- enbaum has concluded? Could I respond?

The CHAIRMAN. Yes, you may respond.

Mr. BOLTON. The claim of executive privilege here is based on all three of the heads that are listed in the sentence from the President's memorandum that you referred to.

And I would say in response to your comments, and to a remark that Senator Biden made, that "a lot of people may not understand this." A lot of people may not understand it, and I wish that the appreciation of the importance of separation of powers and the proper role of the three branches was more generally known.

Senator METZENBAUM. But it is not separation of powers.

Mr. BOLTON. It is, Senator, with all due respect.

Senator METZENBAUM. Because the President has specifically said we may have the information unless you invoke executive privilege and you people told him to invoke it. So, there was no separation of powers issue until you told him to invoke it.

Mr. BOLTON. I do not quite follow that, Senator.

The CHAIRMAN. Go ahead. You have a right to finish your statement.

Senator METZENBAUM. But I do. I do follow it.

The CHAIRMAN. Finish your statement.

Mr. BOLTON. The President has made a determination, based on the recommendations that I noted before, that release of these documents would impair the internal deliberative functions of the Government.

And even though it was some time ago, as I quoted earlier from Justice Brennan, not known as an extreme conservative, and his adoption of the Solicitor General's brief in Nixon against Administrator of General Services, the privilege survives the tenure of any one President because—and I will quote again: "The privilege is not for the benefit of the President as an individual, but for the benefit of the Republic."

Senator METZENBAUM. Mr. Bolton, did you give us the memos, the private memos of Brad Reynolds when he was up for confirmation?

Mr. BOLTON. I was not at the Department at that time. My understanding is that memoranda from the files of the Civil Rights Division were provided to the committee. But I would stress that there is a difference between the work of the litigating divisions of the Department—although in some cases, a claim of executive privilege would be appropriate there—and the Office of Legal Counsel and the Solicitor General's Office which perform core functions of advising the Attorney General, the President's chief legal advisor.

And I might note that, as I understand it, during the confirmation hearings of Charles Freed to be Solicitor General, the committee requested documents from the Office of the Solicitor General, and the request was declined.

Senator METZENBAUM. Mr. Bolton, did you give Office of Legal Counsel memos to the House?

Mr. BOLTON. As I indicated earlier to Senator Simon who asked a similar question, and let me repeat what I said there, because there is still the potential for litigation arising out of that matter, I am constrained in what I can say.

But one critical difference between that situation and the present situation is—

Senator METZENBAUM. Well, just answer yes or no. Did you or didn't you?

Mr. BOLTON [continuing]. Is that in that situation, the President determined to waive executive privilege. Here, he has determined to assert it.

Senator METZENBAUM. But you did give the memos to the House? Mr. BOLTON. Such documents were produced. That is correct.

The CHAIRMAN. Anything else now? We have got to get onto these witnesses. I want to say this: this is not the first time executive privilege has been claimed. In 1961 and 1962, I spearheaded an investigation concerning the merging of the military.

I requested memorandums and documents, and everything from the Defense Department, from Secretary McNamara. He would not furnish them. And finally we kept on and on, and then the vice president was sent down to the hearing to announce that he claims executive privilege.

This is no more of a Watergate or a coverup than I caught back during the Kennedy administration. They denied me the documents I wanted at that time. They claimed they had the reason for it, national security, and so forth. Anyway, that was it.

So this situation today is no worse than it was then. They have a right to exercise executive privilege, and I did not contend further because I knew they had that right.

Now you have exercised executive privilege here on behalf of the Attorney General and the President, and that ends it. If you want to furnish anything else tomorrow or later, you can do it, but so far as I am concerned, that ends it, and we are now going into the witnesses, and you are now excused.

Senator KENNEDY. If the Chair would—since there was some reference to a previous administration, if I could just have maybe one minute on that.

The CHAIRMAN. I will be glad to—

Senator KENNEDY. If it was wrong then, it does not make it right now. There were wrong things that—mistakes made during that time, and it does not make them right now.

Now I understand, that under the Executive order, to comply with it, the document has to be referenced, the date has to be referenced. The author has to be referenced and the recipient has to be referenced, in order to comply with the law. And—

The CHAIRMAN. I thought I should have had them then, but under the authority now—

Senator KENNEDY. Well, I am just asking whether that has been complied with now, from the Office of Legal Counsel.

The CHAIRMAN. But I think—

Senator KENNEDY. Those are the requirements under law now—

The CHAIRMAN. I think they have got grounds here to claim—

Senator KENNEDY [continuing]. And I want to know if those have been complied with.

The CHAIRMAN [continuing]. In fact—

Senator KENNEDY. I am asking a question. Can I get the answer?

The CHAIRMAN. In fact we could even—

Senator KENNEDY. You can give me the answer. Otherwise we will sing a song here—

The CHAIRMAN. Do you want to answer his question?

Senator KENNEDY. I do not think there have been, and that is why we are getting a little committee filibuster.

Senator HATCH. Look at that smile on Senator Kennedy's face.

The CHAIRMAN. Well, at any rate, even if he had not claimed executive privilege, I think the committee had the right to act on the second and third reasons here, to waive exceptions.

Senator KENNEDY. Well, have they got the document date, author and recipient? Have you complied with that part of the law?

Mr. BOLTON. Excuse me, Senator Kennedy. From what portion of the memorandum?

Senator KENNEDY. To use the executive privilege, under existing judicial precedents, you have to name the document, the date, the author, and the recipient. Those are required now under the current judicial holdings for the exercise of executive privilege, and I am asking whether that aspect of the law has been complied with by the administration.

Mr. BOLTON. Well, I believe what you are referring to is if there is anything further to be done with it. There is certainly no requirement, at this juncture, that such a tabulation be prepared.

Senator KENNEDY. I believe once, if you are going to use executive privilege for any particular document, those requirements have to be met. So I would hope that you would, because there is going to be obvious efforts to obtain them.

Mr. BOLTON. I would say again, Senator, I do not believe there is any specific requirement at this point.

The CHAIRMAN. In 1961, they were not referenced then. The military was muzzled. They could not talk against communism, make public speeches, and I objected to it because they were muzzled. I tried to get some documents and they—

Senator KENNEDY. I thought we were going onto the other witnesses.

The CHAIRMAN. Let me get through. And no numbers were given. No numbers were given, no reference was given—

Senator KENNEDY. That is a long time ago.

The CHAIRMAN. And I was just in a—that is right, a long time ago.

Senator KENNEDY. That is a long time ago.

Mr. BOLTON. I am with you, Mr. Chairman.

The CHAIRMAN. At any rate, this situation here is not half as bad as that. Now we are going to the witnesses. We are going to the witnesses now.

Now the following people have submitted statements to save time: Donald Baldwin, executive director, National Law Enforcement Council. Paul M. Weyrich, Free Congress, Research and Education Foundation. Patrick V. McGooghan, the Institute for Government and Politics. The Honorable Phil Neal, Neal, Gover & Eisenberg; Mr. Gerhardt Casper, office of the dean, University of Chicago, Law School; Honorable Charles S. Rhein, past president, American Bar Association. Gerald P. Regard, president, Family Re-

search Council. William French Smith, former Attorney General.
All in support of Mr. Rehnquist.

To save time, we are just going to put them in the record.

[Statement follows:]

NATIONAL LAW ENFORCEMENT COUNCIL

Suite 804
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

Ordway P. Burden
Chairman

Telephones: (202) 223-5598, 223-6850

Donald Baldwin
Executive Director

July 28, 1986

The Honorable Strom Thurmond
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

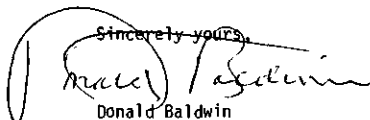
Dear Senator Thurmond:

Please submit for the record the enclosed statement of the National Law Enforcement Council in support of Associate Justice William H. Rehnquist, for Senate confirmation as Chief Justice of the United States Supreme Court.

This statement supporting Justice Rehnquist's nomination to Chief Justice of the Supreme Court is unanimously supported by the fourteen member organizations of the Council, representing over 300,000 law enforcement officers. The member national law enforcement organizations are listed in the attached statement.

Kindest regards,

Sincerely yours,



Donald Baldwin
Executive Director

Enclosure

Statement on Behalf of

The Honorable William H. Rehnquist
Associate Justice of the Supreme Court

For

Chief Justice of the Supreme Court of the United States

Before the Senate Judiciary Committee

July 29, 1986

Submitted by:

Mr. Ordway P. Burden
Chairman
National Law Enforcement Council
Suite 804
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

Senator Thurmond, and Members of the Senate Judiciary Committee, the National Law Enforcement Council, an umbrella group representing, through their executive heads, fourteen national law enforcement organizations, wishes to be on record in favor of President Reagan's nomination of U.S. Supreme Court Associate Justice William H. Rehnquist for Chief Justice of the Supreme Court. We believe Judge Rehnquist's fifteen years as an Associate Justice of the Supreme Court, his experience as Assistant Attorney General of the United States, as an active and successful attorney in private practice, and his experience as a law clerk to a Supreme Court Justice, give the nominee the extensive background and experience we look for in our Chief Justice.

Judge Rehnquist demonstrated early in life an outstanding ability to learn, understand, and apply the law. As a student, he always stood first in his class. This was true in his secondary school years where he stood out as an outstanding student. He graduated first in his class at Stanford Law School in 1952 after receiving his B.A. "with great distinction", earning him election into the highest academic fraternity, Phi Beta Kappa. He also earned advanced degrees from Stanford and Harvard Universities.

Few have ever attempted to question this man's intellectual ability, or his understanding of the law, its application to the rights of our citizens, and the meaning of our Constitution as it applies to the rights of every citizen to protection under the laws of our country.

As members of the law enforcement/criminal justice community sworn to provide protection for every citizen against violence and rights guaranteed by laws and the United States Constitution, we feel that Judge Rehnquist has demonstrated his ability to interpret and write his findings in legal cases to protect the citizens of this great land of ours. We believe that his high intelligence and demonstrated knowledge of the beliefs of our founding fathers as we know them in our Constitution, will help advance the needs of our law enforcement community to be able to act quickly, when necessary, to protect our citizens against law breakers, and violence associated with those that do not believe in upholding our laws.

This statement is being made on behalf of the following national law enforcement criminal justice organizations who have given their unanimous approval for this statement to be submitted to the Senate Judiciary Committee on behalf of Judge Rehnquist to be Chief Justice of the United States Supreme Court.

Associations of Federal Investigators
 Federal Criminal Investigators Association
 FBI National Academy Associates
 Fraternal Order of Police
 International Union of Police Associations
 Law Enforcement Assistance Foundation
 National Association of Police Associations
 National District Attorneys Associations
 National Sheriffs' Association
 National Troopers Coalition
 Society of Former Special Agents of the FBI
 Victims Assistance Legal Organization
 International Association of Chief of Police
 Airborne Law Enforcement Association

The CHAIRMAN. Now we will proceed with the witnesses. We will take the panels just as they are given. The Honorable Rex Lee. Mr. Lee, you come around. The Honorable Erwin Griswold. Is he here? Is Mr. Griswold here? Mr. Griswold, you come around. And Mr. Robert Stern, is he here? If you will hold up your hands and be sworn.

Will the testimony given in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LEE. I do.

Mr. GRISWOLD. I do.

Mr. STERN. I do.

TESTIMONY OF A PANEL CONSISTING OF HON. REX LEE, SIDLEY & AUSTIN, WASH., DC; HON. ERWIN N. GRISWOLD, JONES, DAY, REAVIS & POGUE, WASH., DC; AND HON. ROBERT STERN, MAYER, BROWN & PLATT, CHICAGO, IL

The CHAIRMAN. Have seats. We are going to allow you to put your full statement in the record, but we are going to limit the statements to 3 minutes. Mr. Lee, you may proceed for 3 minutes.

Mr. LEE. Mr. Chairman, members of the committee. I am honored to have this opportunity to testify in support of the nomination of William H. Rehnquist as the 16th Chief Justice of the United States.

Of all of the lawyers with whom I am acquainted, I know of literally no one who is better qualified to be Chief Justice of the United States than the nominee you are considering.

The most important considerations relevant to this confirmation fall into three categories: professional competence, integrity, and judicial temperament.

Justice Rehnquist is magnificently qualified in each of these respects. His abilities and his performance as a legal analyst and scholar can only be described as brilliant. Few persons have as extensive knowledge of the Court's precedents and the substantive areas with which it deals. I have appeared before Justice Rehnquist as an oral advocate 37 times. Many times he has voted in favor of the causes I have advocated, and many times he has voted against them. But always he has been fair. Always he has done his best to understand my position and also, my opponent's position.

No member of the Court is more effective than Justice Rehnquist in identifying an advocate's points of vulnerability and in my cases, he has never hesitated to do that, notwithstanding my resulting discomfort.

But he always does it in a context of due professional respect. I am confident that he also maintains that same professionally respectable relationship with the other members of the Court, thereby contributing to the Court's collegiality and effectiveness.

Mr. Chairman, may I make one final comment. While it is of course important that the Senate take the time necessary to perform properly its constitutionally ordained responsibility to advise and consent to this nomination, the Court, and therefore our Nation, suffer rather serious consequences when the Supreme Court is deprived of the services of one of its members for any period of time.