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Manning, to hypothesize that a simple component of the urea solution—cyanate—might be getting whatever results were showing up in Nalbandian's patients.

"And indeed we found cyanate did inhibit sickling in the test-tube," Cerami said in an interview. They were also able to pin point the exact location on the hemaglobin portion of the red cell where the cyanate hooked on and stayed, making the reversal of the sickling permanent for that cell.

Much of the damage of the disease process arises because the misshapen cells snag in the capillaries between the outgoing arteries and incoming viens, slowing blood cell traffic like a jack-knifed truck on a turnpike. Not only does blood flow get snarled, cells die young in the process.

"If sodium cyanate ever works as therapy," Cerami pointed out, "treatment will have to be continuous throughout life, because each new red cell would have to be doctored."

"REASONABLE" TOXICITY

Safety tests on animals indicated cyanate is "no more than three times as toxic as aspirin," regarded as a reasonable range for proceeding to human trials.

Dr. Peter Gillette, assistant professor at Rockefeller and Dr. Charles Peterson, a Harlem Hospital resident on loan to the project, are now treating the 25 sickle cell anemics, from 7 to 50 years old, either by mouth, by intravenous injection or by taking out blood, treating it and putting the red cells back.

The patients are treated continuously. "We don't wait for a sickle cell crisis," Cerami said. "The hope is to use sodium cyanate to prevent the disease process." The tests, under Food and Drug Administration experimental drug rules, are expected to yield answers in about six months.

Cyanate is a comparatively cheap industrial chemical ($400 a ton) in powder form, easily dissolved. It is a three-atom molecule of nitrogen, carbon and oxygen. The Rockefeller team has been using material from an American firm which is giving up production because German and Japanese firms make it more cheaply.

FULL OF IMPURITIES

The unsolved problem for future medical use, Cerami said, is that "much of the stuff bought for industrial use is full of junk, impurities," which could damage patients and foul up experiments so the true value of the pure drug would be hard to determine.

But if the pure drug works and is adequately safe, it would be the first specific therapy for an ailment that can now be treated only symptomatically in most cases.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Is there further morning business? If not, morning business is closed.

EXECUTIVE SESSION—NOMINATION OF LEWIS F. POWELL, JR., TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session for further consideration of the nomination of Mr. Lewis F. Powell, Jr., to be an Associate Justice of the Supreme Court, with the vote coming at 4 o'clock p.m.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

RECESS

Mr. BYRD of West Virginia. Mr. President, I move that the Senate stand in recess until 1 p.m. today.

The motion was agreed to; and (at 10 o'clock and 44 minutes a.m.) the Senate took a recess until 1 p.m.; whereupon the Senate reassembled when called to order by the Presiding Officer (Mr. McINTYRE).

QUORUM CALL

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. HOLLINGS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. CHILES). Without objection, it is so ordered.

A PERSONAL EVALUATION OF LEWIS E. POWELL, JR., AND WILLIAM H. REHNQUIST, NOMINEES TO BE ASSOCIATE JUSTICES OF THE U.S. SUPREME COURT

Mr. FONG. Mr. President, I support the nominations of Lewis E. Powell, Jr., and William H. Rehnquist to be Associate Justices of the Supreme Court of the United States.

Because of the questions which have been raised in connection with these nominees, I should like to state my analysis of the qualifications of these candidates and my reasons for reaching the conclusions I have.

Mr. Powell is a person of unusual professional competence. His outstanding legal ability is universally recognized.

His personal integrity is unimpeachable.

His sensitivity to the problems which his stockholdings present under the Canons of Judicial Ethics and his efforts to minimize these problems, even where it will probably be at considerable financial cost to him, so as to avoid even "the appearance of impropriety," is further indication to me of his sensitivity to and commitment to the concept of assuring not only equal justice under law to all Americans, but of avoiding any appearances which may lead to questions as to the basis of his actions.

Senators are well aware that I am most concerned about preserving our constitutional rights and especially the rights of the people guaranteed under the first 10 amendments to our great Constitution—our Bill of Rights.

I am one of only four Senators who voted against final passage of the omnibus crime bill. I did this because of its provisions which I am convinced are in derogation of these most sacred constitutional rights.

At the hearing on Mr. Powell's nomination before the Judiciary Committee, I very carefully and at length questioned Mr. Powell as to his position in regard to these most valuable and valued guarantees of the liberty and very safety of minorities—and we are all members of some minority in these United States—against the oppression and tyranny of the majority or of the Government.

The Supreme Court of the United States is the last bulwark of freedom and justice for all our peoples.

I am fully satisfied of Mr. Powell's complete and sincere dedication to the preservation of these vital, constitutional rights and of his ability to so interpret our great Constitution as to assure equal justice under law to all persons in this country.

I urge my brethren to confirm the nomination of Lewis F. Powell, Jr., to be Associate Justice of the Supreme Court of the United States.

Now I turn to the nomination of William H. Rehnquist, which is also before us for confirmation, to be Associate Justice of the U.S. Supreme Court. In Mr. Rehnquist, we have before us a much younger man, one likely to serve in that exalted capacity for many, many years.

Fortunately, in Mr. Rehnquist, we have a person of outstanding legal ability and scholarship and unquestioned personal integrity. Even his most severe critics have not questioned these qualifications, which he so abundantly has demonstrated.

What four of the distinguished Senators who opposed Mr. Rehnquist's nomination in the Judiciary Committee and various witnesses questioned was largely Mr. Rehnquist's interpretations of and dedication to the concepts contained in the Bill of Rights.

In fairness to Mr. Rehnquist, his various utterances on these subjects should be put in context of time and circumstances.

Much is made of his opposition in 1964 to a proposed Phoenix public accommodation ordinance and to a letter to the editor published in the Arizona Republic on the proposals of the Phoenix school officials to eliminate de facto segregation in that city.

Little is made of the nominee's actions at those times or his very humble and human confession of error of an earlier judgment.

Throughout the period in question, Mr. Rehnquist's own children attended fully integrated schools in the downtown area of Phoenix. Surely, his recognition of the benefits of integration to the children he loved and cared for most—his own children—must give credence to his recognition of the value of equality of opportunity for all, else he could readily have chosen to live in one of the suburban areas where de facto segregation was almost assured. In view of his actions in this regard, I feel compelled to conclude the nominee does not endorse or practice segregation.

It takes a big man to reverse himself—a bigger one to admit in public that he was wrong—and a still bigger one to alter his course of conduct.

While Mr. Rehnquist did oppose a proposed public accommodations ordinance in 1964, in 1966 as a member of the Arizona delegation to the National Conference of Commissioners on Uniform

State Laws he supported the proposed public accommodations provision of the draft model State antidiscrimination act.

When he appeared at the confirmation hearings before the Judiciary Committee, he admitted he was wrong in his 1964 opposition; that he was aware of that error of judgment; and that his understanding of the significance of, the need for, and the scope of the concept of equality had changed and broadened since that time.

As the distinguished senior Senator from Pennsylvania (Mr. SCOTT) brought out at the hearing, Mr. Rehnquist altered his course of thinking, and he reflected this in his conduct.

In 1969, the opinion of the Comptroller General of the United States was that the Philadelphia plan was unconstitutional. The Philadelphia plan, as Senators well know, required, as a condition of receiving a Government construction contract, a commitment to achieve certain goals of minority hiring. This was to overcome the fact that certain unions did not have minority race members.

Through the efforts of Mr. Rehnquist, the Attorney General upheld the legality and constitutionality of such plans. This was a major breakthrough in the fight for equality in employment opportunity—a basic right to be afforded all men equally under law.

On the subject of civil rights, I am fully satisfied as to the nominee's position and commitment to equal rights.

Insofar as Mr. Rehnquist's approach to civil liberties and the Bill of Rights is concerned, I questioned Mr. Rehnquist very carefully on the subject of wiretapping and electronic surveillance, and on the subject of certain Federal grand jury practices which I fear are in violation of the fifth amendment.

I spelled out to him at considerable length my long and firmly held conviction that if wiretapping and eavesdropping practices were allowed on a wide scale, we would soon become a nation in fear—a police state. I also indicated that, whether based on fact or fancy, many people in all walks and areas of life fear they are under surveillance, so in my opinion we are coming close to being a nation in fear.

While Mr. Rehnquist as the attorney to the Attorney General had spoken in support of positions of the Justice Department, his response to my questions and his prior statement when he addressed a symposium on law and individual rights held in December 1970, at the University of Hawaii, clearly indicated to me that despite his advocate's position and the attorney-client relationship with the Justice Department, the nominee himself is fully aware of the, as he put it, "chilling effect on one's feeling of freedom of certain alleged Government procedures and is capable of disassociating himself therefrom.

Again, I quote his response, in part:

> I believe that I could divorce my role as an advocate from what it would be as a Justice of the Supreme Court, should I be confirmed.

When I pressed him on comments made by a Phoenix Democrat, but representative of other such comments, that he was a "retrograde" in terms of race relations, "a supporter of police methods," "restrictive" on free speech, and so forth, his response, even under the pressure he was subjected to, showed his humaneness, a sense of humor, and the approach to be expected from him to problems presented to him as a Justice of the Supreme Court.

He stated at page 144 of the hearings before the Committee on the Judiciary:

> My first comment would be I can defend myself from my enemies but save me from my friends.

But then in a most serious vein, he continued:

> I think that that is not a fair characterization even of my philosophical views. My hope would be if I were confirmed to divorce as much as possible whatever my own preferences, perhaps, as a legislator or as a private citizen would be as to how a particular question should be resolved and address myself simply to what I understand the Constitution and the laws enacted by the Congress to require.

I am satisfied Mr. Rehnquist is a man of esteemed legal and intellectual ability, a man of great integrity, whose personal philosophy as shown by his actions may, in fact, prove to be not too far removed from that of his critics.

In any event, I feel that as a Justice of the Supreme Court he would apply his great talents "simply to what (he) understood the Constitution and the laws enacted by Congress to require."

I will, therefore, vote for the confirmation of his nomination.

I urge the confirmation of his nomination to be Associate Justice of the Supreme Court of the United States, for I am certain he will serve all the people of this great country with distinction.

THE NOMINATION OF LEWIS F. POWELL, JR., TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

Mr. JACKSON. Mr. President, the Senate will vote today on the nomination of Lewis F. Powell, Jr. to be an Associate Justice of the Supreme Court.

It is no surprise that this nomination has been unanimously reported by the Senate Judiciary Committee. Mr. Powell's reputation was well known to many of us in the Senate, even before his nomination. Since then, the widespread endorsement of his nomination by those of differing political and philosophical viewpoints has confirmed that Mr. Powell is a man of exceptional ability and character. Indeed, the reception accorded his nomination is a rebuff to those who suggested that the Senate would not confirm a Southerner to serve on the Supreme Court. One wonders why it has taken so long to propose a man of Mr. Powell's stature.

Quite aside from his competence and integrity, Mr. Powell meets another basic test of fitness to sit on the Supreme Court. He has shown by what he has done and what he has been that those who bring causes to him for judgment will have the fullest confidence that their cases will be heard and decided on the law and the merits and not otherwise.

Of course Justices come to the Supreme Court influenced by their pasts. But to be fit to serve there, a nominee must inspire faith that he can overcome these influences when he must. No group—not the organized bar, not business, not labor, not the law schools, not the politicians of any party or region, no racial group—has the right to veto a nominee because they would prefer someone more sympathetic to their side of particular issues. But they do have a right to expect fair treatment and to expect the nomination of those who will justify belief that disputes which come to be settled through the courts will be settled by law and justice alone. I believe that Lewis Powell meets this test: that he will bring to high judicial office the qualities of decency and fairness that are a crucial component of judicial decisionmaking.

Because Mr. Powell has shown in his life and work those qualities of distinction which we should expect in every Justice of the Supreme Court, I hope the Senate will vote—overwhelmingly—to confirm this nomination.

Mr. HOLLINGS. Mr. President, ordinarily I would take this occasion to speak in behalf of the appointment of Lewis Powell to the Supreme Court of the United States. He is a southerner. He is noncontroversial; and he is certain to be approved. But a speech in his behalf would only be an exercise in headlinemanship. Mr. Powell needs no defense from me. The man I rise to defend today, on the other hand, is not from my section of the country. He is controversial; and his nomination is being contested. It would be unfair to William Rehnquist and to his record to remain silent today.

I have studied the record. I have looked closely at the man. And I am convinced that his appointment to the Supreme Court is not merely satisfactory—it is excellent. I know Bill Rehnquist, and I have worked alongside him. I know his beliefs and his reactions. I know he is no racist. Everyone who knows him knows that. I recently received a letter from Mr. Ben Holman, the Director of the Community Relations Service, in Mr. Rehnquist's behalf. The Community Relations Service is a civil rights agency charged with working for the improvement of minority groups in America. As Mr. Holman points out, Bill Rehnquist "has been highly supportive of our cause and on several occasions sought to broaden our statutory mandate." Mr. President, I ask unanimous consent that the full text of Mr. Holman's letter be printed at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HOLLINGS. Mr. President, of all the tasks which come before the Senate, none is more important than its constitutional duty to act on the President's appointments to membership on the Supreme Court.

Throughout most of its history, the Court has held a rightfully exalted position in the esteem of the American people. And because it had the trust of the people, it worked for the inestimable benefit of the Nation. The Supreme Court lacked a bureaucracy, yet it became a powerful force for good. Fragile in form yet enduring in substance, it be-

came a strong pillar for the support of the Republic.

Today—among a sizable, and growing, percentage of our people—the Court has lost ground. The loss is not sectional, nor is it generational. It is North and South. It is young and old. This is simply a statement of fact. No Member of the Senate who has recently been among his constituents is likely to claim that this is the heyday of the Court's prestige. We hear no chorus of praise for the highest tribunal. While its past is still occasionally sung, celebrations of its present are few and far between. The question is obvious—Why? Why this declining esteem for an institution which depends for its success on the public trust?

I believe that the past successes of the Court resulted from its adherence to the activities prescribed by the founders and the Justices themselves. It succeeded because it seldom strayed very far from those activities. And when it did stray, it did not stray for long. The Court usually was in the mainstream of our national life. It saw nothing to be gained from lagging far behind or racing swiftly ahead of America's other institutions.

In recent years, however, the Court seems to have forgotten the lessons of its successful past. It has gone far beyond its normal activities—far beyond its jurisdictions of even a quarter century ago. And, without getting into a lengthy and detailed exposition, there are those who believe the Court has gone into the business of legislation rather than adjudication. There are those who believe that the Court is enforcing practices which the Constitution does not prescribe nor the Congress authorize. I am among the number who so believe.

Mr. President, when a person runs out on his past, forsaking old ways for new, he is the object of at least temporary suspicion. And when a politician promises one thing and does another, his integrity is questioned and his credibility vanishes. So it is with an institution such as the Court. When it goes beyond the normal range of its activities, and does so over a period of many years, it is playing with the fires of suspicion. This is what the Supreme Court has done. And now it has reaped the ashes of discord and distrust.

We are all quick to point out the credibility gaps of the executive branch. And, whether we admit it or not, we are equally aware of the skepticism in which the legislative branch is held. That hardly leaves time to worry about the problems of the judiciary. But today we must find time. Public confidence in the Nation's highest tribunal—in the arbiter of its basic law—is essential if this system of ours is to survive. The Constitution, both as actual law and as popular symbol, is the cement which has bound America together. Weaken the cement by twisting and torturing, and tearing and bending and breaking—and watch the Nation come apart.

Mr. President, the clear imperative of the Constitution is the necessity for balance. The success of our Federal Government has always depended upon balance: balance between the State and local governments; balance between the three separate branches of the Federal Government; and, within the judicial branch, a large measure of self-balance and impartiality. The Constitution is not an ideological brief for today's liberals, or, for that matter, for today's conservatives. It is a complex and diverse document, written by a varied people, and surviving all the many changes of nearly two centuries of national life. Yet there are those who would throw that balance—that richness of experience—that diversity of history—overboard. There are those who argue not for diversity, but uniformity; not for judgment, but for advocacy; not for right versus wrong, but for left versus right or right versus left.

And that, Mr. President, is what this debate today is all about. All the President has to do is nominate someone whose beliefs do not accord with the insistent mood of the establishment, and the establishment rides to the chase with the scent of blood in its nostrils.

The debate over Mr. Rehnquist is not over Arizona polling booths or memberships in such-and-such an organization. It is not over the handling of Mayday or the tapping of a criminal's telephone. A cursory glance at the record suffices to set any impartial observer's mind to rest on all those accounts. No, Mr. President—those are simply smokescreens sent up by those who would remake the Supreme Court in their own image. They know Bill Rehnquist will not help them do that. So Bill Rehnquist becomes to them public enemy, No. 1.

Mr. President, I have been down this road before, 2 years ago, with Judge Haynsworth. The smokescreens went up then, too. "Appearance of impropriety" was the howl of the pack, and a promising high court career was snuffed out before it could begin. Now—with the possibility of Judge Haynsworth's going to the Court gone—many of his opponents admit how flimsy those charges were. The charges against William Rehnquist are just as flimsy.

He is closed-minded, some say. He starts out with the conclusion and works backward toward justifying evidence. Even more serious, he places no value on individual rights and would give the stamp of judicial approval to police-state tactics. The attack on this nominee is a display of dizzying gymnastics the likes we have not seen for a long, long time. He is a conservative, therefore, too individualistic—conservatives want too much freedom for the individual. Then the critics turn right around and attack Mr. Rehnquist for lack of concern for the individual and for glorification of the state. "Now you see it, now you don't" seems to be the motto of the pack in their desire to do Bill Rehnquist in.

Mr. President, there is just no truth in the charge that Mr. Rehnquist is insensitive to civil liberties. His statements abound with references to the rights of the individual. He has thought long and hard about the necessity of protecting the rights of the individual and the necessity for balancing the rights of the individual in relation to the Government's obligation to enforce the law. His statements show a rational balanced, and constitutional position from which the Court can only benefit. As the nominee himself put it:

> 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 for 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.

Would Mr. Rehnquist put a microphone under every table and desk, a wiretap on every phone, an agent in the footsteps of every citizen? Ridiculous. Again, I quote from the nominee,

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

The record demonstrates very clearly that the nominee would never be willing to sacrifice the constitutional protections afforded our people simply in the interest of governmental efficiency. For him, the Constitution clearly places restraints on the activities of government. On the other hand, the record also makes clear that he would use the powers afforded the Government by the Constitution-makers at Philadelphia to preserve, protect and defend the safety and well-being of the American people. Any judge who is too shallow to raise the question of how to maintain order is ignorant of one of the basic questions of all government, and ignorant of one of the enduring themes of political philosophy.

The record shows William Rehnquist to be superbly qualified for service on the Supreme Court. His educational and professional career is a long string of our society's highest accolades. His academic honors testify to an acute and profound intelligence. His professional citations mirror the confidence of his associates and the breadth of his experience. Anyone who seriously expects Bill Rehnquist to be the slave of some narrow ideology or defunct theoretician simply does not know the man or his record.

There is not the slightest doubt in my mind that as Associate Justice of the Supreme Court Justice Rehnquist's allegiance will be to the Constitution, and his dedication to making it the honored and revered fountain of law and trust that it deserves to be. He will be there to research, to question, to study, to analyze, and ultimately, to judge. Justice Rehnquist will not need a law clerk to do his homework for him, or to write his opinions. He knows how to do these things himself. And he does them with a precision and a clarity and a brilliance which command respect.

It is the charge of the jurist to judge just as it is our charge in this chamber to legislate. Mr. Rehnquist has the discernment to keep the two functions separate. His opponents cannot make the same claim.

I commend the President of the United States for the excellent choice he has made. And I urge my fellow Members

of the Senate to vote "aye" when the moment of decision is upon us.

EXHIBIT 1

DEPARTMENT OF JUSTICE,
COMMUNITY RELATIONS SERVICE,
Washington, D.C., November 4, 1971.

HON. ERNEST F. HOLLINGS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HOLLINGS: You have asked that I share with you my regard of William H. Rehnquist who has been nominated by the President to be an Associate Justice of the United States Supreme Court.

I have personally worked in close association with Bill Rehnquist during my 2½ years as Director of the Department of Justice's Community Relations Service. I always found him to be of impeccable integrity and of gentlemanly conduct.

On many occasions Bill Rehnquist and I have discussed issues relative to the welfare of the Community Relations Service, which, as you know, is a civil rights agency whose sole direction is guided by the improvement of the status of minorities in America. He has been highly supportive of our cause and on several occasions sought to broaden our statutory mandate.

His "conservative" philosophy while practicing law in Arizona was unknown to me until I read about it in the newspapers. As a black man sensitive to the various forms of racist behavior I can assure you that Bill Rehnquist will judge minorities fairly if he is confirmed to the Court.

I hope this information will be helpful to you in your deliberations.

Sincerely,

BEN HOLMAN.

Mr. COOK. Mr. President, will the Senator yield?

Mr. HOLLINGS. I yield.

Mr. COOK. Mr. President, I commend the Senator from South Carolina for his remarks. I want to say that the remarks which I will make either late today or on tomorrow will be in respect to what the Senator from South Carolina has said.

I would like to have printed in the RECORD an article in this morning's Wall Street Journal entitled, "Rehnquist and Critics: Who's Extreme?" However, first, I would like to read for the RECORD a portion of that article. It reads:

The minority report argues that "Mr. Rehnquist's record fails to demonstrate any strong affirmative commitment to civil rights, to equal justice for all citizens, let alone a level of commitment which would rebut the strong evidence of insensitivity to such rights." The evidence the report discusses at greatest length is a letter Mr. Rehnquist wrote to The Arizona Republic in 1967, responding to remarks on school integration by Phoenix School Superintendent Howard Seymour.

The minority report says, "The truly alarming aspect of the 1967 letter, however, is Mr. Rehnquist's statement, 13 years after Brown v. Board of Education that 'We are no more dedicated to an "integrated" society than we are to a "segregated" society'. . . Yet at least since the Supreme Court declared that 'separate is inherently unequal,' this nation has not been neutral as between integration and segregation; it stands squarely in favor of the former. And if Mr. Rehnquist does not agree, he is outside the mainstream of American thought and should not be confirmed."

A FREE SOCIETY

The statement in the original letter that must be located with respect to the mainstream runs, "Mr. Seymour declares that we 'are and must be concerned with achieving an integrated society.' . . . But I think many would take issue with his statement on the merits, and would feel that we are no more dedicated to an 'integrated' society than we are to a 'segregated' society; that we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities."

Mr. Rehnquist's extremist position on civil rights, then, turns out to be nothing more than the familiar proposition that the Constitution is color-blind. On surveillance he believes that at this moment the scales are not tipped in such a way that dissent is "chilled." On wiretapping he believes the government side of the national security question deserves its day in court. These opinions, the minority report suggests, are so outrageous the nominee should be defeated.

Then, the most important paragraph of the editorial in relation to the remarks of the distinguished Senator from South Carolina:

As the Senate debates the nomination, it seems, it will have to decide more than whether it's proper to weigh a nominee's philosophy. It also needs to weigh whether words like "extreme" and "out of the mainstream" better describe Mr. Rehnquist's philosophy, or the position his critics have been forced to take to oppose him.

Without objection the article was ordered to be printed in the RECORD, as follows:

REHNQUIST AND CRITICS: WHO'S EXTREME?

(By Robert L. Bartley)

WASHINGTON.—The most powerful impression to emerge from the microscopic public analysis of the life and works of Supreme Court nominee William H. Rehnquist is that his critics are pretty desperate. At one point the arguments and innuendos offered by critical witnesses proved too much even for the most critical Senators, and Sen. Edward Kennedy upbraided the witnesses for creating "an atmosphere which I think is rather poisonous."

Now the critical members on the Senate Judiciary Committee—Sens. Bayh, Hart, Kennedy and Tunney—have filed their minority report setting out the responsible case against the nomination. As Sen. Kennedy's remark suggests, it judiciously avoids the less substantial allegations that have appeared in the press in recent weeks. There is, for example, no suggestion that Mr. Rehnquist is guilty until proven innocent of membership in extremist organizations because his name appears on a list compiled by a little old lady and willed to someone else.

OUTSIDE THE MAINSTREAM

The minority report, rather, focuses mostly on Mr. Rehnquist's views on certain issues, and as such is an intriguing document. It volunteers that there is no question about Mr. Rehnquist's qualifications in terms of legal standing or personal integrity. On the widely debated question of whether the Senate should consider a nominee's judicial philosophy, it makes the case that indeed the Senate should.

The minority, of course, argues that on this third test Mr. Rehnquist flunks. It says he "has failed to show a demonstrated commitment to the fundamental human rights of the Bill of Rights, and to the guarantees of equality under the law." While not every detail of a nominee's philosophy ought to bear on his Senate confirmation, it suggests, so extreme a deviation should. At one point the text puts it simply: The nominee "is outside the mainstream of American thought and should not be confirmed."

A fascinating proposition, this. How can someone with legal standing and personal integrity fit to grace the Supreme Court be that far out of the mainstream? What would be the opinions of a man who is such a pillar of the bar and still fails to understand the Bill of Rights?

So it is with no little anticipation that one turns to the issues discussed in the minority report to find just which of Mr. Rehnquist's opinions bar him from the Court service. One expects not merely that he will have debatable opinions on debatable topics. Certainly the four Senators disagree on many things with Lewis F. Powell Jr., the other Supreme Court nominee before the Senate, but they voted to approve him. So in Mr. Rehnquist's case one expects more extreme opinions, those further out of the mainstream on the right, say, than Justice William O. Douglas is on the left.

As sort of a benchmark, recall Justice Douglas' popular book arguing, "We must realize that today's establishment is the new George III. Whether it will continue to adhere to his tactics, we do not know. If it does, the redress, honored in tradition, is also revolution." What right-wing outrages has Mr. Rehnquist uttered, one wonders, that are further from the mainstream than *that?*

As the confirmation hearings started, the best bet for that sort of outrage seemed to lie in the Justice Department position on wiretapping. As the department's chief legal adviser, Mr. Rehnquest must bear no small responsibility for that position, and the department has argued that the Executive Branch has an "inherent right" to wiretap without court order in national security cases. This is tantamount to an assertion that neither Congress nor the courts can control executive wiretapping, and certainly does suggest an insensitivity to the spirit of the Bill of Rights.

Alas for Mr. Rehnquist's critics, though, it turns out that on his advice the Justice Department has dropped the "inherent right" argument in current briefs before the Supreme Court. It now merely argues that in the particular instances of the case, the tap in question was not an "unreasonable" search barred by the Fourth Amendment. He says that the effect of the change is "to recognize that the courts would decide whether or not this practice amounted to an unreasonable search."

Mr. Rehnquist declined to give his personal views, as opposed to the Justice Department position, but he did defend the department's current arguments on the grounds that there are substantial legal questions unresolved, and the Executive is obligated to make its side of the case. "Five preceding administrations have all taken the position that the national security type of surveillance is permissible . . . one Justice of the Supreme Court has expressed the view that the power does exist, two have expressed the view that it does not exist . . . one has expressed the view that it is an open question . . . the government is entirely justified in presenting the matter to the court for its determination."

WIRETAPPING OF RADICALS

This did not satisfy the four critical Senators. They noted that the current issues are somewhat different from those of preceding administrations, not least because the current argument is about wiretapping not of foreign agents but of domestic radicals. The change in the department's position is "more cosmetic than real," they argued, because it is still defending wiretapping rules that would not "provide an adequate restraining effect on the Executive Branch, an adequate deterrent to protect the right of privacy."

For those who may find this particular dispute a matter not of extremist opinions but of reasonable men differing, the minority also delves into Mr. Rehnquist's widely quoted opinion on government surveillance of individuals, that is, not wiretapping but the recording of their activities in public

places. In warning against overly restricting such surveillance, he once said, "I think it quite likely that self-restraint on the part of the Executive Branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering."

During the hearings, Mr. Rehnquist noted that in his remark he was addressing the question of whether new legislation is needed in addition to the Bill of Rights and laws already on the books, and that the remark must be understood in that context. In colloquy at the time, he conceded that widespread surveillance should be "condemned," and that an individual might already have legal recourse against a government tail. But in considering the argument that surveillance is unconstitutional because it has a "chilling effect" on freedom of expression, he said any such effect is a question not of constitutional law but of fact. And, "those activities didn't prevent, you know, two hundred, two hundred fifty thousand people from coming to Washington on at least one or two occasions to, you know, exercise their First Amendment rights, to protest the war policies of the President. . . ."

The minority report argues that even if 250,000 appeared, others may have been deterred by surveillance. It agrees that the committee's majority report correctly describes Mr. Rehnquist's attitude: "Information-gathering activity may raise first amendment questions if it is proven that citizens are *actually* deterred from speaking out." The minority argues that this is precisely the problem, "the difficulty of proving a specific chilling effect is obvious, and the notion that a First Amendment question isn't even *raised* until it is 'proven that citizens are *actually* deterred from speaking out' (emphasis in original) is alarming."

But if Mr. Rehnquist's opinions here are outrageously extreme, it would seem, so are the opinions of the majority of the Senate Judiciary Committee. Similarly if his defense of the constitutionality of such laws as "no-knock" raids and "preventive detention" in the District of Columbia are out of the mainstream, the mainstream does not include the majority of both houses of Congress. So what mostly remains is the question of Mr. Rehnquist's attitudes on the racial issue.

The minority report does not make too much of allegations that Mr. Rehnquist harassed black voters when he was involved in Republican voter challenging teams in Phoenix, but it also does not dismiss them as the majority did. Some of his black opponents have come up with affidavits charging he was personally involved in harassment, and his supporters have come up with a defense of his challenging activities and attitude by a sometime counterpart on the Phoenix Democratic challenging team. The minority report says, "Each Senator will have to decide for himself what weight—if any—to give either the charges or the blanket denial."

On the nominee's general racial attitudes, the majority report also came up with a letter from the principal of the elementary school Mr. Rehnquist's children attended in Phoenix. "Mr. Rehnquist became known to me when I was a teacher here at Kenilworth School. He had moved his family into Phoenix Elementary School District from one of the outlying suburban, and predominantly middle socio-economic, school districts. He wanted his children to have experience and associations with children from minority groups, as well as with the different socio-economic groups."

The minority report argues that "Mr. Rehnquist's record fails to demonstrate any strong affirmative commitment to civil rights, to equal justice for all citizens, let alone a level of commitment which would rebut the strong evidence of insensitivity to such rights." The evidence the report discusses at greatest length is a letter Mr. Rehnquist wrote to The Arizona Republic in 1967, responding to remarks on school integration by Phoenix School Superintendent Howard Seymour.

The minority report says, "The truly alarming aspect of the 1967 letter, however, is Mr. Rehnquist's statement, 13 years after Brown V. Board of Education that 'We are no more dedicated to an "integrated" society than we are to a "segregated" society'. . . Yet at least since the Supreme Court declared that 'separate is inherently unequal,' this nation has not been neutral as between integration and segregation; it stands squarely in favor of the former. And if Mr. Rehnquist does not agree, he is outside the mainstream of American thought and should not be confirmed."

A FREE SOCIETY

The statement in the original letter that must be located with respect to the mainstream runs, "Mr. Seymour declares that we 'are and must be concerned with achieving an integrated society.' . . . But I think many would take issue with his statement on the merits, and would feel that we are no more dedicated to an 'integrated' society than we are to a 'segregated' society; that we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities."

Mr. Rehnquist's extremist position on civil rights, then, turns out to be nothing more than the familiar proposition that the Constitution is color-blind. On surveillance he believes that at this moment the scales are not tipped in such a way that dissent is "chilled." On wiretapping he believes the government side of the national security question deserves its day in court. These opinions, the minority report suggests, are so outrageous the nominees should be defeated.

As the Senate debates the nomination, it seems, it will have to decide more than whether it's proper to weigh a nominee's philosophy. It also needs to weigh whether words like "extreme" and "out of the mainstream" better describe Mr. Rehnquist's philosophy, or the position his critics have been forced to take to oppose him.

Mr. ERVIN. Mr. President, for many years I have followed the career of Lewis Powell, of Richmond, Va., as one of the leaders of the American bar. It will afford me much pleasure to vote for his confirmation as an Associate Justice of the Supreme Court of the United States. I predict that in that post he will exhibit some of the finest legal acumen and some of the most profound learning that has ever been shown by any member of the Court.

I have found in the decisions of the Supreme Court only one ruling which sets forth the qualifications which the Constitution requires of a member of the Supreme Court bench. This statement appears in the ruling of the greatest jurist of all time, Chief Justice John Marshall, in what was, perhaps, the most famous of all his decisions, that of Marbury versus Madison. In that case Chief Justice Marshall pointed out that the Constitution of the United States obligates every Supreme Court Justice to take an oath or to make an affirmation to support the Constitution. This clearly means that it is the duty of a Supreme Court Justice to lay aside his own notions of what he thinks the Constitution ought to provide and to be guided solely in his decisions by what the Constitution actually does provide.

Chief Justice Marshall made this abundantly clear when he said that the oath of a Supreme Court Justice to support the Constitution requires him to accept that instrument as the rule for his official action as a member of the Court.

I am confident that Lewis Powell possesses this qualification and that he will adhere faithfully to his oath as a Supreme Court Justice to support the Constitution. For this reason I look forward with confidence to seeing him assist the Constitution of the United States in performing its function as a rule for the guidance of Supreme Court Justices.

Mr. President, for these reasons I shall take delight in voting for the confirmation of the nomination of this distinguished American lawyer.

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that a nomination reported earlier today, which is at the desk, and which has been cleared all around, be stated.

The PRESIDING OFFICER (Mr. CHILES). Without objection, it is so ordered. The nomination will be stated.

U.S. DISTRICT JUDGE

The legislative clerk read the nomination of Richard A. Dier, of Nebraska, to be a U.S. district judge for the district of Nebraska.

The PRESIDING OFFICER. Without objection, the nomination is considered and confirmed.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the President be notified of the confirmation of the nomination.

The PRESIDING OFFICER. Without objection, it is so ordered.

QUORUM CALL

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Hackney, one of its reading clerks, announced that the House had passed, without amendment, the following bill and joint resolution of the Senate:

S. 952. An act to declare that certain public lands are held in trust by the United States for the Summit Lake Paiute Tribe, and for other purposes; and

postal employees or mail processing machines by imposing restrictions on certain advertising and promotional matter in the mails, and for other purposes;

H.R. 8689. An act to provide overtime pay for intermittent and part-time General Schedule employees who work in excess of 40 hours in a workweek;

H.R. 9097. An act to define the terms "widow," "widower," "child," and "parent" for servicemen's group life insurance purposes;

H.R. 9442. An act to authorize compensation for five General Accounting Office positions at rates not to exceed the rate for Executive Schedule Level IV;

H.R. 11220. An act to designate the Veterans' Administration hospital in San Antonio, Tex., as the Audie L. Murphy Memorial Veterans' Hospital, and for other purposes; and

H.R. 11335. An act to amend section 704 of title 38, United States Code, to permit the conversion or exchange of National Service Life Insurance policies to insurance on a modified lief plan with reduction at age 70.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued in executive session with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. The Chair recognizes the Senator from Mississippi.

Mr. EASTLAND. Mr. President, I rise to support the nomination of William H. Rehnquist to be an Associate Justice of the Supreme Court of the United States. In my judgment, the hearings on his nomination conducted by the Judiciary Committee clearly demonstrate that Mr. Rehnquist is a man of great legal ability and impeccable character. I am certain that he will be a distinguished addition to the Supreme Court.

The record shows that Mr. Rehnquist has had a distinguished career in at least four areas of the law: as a law student at Stanford University, as a clerk to Mr. Justice Robert Jackson, as a successful private practitioner, and since January 29, 1969, as Assistant Attorney General in charge of the Office of Legal Counsel in the Department of Justice.

Mr. Rehnquist was born on October 1, 1924, in Milwaukee, Wis., and attended the public schools of that State. He enlisted in the U.S. Army in 1943 and served his country in that capacity for 3 years. After his honorable discharge from the Army, he enrolled in Stanford University and received his undergraduate education at that institution. In 1948 he was awarded a bachelor of arts degree "with great distinction." He received a master of arts degree in history from Harvard University in 1950. Mr. Rehnquist then returned to Stanford University and entered the law school, from which he was graduated first in his class in 1952. After graduation from law school in February 1952, he served as law clerk to Justice Jackson for about 18 months. After completing his clerkship, Mr. Rehnquist moved to Phoenix, Ariz., and actively engaged in the practice of law in that city from June 1953 until his appointment as Assistant Attorney General in January 1969. Mr. Rehnquist quickly attained the reputation of a great lawyer among the members of the Arizona bar. The esteem in which his fellow lawyers held him is attested by the fact that in 1966 he received an "a.v." rating in Martindale's Legal Directory. This rating is made by one's fellow lawyers and is the highest rating given by Martindale's. One must have practiced law for at least 10 years before receiving an "a.v." rating, and Mr. Rehnquist received it shortly after the expiration of the minimum period. This is an exceptional tribute to a young lawyer.

In January 1969, President Nixon nominated Mr. Rehnquist to be Assistant Attorney General in charge of the Office of Legal Counsel, a position he presently holds. By all accounts he has served in that office with great dedication and ability. The quality of his legal mind and his skill in presenting arguments in favor of the administration's position on legislation are acknowledged even by his opponents.

I can add my own personal testimony as to Mr. Rehnquist's great legal ability. As chairman of the Judiciary Committee, I have had occasion to personally observe his work. It is outstanding. I did not know Mr. Rehnquist until he assumed his position in the Department of Justice. Based on almost 3 years of personal knowledge of this man, I can assure the Senate that he is of the highest character and intellect.

Mr. President, those who know Mr. Rehnquist best know that he is a very fair-minded person of great legal and intellectual capacities. A number of persons have written letters to the Judiciary Committee in support of his nomination. These letters were not printed in the hearings. I ask unanimous consent that these letters be printed at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. EASTLAND. The opponents of this nomination cannot and do not say that Mr. Rehnquist lacks the legal and intellectual credentials which are prerequisite to becoming a great Justice of the Supreme Court.

They cannot and do not say that his nomination presents any questions or problems of ethics or conflicts of interest.

They cannot and do not say that he does not possess a high character and the proper judicial temperament.

In my judgment, there is not much left for the opponents of this nomination to go on.

The opposition to this nomination has boiled down to dislike for alleged personal and philosophical views of Mr. Rehnquist. The first series of attacks on the Rehnquist nomination were made shortly after President Nixon made the nomination on October 21, 1971. These attacks consisted of desperate and irresponsible efforts on the part of so-called "liberals" in the news media and the academic community to charge that Mr. Rehnquist, in his personal actions and associations, had shown himself to be an "extremist" and "hostile to the rights of minorities."

These charges and attacks were given wide circulation in the press and on TV. They are untrue.

First, it was charged that Mr. Rehnquist was a member of the John Birch Society.

Next, it was alleged that he had been instrumental in challenging black voters in Phoenix at various elections, including those of 1962, 1964, 1966, and 1968.

Lastly, it was charged that Mr. Rehnquist had been a member of For America and/or Arizonans for America, which were alleged to be right-wing extremist groups.

These charges were made and publicized by those in the academic community and in the news media, who are horrified at the prospect that the Supreme Court might not be dominated by liberal judicial activists in perpetuity.

The Judiciary Committee carefully investigated all of these untruths and smears. Each of these charges designed to show that Mr. Rehnquist was or is an "extremist" or a bigot were exploded.

Mr. Rehnquist gave sworn statements to the committee that he had never been a member of the John Birch Society or of For America or Arizonans for America.

I say further, Mr. President, that I have had access to the files of the FBI, and that the Bureau, after a full field investigation, completely exploded each of those charges.

Here is a letter that I received on November 20 from Phoenix, Ariz. It says:

Re William H. Rehnquist.

DEAR SIR: I was on the board of Arizonans for America from its inception to its end, and was its last president.

To my knowledge, Mr. Rehnquist was never a member of Arizonans for America. He did make a speech to us, and was subsequently put on our mailing list.

Sincerely,

GEORGE HEARN WOOD,
An Optometrist.

He also gave the same statement to the Bureau when its agents called upon him.

Mr. Rehnquist further gave testimony to the committee that he had never acted as a challenger to voters in elections. He further testified that as a legal adviser to the Republican Party in Phoenix, Ariz., he had instructed a party worker who was overzealous in challenging voters to refrain from such actions. Judge Charles L. Hardy, of Phoenix, who was chairman of a committee of Democratic lawyers in the 1962 elections, gave a statement to the committee which confirms the fact that Mr. Rhenquist did not engage in any improper activities in this respect.

There was no testimony obtained by the Judiciary Committee to support these irresponsible and baseless charges against Mr. Rehnquist. Every opportunity was given to those with any evidence to produce it before the Judiciary Committee. The fact that some members of the academic community and the news media chose not to present any evidence to the committee, but chose rather to broadcast fresh charges to the press gives a strong indication of the motivation, responsibility and veracity of such persons.

The hearings conducted by the Judiciary Committee thoroughly discredited these allegations. So now the opponents of the Rehnquist nomination have had

to fall back on the issue of the judicial philosophy of the nominee.

Each Member of the Senate has the right and responsibility to determine what weight, if any, to give the personal or judicial philosophy of a nominee in making a decision of whether to advise or consent to a nomination.

Thus, I do not quarrel with my colleagues who oppose Mr. Rehnquist on the basis of his supposed judicial philosophy.

I do think it is very important, however, to recognize that judicial philosophy can and should be a large consideration in all future nominations for the Supreme Court.

During the hearings those who wished to use what they supposed to be Mr. Rehnquist's judicial philosophy against his nomination made repeated efforts to distinguish the Rehnquist nomination from other Supreme Court nominations. What these opponents of Mr. Rehnquist's nomination said to him in essence was:

It is especially appropriate for us to inquire into your judicial philosophy because you wrote an article in the Harvard Law Review in which you stated that the Senate should carefully inquire into the judicial philosophy of a nominee for the Supreme Court before giving its advice and consent to the nomination, and because President Nixon has publicly stated that judicial philosophy was one of the criteria used by him in making your nomination.

In all honesty, I do not believe that this distinction withstands analysis. If this distinction were valid, suppose that a future nominee for the Supreme Court had written an article in which he stated his opinion that it was improper for a Senator to inquire into the judicial philosophy of a nominee for the Supreme Court, and suppose that the President who nominated such a person stated that the judicial philosophy of the nominee had no bearing on the nomination.

Would this mean that it would not then be proper for the Senate to attempt to ascertain the judicial philosophy of such a nominee? Of course not. The Senate cannot allow its constitutional responsibility to advise and consent to Supreme Court nominations to depend upon such fortuitous circumstances as the past writings of a nominee and the statements or silence of a President who makes the nomination.

As a matter of fact, it is common knowledge that Presidents usually take the judicial philosophy of nominees into account when they make nominations. Strangely enough, until the present administration there has been no outcry among so-called liberal elements of the news media and academic community against this fact of life. They appeared to enjoy having like-minded persons put on the Supreme Court.

The truth is that Presidents have taken the judicial philosophy of nominees into account even when a nomination will further unbalance the Supreme Court. The nomination speaks for itself. The President does not need to tell us that he took judicial philosophy into consideration; it is a self-evident fact.

We do not have to speculate as to the reasons President Johnson twice nominated Mr. Abe Fortas to the Supreme Court. The former President has recently written a book entitled "The Vantage Point" dealing with his tenure as President. Excerpts from this book have appeared in various newspapers. I will quote from the New York Times of October 27, 1971, which contained excerpts from President Johnson's book dealing with the Fortas appointment. First, President Johnson reveals the reason why he appointed Mr. Fortas to be an Associate Justice of the Supreme Court to succeed Mr. Justice Goldberg:

I was confident that the man would be a brilliant and able jurist. He had the experience and the liberalism to espouse the causes that both I and Arthur Goldberg believed in. He had the strength of character to stand up for his own convictions, and he was a humanitarian.

In discussing his nomination of Mr. Fortas to be Chief Justice of the United States, President Johnson tells us:

When I nominated Fortas to succeed Chief Justice Warren three years later, I did so for the same reasons I had first appointed him to the Court.

This is what the former President said of Mr. Fortas' rejection by the Senate:

In the end, Abe Fortas' chief assets—his progressive philosophy, his love of country, his frank views always spoken from the heart and his service to his President—brought his downfall.

A consideration of what appears to be the judicial philosophy of Mr. Rehnquist leads me to the conclusion that his service as a member of the Supreme Court would be highly beneficial to the Nation.

On the basis of the record of the hearings on his nomination, I believe it is fair to say that Mr. Rehnquist possesses what might be termed a conservative judicial philosophy. However, the record amply indicates that he is not the prisoner of any judicial philosophy, and that he will decide cases on the basis of the application of his first-rate legal mind to the question of the proper result as mandated by the Constitution and laws of the United States and applicable judicial precedents. He is certainly not blinded by ideology.

I would like to read from a letter written by Mr. Martin F. Richman, former law clerk to Chief Justice Earl Warren, and Deputy Assistant Attorney General in the Office of Legal Counsel under the previous administration, who gave the following assessment of the cast and quality of Mr. Rehnquist's approach to legal issues:

The key question for inquiry here, in my opinion, is whether as a Justice Mr. Rehnquist will bring to the decision of the cases not only his own views, however long held and well thought out, but an open mind. Will he approach each case on the basis of the facts in the record, the briefings by counsel, the arguments of his Brethren in conference, and his best judgment of all the available legal materials. In short, will he act like a Judge?

Based on my experience with him my own answer is in the affirmative.

* * * * *

But . . . I am confident that his votes will be based on the merits of the cases, that his opinions will illuminate the issues, and he will make a constructive contribution to the on-going work of the Court in the development of our law.

Mr. Robert H. Bork, professor of law, Yale University, wrote a letter to me as chairman of the Judiciary Committee, in support of Mr. Rehnquist's nomination. He stated, in part, as follows:

My support is based not merely upon Mr. Rehnquist's professional reputation, which is extremely high, but upon my opportunities to talk with him and to observe him in debate concerning legal matters. There can be no doubt whatever concerning his intellectual qualifications. He possesses a brilliant and analytical mind. More than that, however, Mr. Rehnquist is a deeply thoughtful man with respect for the requirements of intellectual honesty. I am sure, therefore, that in the decision of constitutional cases he will be guided not by his personal philosophy but by a commitment to the commands of the Constitution, interpreted in the light of its text and its history. This does not mean that he will be a wooden internalist but rather that he will attempt to discern the meaning of the Constitution in new circumstances by the document's fundamental principles instead of in accordance with whatever legislative views he might entertain if he were in the Congress rather than upon the Court. This is a difficult task, requiring the utmost in self-discipline and thoughtfulness. I believe that Mr. Rehnquist has those qualities in abundance.

I believe that the record as a whole validates these appraisals of the nominee. Mr. Rehnquist's own testimony clearly shows that he will approach all legal and constitutional issues on this basis.

Mr. President, in considering the personal and intellectual qualities of Mr. Rehnquist, it is very pertinent to consider the judgments of spiritual and religious leaders who have known Mr. Rehnquist and his family.

Mr. Louis B. Early, chairman of the church council and Rev. William B. Schaeffer, pastor of the Emmanuel Lutheran Church, Bethesda, Md., the church presently attended by the Rehnquist family, have written me a letter on behalf of the Rehnquist nomination, I quote from this letter:

Since the Rehnquist family became members of Emmanuel in July, 1969, they have given a clear witness to the centrality of the Christian faith in their life and home. Their regular presence on Sunday at worship services, the obvious closeness and mutual respect within the family circle, and the readiness to share in the life of the congregation reflect the values which are held in highest regard by the head of the household.

Mr. Rehnquist's unfailing kindness and innate modesty give testimony to the genuineness of his concern for others and his understanding of viewpoints contrary to his own. His clarity of thought and firmness of conviction demand respect. Such characteristics seem to us to be of special importance for one who is being considered for the highest court in the land.

The Right Reverend Joseph M. Harte, the Bishop of Arizona wrote the following letter:

DIOCESE OF ARIZONA,
Phoenix, Ariz., November 2, 1971.

Hon. JAMES O. EASTLAND,
Senator, Chairman of the Judiciary Committee, The New Senate Building, Washington, D.C.

MY DEAR SENATOR: The Hon. William Rehnquist from Arizona is a man of enormous ability and, speaking as the Bishop of Arizona, I can assure you and your Com-

mittee that he is "his own man," a man of independent thought and not one to go blindly down the "Right-wing Conservative Path."

Mr. Rehnquist, with a superb judicial background, is flexible, understanding and full of compassion. He is not a person to simply follow without a rational and highly reasonable criteria. His reputation from our part of the country is unblemished and I want to speak out in his favor.

Faithfully and sincerely,

JOSEPH M. HARTE,
The Bishop of Arizona.

Based on the hearing record and all the facts available to us, I urge that the Senate overwhelmingly give its advice and consent to the nomination of William H. Rehnquist to be an Associate Justice of the Supreme Court of the United States.

EXHIBIT 1

EMMANUEL LUTHERAN CHURCH,
Bethesda, Md., October 25, 1971.

Hon. JAMES O. EASTLAND,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR EASTLAND: We, the Church Council and Pastor of Emmanuel Lutheran Church, wish to give this testimony to the integrity and Christian character of our fellow member, William H. Rehnquist.

Since the Rehnquist family became members of Emmanuel in July, 1969, they have given a clear witness to the centrality of the Christian faith in their life and home. Their regular presence on Sunday at worship services, the obvious closeness and mutual respect within the family circle, and the readiness to share in the life of the congregation reflect the values which are held in highest regard by the head of the household.

Mr. Rehnquist's unfailing kindness and innate modesty given testimony to the genuineness of his concern for others and his understanding of viewpoints contrary to his own. His clarity of thought and firmness of conviction demand respect. Such characteristics seem to us to be of special importance for one who is being considered for the highest court in the land.

We urge your approval of his nomination for the Supreme Court of the United States.

LOUIS B. EARLY, *Chairman.*
WILLIAM B. SCHAEFFER, *Pastor.*

CHRIST CHURCH OF THE ASCENSION,
Paradise Valley, Ariz., November 2, 1971.

Hon. JAMES O. EASTLAND,
Chairman, of Senate Judiciary Committee, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: I am writing to commend to your Committee favorable action on the nomination of Mr. William Rehnquist to the United States Supreme Court.

This recommendation is based upon the enviable reputation which Mr. Rehnquist enjoys in this community as a man of integrity, intelligence and the highest moral character.

I am pleased to be able to write to you in his behalf.

Yours very truly,

THE REV. DAN GERRARD,
Rector.

GRACE LUTHERAN CHURCH,
Phoenix, Ariz., November 2, 1971.

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: A group of persons interested in the nomination of William H. Rehnquist to the Supreme Court, and who are anxious for his approval by the Senate, and who heard the enclosed "Youth Sermonette" have asked me to submit a copy of it to you. The copy is enclosed.

Bill has always been, since I have known him for the past nine years, a good example to hold before the youth of our congregation. He and I were personal friends besides enjoying a pastor-parishioner relationship.

If there were other ways to urge his approval for the Supreme Court, I would like to make them!

If there is further information you would like from me, please feel free to call upon me.

Sincerely yours,

CHARLES L. STRUBEL.

YOUTH SERMONETTE

(NOTE.—The Youth Sermonette was given at the morning worship of Grace Lutheran Church, Phoenix, Arizona, on Sunday, October 24, 1971, as a regular part of the morning worship. A Sermonette is given each Sunday. This copy of the Sermonette was transcribed from a tape made at the time. A request was made to distribute copies to the above. The request was made by persons interested in supporting W. H. Rehnquist in his nomination to fill a vacancy in the Supreme Court.)

To all of my young friends this morning:

The Bible tells us that each one of us is a citizen of two kingdoms: first, we are members of the Kingdom of God, and second, we are members of the kingdoms of men, or, in our case, citizens of the United States of America. So, we have to learn how to be good citizens of the Kingdom of God; and that is why you attend Sunday Church School, the catechetical classes, come to Church Worship; that is why you are Confirmed. Confirmation means a prescribed course of study on the Bible, the Catechism, and on churchmanship has been completed, and you become members of the adult community of the church.

In the same way, you learn in school about our country: about its history, the philosophy behind our democracy, the Constitution and our kind of politics. You learn the laws of our land and to obey them. If you don't like the laws, you learn that they can be changed by the will of the people. Therefore, we learn to be aware of what is going on in all of the areas of our government and to vote intelligently.

Since we are members of the Kingdom of God, and citizens of the world—the United States—we are living parts of the two! We are members of both of these kingdoms at the same time!

Now, these two kingdoms, although different, with different purposes, are not separate. For instance, you are not a member of the Kingdom of God on Sunday, and then, on Monday through Saturday, drop that membership to become citizens of our country, only to change back to being a member of the Kingdom of God on Sunday!

Rather, what you learn on Sunday, and through all of our educational groups, you use every day of your life. You take the Christian values and put them into the political situation!

I have known many people in the political life who have done just that. During my seminary days, I supplied a parish in Tennessee. One of my parishoners who had been a member of the congregation since birth was the former governor of the state, Prentiss Cooper. In Louisville, Kentucky, Judge Brachy was judge of the City Court; and also, in Louisville, Marvin Sternberg is the judge of the Court of Conciliation. I have known mayors of cities, city councilmen, and so on and so on. These men and women are using their Christian values in almost all of the political positions in our nation.

This last week, President Nixon made an announcement. He stated that he was proposing two men to fill the two vacancies on the Supreme Court of our country, which Court is a most important judicial body. I was surprised to hear the name of Mr. William H. Rehnquist. When I first heard his name, I could not believe my ears; and when I heard and saw the announcement on television a little later, I could scarcely believe my eyes! But, it was true! President Nixon had asked Bill Rehnquist to serve on the Supreme Court! You remember Bill, don't you? He spoke from this Lectern many times when he was a member of our congregation. You remember the "Temple Talks" he made for several years on Stewardship, when he was the chairman of that committee.

It is difficult, even after a person has been nominated for such a position, to be approved for the position on the Court, because he must have the approval of the Senate of the United States. Sometimes that is a high hurdle to jump! Then, there are those who like to defame any person who may be selected for such a position, and sometimes, even in the case of a Christian, ugly names are called, unwarranted charges, unsustained, are made against the person. I have already heard some of these untruths and half-truths and accusations which are not documented. Yet, a Christian's place is in the political arena, to do his best for his God and for his country.

You see, if you say that politics is crooked, or that there is much graft, or anything else like that, then it is up to the likes of you and me to vote in Christian people, or support Christian people, who will change the scene, and change the scene by a witness to a faith in Jesus Christ.

I am sure that we were thrilled to hear our President's announcement! I telephoned the Rehnquists' bome the evening that I heard it. Bill was not at home. But Nan was! You remember Bill's wife, Nan, don't you? She taught a class in our Sunday Church School, as Bill did, and she also taught a class in our Vacation Church School. The family was deeply involved in the life of our congregation: Bill was on our church council and he was the vice-president of the congregation for several years. Nan was very excited; she said that they were very proud that President Nixon had nominated Bill, and that she was pleased that their friends in Phoenix were thinking about them.

I do not know whether or not Bill Rehnquist's nomination will be approved; I hope so. I do know that we need some people to speak out. For sure, some of you boys and girls here this morning should be where Mr. William H. Rehnquist may be. The Bible tells you this: you are members of two kingdoms, the Kingdom of God and the Kingdom of Men—the United States of America, and you can use the values of the first to make the second a better place in which to live!

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES,
Washington, D.C., November 2, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, D.C.

MY DEAR SENATOR EASTLAND: I am writing in support of the President's nomination of William H. Rehnquist as an Associate Justice of the Supreme Court of the United States. As a former law clerk to the Honorable Harold H. Burton, a law professor for many years, and a friend of a number of Justices, including the late Justices Black, Frankfurter and Harlan, I have been a keen student of the Court for many years. I have a deep conviction that appointees to the Court should be men of the personal integrity with extraordinary intellectual qualifications.

Bill Rehnquist easily surpasses these high standards. His quick wit, shining intelligence, and legal acumen are evident from the most casual contact. What emerges after deeper acquaintance, which I have had the good

fortune to have had with him, is balanced objectivity, a scholarly detachment, a rooting in the basic values of the Western tradition that are likely to make him in time one of the great Justices of the Court. The power of his intellect, when combined with his rhetorical skills and personal charm, will make an immediate contribution to the Court; and over the years he will become, I believe, one of its intellectual leaders.

I have worked closely with Bill Rehnquist since 1969 in my capacity as consultant and then as Chairman of the Administrative Conference of the United States, an independent Federal agency which has been greatly assisted by Bill Rehnquist's presence on its Council. Although Bill Rehnquist is a man of convictions—a deeply "principled man"—his convictions are reasoned ones which are likely to be highly responsive to changing conditions and circumstances. Moreover, he is a man of compassion and humanity, who will respond to the uniqueness of particular controversies with the appropriate degree of flexibility.

In short, I believe that William H. Rehnquist is admirably qualified for appointment to the Supreme Court of the United States. I hope that the Senate will confirm him promptly. If I can be of any assistance to the Committee on the Judiciary in connection with this matter, I hope you will call upon me. In any event, I ask that this letter be included in the record of the hearing on the confirmation.

Sincerely yours,

ROGER C. CRAMTON,
Chairman.

TUCSON, ARIZ.,
October 30, 1971.

Senator JAMES EASTLAND,
Chairman, Senate Judiciary Committee, Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: In reference to your Committee's examination of the qualifications of William Rehnquist as a nominee to the Supreme Court of the United States, I wish to inform you that some of the news releases emanating from Arizona covering Mr. Rehnquist's activities on the Civil Rights question are in error either deliberately or inadvertently.

During the 1965 debates in the Arizona Legislature on Civil Rights I was the Majority Leader in the Arizona House of Representatives, a majority put together at that time by a coalition of Democrats and Republicans. In my capacity as Majority Leader I was primarily responsible for the Civil Rights Legislation and headed the House of Representatives Conference Committee which dealt with the Senate on that subject.

Demonstrations did take place before the State Capitol. Some demonstrators also tried to invade the Senate side of the Capitol mall, attempted a sit-in, and were ejected by members of the State Highway Patrol. In my recollection, Mr. Rehnquist had no involvement in any of these proceedings.

The demonstrators and their cohorts including then Representative, now Senator Clovis Campbell, were determined to have a piece of legislation which was highly punitive and far beyond the language and purpose of the 1964 Federal Civil Rights Legislation which we tried to approximate. During that tense period some legislators were threatened with death; we had the building evacuated for a bomb scare; and the orderly processes of government were threatened continuously by roving radicals from out-of-state who managed to be influential among Arizona sympathizers to the view that the Federal Act was weak and insufficient and the legislature controlled by bigots and racists. Again, Mr. Rehnquist had no part in the matter either directly or indirectly.

In terms of personal evaluation I watched Mr. Rehnquist in action long enough during my career within the Arizona political scene to make the following judgment:

He is a man of tremendous balance. His judgment is not casually given and when it is given it will be humane, considerate, intelligent, and sound. Any charges that he is a racist will have been made by people who are themselves separatists, political opportunists, chronic trouble makers, or some remainder of those emotionally overcharged people of 1965 whose tunnel vision rendered them incapable of good judgment then or now.

When the Chairman of both the major political parties in this state endorse Mr. Rehnquist, it is a clear indication of the acceptance he has in Arizona. To give any important consideration to the highly personalized opposing reactions of a few of our Arizona citizens whose minds and emotions run in a very narrow channel would be an unfortunate injustice to Mr. Rehnquist. It would also result in an injustice to the well being of our country.

Very truly yours,

JOHN H. HAUGH.

BILBY, THOMPSON,
SHOENHAIR & WARNOCK,
Tucson, Ariz., November 5, 1971.

Hon. JAMES O. EASTLAND,
U.S. Senator,
Senate Office Building,
Washington, D.C.

DEAR SENATOR EASTLAND: I have been a member of the Bar of Arizona for over thirty-five years, having served my state and its Bar Association in various capacities during that time.

I am well acquainted professionally with William Rehnquist, presently under consideration for the Supreme Court.

In my opinion, integrity, intellect and legal skill are, in that order, the essential requisites for judicial office, and Mr. Rehnquist meets the highest standards in these respects.

It would be impossible for a lawyer of Mr. Rehnquist's experience, standing in the community, and interest in his state and nation, not to have assumed some philosophical stance by the time he had attained professional maturity. In my opinion, a man is not qualified to become a judge if he has not taken a philosophical position, whether it be liberal or conservative.

I can state with confidence that there is no person in Arizona worthy of credence and familiar with his career, who would have the slightest doubt that Mr. Rehnquist could be swayed from an unbiased interpretation of the law by his personal philosophy.

I sincerely urge the Senate to approve President Nixon's appointment of Mr. Rehnquist.

Very truly yours,

H. C. WARNOCK.

SUPERIOR COURT OF PIMA COUNTY,
Tucson, Ariz., November 2, 1971.

Hon. JAMES O. EASTLAND,
U.S. Senator,
Senate Office Building,
Washington, D.C.

DEAR SENATOR EASTLAND: I support the confirmation of William H. Rehnquist as Associate Justice of the Supreme Court of the United States. It is my feeling that he is eminently qualified for the office in every respect.

Among his colleagues in the legal profession, Mr. Rehnquist's legal scholarship and professional skill are highly respected.

It is urged that the Senate act promptly to confirm the appointment of Mr. Rehnquist as Associate Justice.

Very truly yours,

J. RICHARD HANNAH.

SNELL & WILMER,
Phoenix, Ariz., November 3, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judicial Committee,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR EASTLAND: In support of the confirmation of the nomination of William Rehnquist for the Supreme Court I wish to express my unqualified and whole-hearted endorsement. I have known him through law school, in legal practice, and personally in civic, social, and church settings for more than twenty years. He has rare legal talent in depth, humor, balance, integrity, exemplary moral character, wide practical experience, and great courage. I whole-heartedly believe him to be ideally suited in ability, temperament, and background for the office. So, I believe, will feel anyone, of whatever affiliation or group, who will look into his qualifications deeply, fairly, and objectively.

Yours very truly,

FREDERICK K. STEINER, Jr.

TOWN OF PARADISE VALLEY,
Paradise Valley, Ariz., November 2, 1971.

Hon. JAMES O. EASTLAND,
U.S. Senator, Chairman, Senate Judiciary Committee, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: William H. Rehnquist served as our Town Attorney for four years from 1965 thru 1968 when he moved to Washington, and we would like to encourage approval of this great attorney as an Associate Justice of the United States Supreme Court.

In all cases, Mr. Rehnquist handled the legal problems of our Town efficiently and effectively. Even tho this was a part-time job for him, Mr. Rehnquist never slighted any of our requests regardless of how busy he might be with his regular law practice—which reflects his helpful attitude and his sincere public spiritedness. He was industrious and thorough at all times yet never was he pedantic; he truly was a problem-solver for our Town Council and never, not even once, did he mislead us.

From our close association with Mr. Rehnquist we know that it would be a credit not only to the Town of Paradise Valley, Arizona but to the nation as a whole to have him appointed to the United States Supreme Court.

Sincerely,

JACK B. HUNTRESS,
Mayor.

O'CONNOR, CAVANAGH, ANDERSON,
WESTOVER, KILLINGSWORTH & BESHEARS,
Phoenix, Ariz., November 1, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, New Senate Office Building, Washington, D.C.

DEAR SENATOR: I am writing to you in connection with the nomination of William H. Rehnquist to the Supreme Court of the United States, and to express my opinion as to the merits of the appointment.

Let me briefly describe my background and legal qualifications, so far as they may be pertinent to my evaluation of Mr. Rehnquist: I am a past-president of the Maricopa County Bar Association; I am a member in good standing of the following organizations: American College of Trial Lawyers, International Society of Barristers, International Association of Insurance Counsel, International Bar Association, Maricopa County, Arizona State and California State Bar Assns.; Board of Visitors, Arizona State University and University of Arizona; lawyer delegate, Ninth Circuit Judicial Conference, since 1968.

I have known Bill Rehnquist for approximately twelve years: I have known him well,

and have tried a lawsuit against him; as a friend, I have talked with him on the subject of law in general, about cases, and the practice of law. As a registered Democrat—I am not the least bit concerned about Bill Rehnquist's allegedly ultra conservative Republican views. Most significant to me as a lawyer are his two overriding characteristics—exceptional scholarly ability and complete integrity, that fit him superbly for this position.

Very truly yours,

JAMES H. O'CONNOR.

LESHER & SCRUGS,
Tucson, Ariz., November 1, 1971.

Senator JAMES O. EASTLAND,
Chairman, Senate Judicial Committee,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR EASTLAND: I am writing you with reference to Senate confirmation of Mr. William Rehnquist's nomination to the Supreme Court. I have been reading newspaper and magazine accounts of reaction to Mr. Rehnquist's nomination that have renewed in me a deep and growing concern for the whole process of Senate confirmation, which I am taking this occasion to express to you.

I am unable even in my imagination to conceive any basis for legitimate attack on this nomination or this nominee. I know enough of the man and his record to be confident that no attack can be made on his scholarship and intellectual excellence, his professional competence or his personal integrity. I now read, nevertheless, of opposition to his nomination, opposition based, presumably, on his failure to share the political, social or economic philosophies that seem to motivate his detractors. He is reportedly a "judicial conservative." So, I suspect, am I. In my lifetime I have watched Presidents nominate to the Supreme Court lawyers cherishing the most liberal judicial philosophies, and I have sat silent when, as in the case of Justice Goldberg, for example, the nominee was a man whose professional qualifications I could not challenge.

I deeply respect the function that the United States Senate performs in giving or withholding its consent to these nominations. It seems to me quite clear that any group degrades that function when it attempts to convert your hearings on a nominee's character, competence and professional qualifications into a contest of extra-judicial philosophies.

Such I take to be the nature of much of the effort now made in opposition to Mr. Rehnquist's nomination.

I believe that nomination to be a credit both to him and to the President. I hope and trust that the Senate in considering it will focus its attention on the relevant issues—the quality and competence of the lawyer nominated.

Yours very truly,

ROBERT O. LESHER.

ALLEN MCCLENNEN AND FELS,
Phoenix, Ariz., November 2, 1971.

SENATE JUDICIARY COMMITTEE
Senate Office Building,
Washington, D.C.

GENTLEMEN: Charges are being made that Mr. William H. Rehnquist should be disqualified from serving on the Supreme Court because of racial prejudice. My opinion on this question may be of assistance to the Senate Judiciary Committee.

You will need to know something about me and my knowledge of Mr. Rehnquist.

I am a life-long Democrat, and from September, 1963 until April, 1966, I was State Chairman of the Democratic Party of Arizona. I consider myself and am considered to be a "liberal" Democrat; for example, it is well known in Arizona that I supported Bobby Kennedy's presidential campaign even before President Johnson announced that he would not be a candidate for re-election. It is difficult to fully define "liberal" in the present political context, but in my case it has included unqualified support for all civil rights legislation and the Supreme Court decisions requiring integration and forbidding segregation.

I have practiced law in Phoenix since 1949 and have known Mr. Rehnquist both professionally and socially since 1953. We have had frequent contact over these years, politically, professionally and socially, and he has never given me any reason to believe that he was prejudiced in matters of race or color, and I believe that the truth is to the contrary.

I am aware that Mr. Rehnquist has opposed civil rights legislation and Supreme Court decisions in this area, but I believe that this springs entirely from his philosophical belief (which I hope has moderated) that the government should not attempt to intervene in the relationships of people.

My support for Mr. Rehnquist's nomination—and I do support it—arises primarily from the fact that Mr. Rehnquist is first and foremost a *lawyer*, and a very fine and very honest one. His devotion to the law and its proper practice is so strong that he could not possibly be other than completely impartial in trying or deciding a case before him. For example, if I were defending Angela Davis, I would be happy to have Mr. Rehnquist serve as the trial judge.

I realize, of course, that the role of the Supreme Court Justice is not that of the trial judge, and that philosophical bias can affect the Justice's opinion. However, what may be lost here (from my standpoint) will, in my opinion, be more compensated for by Mr. Rehnquist's ability, devotion to the law and complete integrity.

Respectfully,

ROBERT H. ALLEN.

BARRIE H. GROEN & ASSOCIATES,
ARCHITECTS,
Phoenix, Ariz., October 28, 1971.

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: I had the pleasure of knowing Mr. William H. Rehnquist personally some 15 years ago when he and I were members of the same toastmasters club in Phoenix over a two-year period. During that time our club met weekly and I had the opportunity of hearing Mr. Rehnquist give many, many extemporaneous and prepared speeches on every conceivable topic. I, therefore, was exposed to a very broad spectrum of his views and philosophies of life.

Even in those early years I could not help but be impressed with Mr. Rehnquist's brilliant analytical mind. I always suspected that he was destined for a great future and time has proven me correct. He has a tremendous respect for the law and I have never detected any prejudice in his thinking. Detractors who are trying to brand him as a "racist" obviously do not know him. These charges are pure "bunk".

In my opinion President Nixon could not have picked a better man for a Supreme Court nominee. I urge you to support the president in his wise choice of Mr. Rehnquist.

Respectfully yours,

BARRIE H. GROEN.

DEMOCRATIC PARTY OF ARIZONA,
Phoenix, Ariz., October 28, 1971.

Re appointment to the U.S. Supreme Court of William H. Rehnquist.

Hon. JAMES EASTLAND,
Chairman, Senate Judiciary Committee, The U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: Although I am Chairman of the Democratic Party in Arizona, I am not writing this letter on behalf of the Party, but solely to express my own opinion regarding Mr. Rehnquist's nomination to the Supreme Court. I am writing this letter because I have been requested to state my opinion concerning Mr. Rehnquist.

So that the Committee understands my background and orientation, I offer the following. I have been a practicing attorney in Phoenix for approximately fifteen years and have served as State Chairman of the Democratic Party since January, 1970.

In addition, I have been involved in the civil rights movement in Arizona for a number of years, and especially during the first ten years of my residency here. I was one of the drafters of the Arizona Civil Rights Act and was involved in several organizations seeking improved human and race relations in the state. In the past I served as counsel for the American Civil Liberties Union, Arizona Branch, and was one of the founders of the state organization.

I know William Rehnquist personally and have debated with him on several occasions on such subjects as dissent in a free society, and the issue of civil disobedience. In essence, Mr. Rehnquist represented the conservative point of view, and I the liberal point of view on these subjects, if one can generalize in such a fashion. William Rehnquist's superb intellect and competency cannot be legitimately questioned. While I have not seen Mr. Rehnquist since he moved to Washington, when he was in Phoenix, he was regarded as probably one of the ablest lawyers and most brilliant legal scholars practicing law in Phoenix. So far as I know, he has the respect of all of the members of the bar for these legal abilities.

If I were a Senator, even given my own political biases, I would confirm the President's nomination. I have said to others, and repeat here, that I wish the President would not select conservative, "strict constructionist" Judges, but as I understand the Constitution and the custom which bears thereon, the President has a right to select nominees of his own political persuasion. William Rehnquist is a strict constructionist. He is not a radical, not a reactionary, not an extremist, and I have absolutely no evidence to suggest that he is a bigot or a racist. He is a genuine conservative without rancor, and a man of absolute honesty and integrity.

Cordially,

HERBERT L. ELY.

JERRY H. GLENN,
Phoenix, Ariz., October 28, 1971.

Senator JAMES EASTLAND,
Chairman, Senate Judiciary Committee, Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: The attached resolution was adopted by the Judges of this Court on this date.

Same is passed on to you and your committee for your consideration.

I recall knowing quite well your good friend, Attorney General Joe Patterson of Jackson, with whom I served in the air corps.

I am,

Very truly yours,

JERRY H. GLENN,
Presiding Judge.

RESOLUTION

Whereas, William H. Rehnquist, a member of the State Bar of Arizona, has been nominated by the President of the United States as an Associate Justice of the United States Supreme Court, and

Whereas, the Judges of the Superior Court in Maricopa County are well familiar with his legal ability by reason of professional association with him or of having had the opportunity to observe him while practicing before this Court, and

Whereas, the Superior Court Judges in Maricopa County believe that Mr. Rehnquist is well qualified to be an Associate

Justice of the United States Supreme Court and believe that his nomination should be speedily confirmed by the United States Senate.

Now, therefore, it is resolved that the Judges of the Superior Court of Arizona, in and for the County of Maricopa, do hereby approve the nomination of William H. Rehnquist as an Associate Justice of the United States Supreme Court and do hereby urge the United States Senate to take speedy action to confirm his nomination.

Dated this 28th day of October, 1971.

OFFICE OF THE ATTORNEY GENERAL,
Phoenix, Ariz., October 29, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, New Senate Wing, Washington, D.C.

DEAR SENATOR EASTLAND: I am writing this letter to support the nomination of William H. Rehnquist for appointment to the United States Supreme Court.

As an attorney, I can attest to Mr. Rehnquist's capabilities as a practicing attorney of the highest caliber. Those of us who have been associated with him as an attorney recognize his ability, his dedication to the law, and the high ethical standards that he evinced in the private practice of law.

Very truly yours,

GARY K. NELSON,
Attorney General.
FRANK SAGARINO,
Chief Assistant Attorney General.

SUPREME COURT, STATE OF ARIZONA,
Phoenix, Ariz., October 29, 1971.

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: I should like to indicate to you and to your committee my ardent support for William Rehnquist who has been nominated by the President for a Supreme Court vacancy.

I have known Mr. Rehnquist for many years and have a very high opinion of his personal integrity and ability. Not only is he an outstanding legal scholar, but he is a man dedicated to the rule of law. When I was on the trial bench in Maricopa County, Mr. Rehnquist appeared before me numerous times which gave me an opportunity to evaluate his ability. Since that time, I have also had the opportunity to see him in various other capacities in the legal field. His reputation in the Phoenix area is outstanding. He can certainly make a great contribution to the U.S. Supreme Court. I urge you and your committee to support his confirmation.

Very truly yours,

JACK D. H. HAYS,
Vice Chief Justice.

SUPREME COURT, STATE OF ARIZONA,
Phoenix, Ariz., October 29, 1971.

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: I am enclosing a petition in support of William H. Rehnquist as Associate Justice of the Supreme Court of the United States, containing the signatures of all the members of the Arizona Supreme Court, as well as the members of the Court of Appeals. These judges and justices are members of both political parties and by signing this petition wish to indicate to your committee the high esteem in which they hold Mr. Rehnquist.

Very truly yours,

JACK D. H. HAYS,
Vice Chief Justice.

TO THE JUDICIARY COMMITTEE,
U.S. Senate,
Washington, D.C.

Each of the undersigned is a member of the State Bar of Arizona and engaged in the practice of law in that state. We have signed this petition in support of the confirmation of William H. Rehnquist as Associate Justice of the Supreme Court of the United States and as an expression of our unequivocal conviction that he is in every respect eminently qualified for the office.

Mr. Rehnquist is possessed of unquestioned legal scholarship. His academic record, clerkship for the late Mr. Justice Jackson and practice in the widest spectrum of difficult areas of legal challenge attest to this. Among his colleagues at the bar he is known as a master of professional skills.

We urge the Senate to act promptly to confirm the appointment of Mr. Rehnquist so that the important business of the Court may move forward with dispatch.

JACK D. H. HAYS,
(And 10 others).

SUPERIOR COURT OF ARIZONA,
Phoenix, Ariz., October 22, 1971.

Hon. JAMES EASTLAND,
Chairman, Senate Judiciary Committee, Senate Office Building, Washington, D.C.

DEAR SIR: The President's appointment of The Honorable William H. Rehnquist to the Supreme Court is one of the best possible.

Mr. Rehnquist is a man of exceptional legal ability and high integrity. I can think of no other member of the Arizona Bar who is better qualified than he for this important position.

I urge that prompt and favorable consideration be given to Mr. Rehnquist's appointment.

Yours very truly,

CHARLES L. HARDY.

THE SECRETARY OF STATE,
Phoenix, Ariz., October 22, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: The nomination of William H. Rehnquist to the United States Supreme Court by President Nixon prompts me to write you.

Mr. Rehnquist was on the bar committee when the Uniform Commercial Code was adopted by Arizona, and I cannot thank him enough for the help he gave us, he did a magnificent job. Due to his work on the Code we have had no problems.

In my estimation, Mr. Rehnquist would make a very fine addition to the Supreme Court. I have found him to be highly intelligent and a very fine person in every respect. He is held in high regard by the legal profession of this State and we would all like very much to see him get the appointment.

Very sincerely,

WESLEY BOLIN,
Secretary of State.

OFFICE OF THE GOVERNOR,
Phoenix, Ariz., October 26, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: May I commend without reservation Mr. William H. Rehnquist for confirmation as Associate Justice of the Supreme Court of the United States?

His record of service in our State, his scholastic achievements, and lately his federal service all combine to affirm his qualifications for such confirmation.

During his career in Arizona, I appointed him to our Commission on Uniform State Laws in which work he rendered yeoman service.

Your favorable consideration and action will be appreciated.

Sincerely,

JACK WILLIAMS.

WITTENBERG UNIVERSITY,
Springfield, Ohio, October 26, 1971.

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: As a citizen deeply concerned that our Supreme Court justices be men of highest character and of the finest judicial ability I hereby express to you and your Committee my unqualified support for the nomination by President Richard Nixon of William H. Rehnquist.

During the period from 1958 to 1962 I was pastor of Grace Lutheran Church in Phoenix, Arizona. During that time the Rehnquist family were regular worshippers and workers in our congregation. Their participation was not a matter of mere convention but of earnest conviction. The Rehnquist's were loved and respected by all who got to know them in our parish.

Through our numerous personal contacts, as friends visiting in their home and they in our home I got to know Bill Rehnquist very well. I know him to be an intelligent and sensitive man, one whose integrity is unquestioned, whose honesty is uncompromising and whom his fellow men can trust unreservedly. Bill Rehnquist will bring to the Supreme Court qualities of moral uprightness, thoughtfulness and fairness that will make him stand tall and respected among his associates and trusted by the citizens of our land.

Reliable, intellectually keen, a man of conscience and compassion . . . these are qualities of Bill Rehnquist. This I know from personal experience, not from hearsay. Our nation and our Supreme Court need the dedicated service of this man and to this end I support him with all my being and urge his approval by you and the Judiciary Committee.

Sincerely yours,

DAVID J. HARTMAN,
Associate Professor,
Department of Religion.

SUPREME COURT
STATE OF ARIZONA,
Phoenix, Ariz., October 27, 1971.

Hon. JAMES O. EASTLAND,
U.S. Senate, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: As Chairman of the Senate Judiciary Committee, you probably are receiving innumerable letters regarding President Nixon's most recent nomination of William H. Rehnquist for the United States Supreme Court bench.

May I take advantage of this opportunity to endorse this recommendation. As Clerk of the Arizona Supreme Court and, prior to that, 17 years with the Clerk of the Superior Court of Maricopa County in and for the State of Arizona, I had considerable opportunity to work with and observe the abilities of William H. Rehnquist. Although I am a life-long Democrat, I can only say that this man has always had my deepest admiration and respect and will, without a doubt, be a tremendous asset to the United States Supreme Court.

Sincerely,

CLIFFORD H. WARD,
Clerk of the Supreme Court.

COURT OF APPEALS,
STATE OF ARIZONA,
Phoenix, Ariz., October 27, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, U.S. Senate, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: May a citizen of Arizona presume to speak on behalf of Mr. Rehnquist?

Mr. Rehnquist was admitted to the practice of law not long before I commenced my judicial service first as a trial judge and then as a member of this Court. Mr. Rehnquist appeared before me while I was on the trial bench and he has appeared in this Court. One case I recall is the complex case of Arizona Water Company v. City of Yuma, 7 Ariz. App. 53, 436 P.2d 147 (1968).

Mr. Rehnquist has always been well prepared. He has the fine capacity for objective

analysis. His presentations have been quiet and respectful and at the same time thorough and effective.

We have been neighbors, though not close friends. He has an excellent personality.

Mr. Rehnquist has devoted himself to the service of his profession. He is a past president of the Maricopa County Bar Association. The County Bar was then one of the chief financial supporters of Legal Aid. There was an important recruiting of volunteer lawyer service. As an officer of and as president of the County Bar Mr. Rehnquist gave full devotion to the needs and services of Legal Aid.

As a sidelight and as an insight to Mr. Rehnquist's personal equation with people I mention that Mr. Rehnquist and I traded at the same neighborhood gas station. The people there knew him as a man and as a customer. I bought gas there shortly after the nomination was announced. The enthusiasm of these men for Mr. Rehnquist was genuine and heartwarming.

In my opinion based upon my great respect for Mr. Rehnquist as a man and as a lawyer, it is my sincere recommendation that his nomination be given favorable consideration by the United States Senate.

Because Senator Paul Fannin and Senator Barry Goldwater, I am sure, share my views I am taking the liberty of sending each of them a copy of this letter.

Respectfully yours,

HENRY S. STEVENS.

SUPERIOR COURT OF ARIZONA,
Phoenix, Ariz., October 27, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Judiciary Committee, U.S. Senate, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: Supreme Court nominee William H. Rehnquist has been known to me for approximately twelve years. I feel confident in stating that Mr. Rehnquist is a lawyer of outstanding learning and ability. He has an excellent reputation in the community and enjoys high standing in the State Bar of Arizona. His moderate temperament and willingness to consider all viewpoints equip him very well for appointment to the United States Supreme Court.

Respectfully yours,

DONALD F. FROEB.

SUPERIOR COURT OF ARIZONA,
Phoenix Ariz., October 27, 1971.

Senator JAMES EASTLAND,
Senate Judiciary Committee,
Washington, D.C.

DEAR SENATOR EASTLAND: I would like to add a word in support of William H. Rehnquist as Justice of the Supreme Court.

Mr. Rehnquist has actively practiced law in our courts and has appeared before me on various occasions. I consider him a man of absolute integrity and I believe him to possess unusual ability in the legal field.

Sincerely yours,

LAURENS L. HENDERSON.

STATE TAX COMMISSIONER OF ARIZONA,
Phoenix, Ariz., October 26, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, New Senate Office Building, Washington, D.C.

GENTLEMEN: Please use this letter as my unqualified support of Wm. H. Rehnquist for appointment to the United States Supreme Court based upon his recent nomination by President Richard M. Nixon.

Bill Rehnquist represented the State of Arizona in impeachment proceedings of certain of our elected officials during which trials he presented a masterful case against a very astute defense.

I feel his handling of this case and his respect for the individual rights of our citizens is terrific. I thoroughly recommend this appointment.

Respectfully submitted,

JOHN M. HAZELETT,
Member.

PHOENIX, ARIZ.,
October 28, 1971.

Hon. JAMES O. EASTLAND,
Chairman of Senate Judiciary Committee, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: I was Bill Rehnquist's law partner for almost ten years. His appointment to the Department of Justice ended an association that was about as satisfying as could ever be hoped for.

Bill has intellectual equipment of the very highest order, a deeply felt respect for his calling, and a fundamentally judicial temperament. Our substantially divergent political views never once led me to doubt his willingness, or his capacity, to consider and decide any question, of any kind, on its own merits.

He will make an outstanding member of the Supreme Court.

If I can provide any assistance at all to the deliberations of your committee, please call on me.

Very truly yours,

JAMES POWERS.

COURT OF APPEALS,
STATE OF ARIZONA,
Phoenix, Ariz., November 2, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, U.S. Senate, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: I am writing this letter to express my personal support of the proposed appointment of William H. Rehnquist to the position of Associate Justice of the United States Supreme Court. I am well acquainted with Bill Rehnquist on both a professional and a personal basis.

Recent newspaper articles have made much of Mr. Rehnquist's conservative political philosophy and the statements which he has made in the past relative to his political views on various subjects. Let me express the hope that the question of Mr. Rehnquist's appointment to the United States Supreme Court does not degenerate into a political popularity contest. His integrity is beyond question. His extreme intelligence and sound legal scholarship, combined with his varied professional experience would, in my opinion, enable him to contribute immensely to the solution of matters brought before the Supreme Court.

Sincerely yours,

LEVI RAY HAIRE.

MCCUTCHEN, DOYLE,
BROWN & ENERSEN,
San Francisco, Calif., October 29, 1971.

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR EASTLAND: I am writing in support of the President's nomination of William H. Rehnquist to the Supreme Court. From 1961 to 1965 I practiced law in Phoenix and knew Mr. Rehnquist. He was in my opinion an able, effective lawyer whose intellect was well respected by the legal profession in Phoenix. He was known to be a sound counsel and advocate. I believe that he has a high understanding and respect for the rule of law and the integrity of the legal process. Although my political views differ sharply from his as a lawyer I have no hesitancy in urging his confirmation.

Sincerely,

ROBERT A. MILLS.

Mr. HRUSKA. Mr. President, after long and thorough hearings, the Senate Judiciary Committee reported the nominations of William Rehnquist and Lewis Powell to the Senate for confirmation as Associate Justices of the Supreme Court of the United States. Mr. Powell has now been confirmed.

As a member of that committee who has followed the confirmation hearings carefully. I feel compelled to answer what I consider mistaken and unfair attacks upon William Rehnquist.

To begin, let me say that that there is no challenge to the legal ability or integrity of the nominee. The attack directed at Mr. Rehnquist is focused principally on his alleged shortcoming in the field of civil rights which, in the words of the Senator from Indiana, "displays a dangerous hostility to the great principles of equal justice for all people." Such a sweeping accusation must be carefully examined in light of the facts. Certainly it cannot be allowed to go unchallenged.

Mr. Rehnquist is accused of "persistent unwillingness to allow law to be used to promote racial equality in America." To support that charge, three occasions are cited on which Mr. Rehnquist opposed a civil rights proposal, ignoring altogether that the nominee had supported a public accommodations provision as well as other civil rights provisions in 1966; that he played a major role in developing the Nixon administration's Philadelphia plan to end race discrimination in the building trade unions; and that he supported school integration efforts in Phoenix until compulsory busing to achieve racial balance was suggested.

Obviously the record does not support a charge of "persistent" opposition to civil rights. At most, it suggests that the nominee was cautious and concerned about racial changes in the law, even though directed at noble ends. Too often changes which are prompted by the most praiseworthy sentiments unhappily create greater harm than good.

The first occasion mentioned on which Mr. Rehnquist opposed a civil rights measure was in 1964 when the nominee expressed grave reservations about the advisability of a public accommodations ordinance. He was not alone in his concern that a certain amount of harm in the nature of greater governmental control over an individual's life would accompany whatever good would come of the Phoenix public accommodations ordinance. He suggested that passing laws would not eliminate either the racial animosity or the indignity to the customer which arose because of that animosity.

Mr. Rehnquist argued at the time that there was no widespread discrimination in Phoenix as there may have been in the Deep South. What practical good might come of the Phoenix public accommodations ordinance in the way of "whipping a few recalcitrants into line" was far outweighed, in Mr. Rehnquist's mind, by the serious harm that could come of widening the range of governmental controls.

I urge my colleagues to note that Mr. Rehnquist has said that his opposition to the 1964 public accommodations ordinance was ill-advised, principally

because he did not fully appreciate in 1964 that the minorities wanted symbolic recognition of their right to equal treatment, if nothing more. This change of heart did not come after Mr. Rehnquist's nomination, as some have suggested. In 1966, for example, Mr. Rehnquist supported the public accommodations provision of the Model State Anti-Discrimination Act while he was serving as a member of the Arizona delegation to the National Conference of Commissioners on Uniform State Laws.

The second incident relied upon was Mr. Rehnquist's attempt in 1966 to amend two provisions of that same Model State Anti-Discrimination Act. I find the suggestion that this demonstrates "a dangerous hostility to equal justice" altogether unfair. Have we reached the point at which any opposition to a civil rights proposal, no matter how thoughtful and sound, is to be taken as opposition to civil rights and equal justice? Is it not possible that valid doubts can be voiced about the wisdom or constitutionality of a particular civil rights measure without being opposed to civil rights? I would urge those of my colleagues who are still troubled by the 1966 incident to look to the actual transcript of the proceedings of the National Conference of Commissioners on Uniform State Laws which has been inserted in the RECORD on November 24. I suggest that Mr. Rehnquist's opposition to those two provisions was thoughtful, level headed, and devoid of anti-civil-rights sentiment. It was based—as the transcript will demonstrate—entirely on the grounds that there were possible constitutional problems with the proposal as then drafted and that these sections of the act were not relevant or essential to the topic then under discussion.

It is also important to put this 1966 episode into perspective. After his initial reservations about part of the Model Act, Mr. Rehnquist joined with all other members of the Arizona delegation in voting for the entire act. The chairman of the conference, Albert Jenner, a Chicago lawyer widely recognized as a civil rights advocate, wrote to the committee on November 5 that he endorsed Bill Rehnquist's nomination. He pointed out that while the nominee was a commissioner, he actively supported the proposals of the conference once they were finally adopted.

The third occasion relied upon is Mr. Rehnquist's 1967 letter to a Phoenix newspaper criticizing a suggestion by the superintendent of the Phoenix Union High School District that compulsory busing of students might be used to achieve a better racial balance in the schools. It is not Mr. Rehnquist's defense of the concept of neighborhood schools which offends the nominee's opponents on the committee as much as his statement in that letter that—

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

In fairness, the rest of that sentence said should also have been quoted. Mr. Rehnquist went on to say that—

> We are instead dedicated to a free society, in which each man is accorded a maximum amount of freedom of choice in his individual activities.

Mr. Rehnquist's opponents contend that he has never dissociated himself from this statement. Indeed, he has not. Instead he agrees with the famous statement of the elder Justice Harlan who said that "the Constitution is color blind." He also agrees with Mr. Justice Holmes that the Constitution does not embody any particular social, economic or political theory. His obligation as a Supreme Court Justice will not be to advocate a social view, no matter how laudable and widely held. His obligation will be to apply the language of the Constitution to the facts of the case before him. To go beyond that and infuse his own political or social views is to ignore the proper role of a Supreme Court Justice.

Interestingly, the four members of the Judiciary Committee who oppose Mr. Rehnquist ignore the nominee's testimony that his children receive an integrated education and benefit from it.

We have some reason to question whether every Member of this body is in that same happy circumstance.

Mr. Rehnquist demonstrates the clarity of thought and careful analysis that every judge should possess. He recognizes a distinction between what may be socially desirable or morally good, and what the Constitution requires. He does not confuse his own philosophy with the provisions of the Constitution.

When Mr. Rehnquist wrote that letter to the editor in 1967 on the subject of neighborhood schools, he was hardly displaying a "dangerous hostility to equal justice." He was insisting that there are limits to the reliance upon force and legislative edict to accomplish the goal of integration. Ultimately, the solution to race problems, he suggested, would be found in the free choices made by the citizens of this country.

The faulty reasoning of those opposing Mr. Rehnquist can be seen in the memorandum accompanying the minority views in the committee report. On page 39 in a discussion of the 1967 letter to the editor, one finds the following comments:

> The truly alarming aspect of this 1967 letter, however, is Mr. Rehnquist's statement, 13 years after *Brown* v. *Board of Education* that "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society." As explained above, this statement cannot simply be written off by the nominee as made in the context of long-distance busing. It must stand on its own as representing his view of our society's obligation to its citizens. And Mr. Rehnquist has never disassociated himself from this statement. Yet at least since the Supreme Court declared that "separate is inherently unequal," this Nation has not been neutral as between integration and segregation; it stands squarely in favor of the former. And if Mr. Rehnquist does not agree, he is outside the mainstream of American thought and should not be confirmed.

I challenge the statement that "this Nation has not been neutral as between integration and segregation." Surely this country has not been silent on the subject of segregation. We have condemned segregation. But to fall into the trap of either-or reasoning is to miss a significant point. The Supreme Court has required desegregation; it has not ordained integration. It has ruled that States and local communities which have resorted to de jure segregation must now take affirmative steps to undo that segregation. Yet it has not said that racial balance is constitutionally required in classrooms or neighborhoods, for example. Congress and the legislatures of the various States have passed statutes to prohibit discrimination and to insure equal opportunities for all Americans regardless of race, sex, religion, or national origin. But no one has decreed racial balance. The predominant social view in this country certainly is that integration is desirable, but the prevailing social philosophy is not necessarily the law.

Mr. Rehnquist is not opposed because he is personally against integration, because he is not. Indeed, he chose to live in an integrated neighborhood in Phoenix and to send his children to integrated schools. Mr. Rehnquist is challenged because he has not been a civil rights activist, because he has expressed concern about the wisdom of particular civil rights approaches—although not the goal of such measures—and because he has urged caution in passing civil rights laws.

Far from being a disqualifying factor, Mr. Rehnquist's consistent refusal to permit his personal views to affect his view of the proper role of law in our society is a characteristic which suggests that he will ignore his own philosophy in interpreting the Constitution.

The Senate has already confirmed Lewis Powell.

Mr. Rehnquist's opponents on the committee chose to support Lewis Powell. I commend them for that. But these opponents fail to explain why they chose to credit the statement of one supporter of Mr. Powell as proof of his acceptability on civil rights, while on the other hand they utterly ignored the strong statements from a number of Mr. Rehnquist's supporters to the effect that he possessed a sensitivity to civil rights. Some of these supporters harbor political views diametrically opposed to those of Mr. Rehnquist.

The record of both Lewis Powell and William Rehnquist in the field of civil rights demonstrates a cautious approach, without taint of racial animosity. Both men possess the sensitivity and humanity which are essential qualities for Supreme Court Justices.

Mr. President, there is one aspect of this nomination and this debate which I would particularly like to emphasize—Mr. Rehnquist's fairness, openmindedness, and lack of bias. In doing so, I quote from the penultimate paragraph from my individual views in the committee report:

> The Committee during the course of its hearings heard from a number of witnesses on this nomination—some endorsed Mr. Rehnquist while others opposed his con-

firmation. I think it interesting to note that those who know him well including those who differ with him philosophically, have had the best things to say concerning him. In the absence of any ability to reach into a person's mind and determine with certainty his thinking and reasoning on a given subject, I submit that we must rely on the evaluations of those who are personally acquainted with him. This is certainly a more reliable guide to the objectivity and openmindedness of a man than hearsay once or twice removed. On this ground I believe that William H. Rehnquist is an extraordinarily competent, thoughtful scholar and student of the law and in addition is a most compassionate and understanding human being.

The committee report dealt at length with the favorable testimony of several witnesses, and correspondence in support of this nominee, including that from Martin Richman, formerly Deputy Assistant Attorney General, Dean Pedrick of the Arizona State University Law School, Dean Neal of the University of Chicago, Jarril Kaplan, of the Arizona Bar, U.S. District Judge Walter Craig, and Prof. Benno Schmidt of Columbia Law School. Each of these men, while indicating that they might have different philosophical views than Mr. Rehnquist, affirmed their conviction that he was a man of fairness, ability, and judicial temperament. These men who know the nominee well are the best evidence we can have of his outstanding qualities, abilities, and openmindedness.

Mr. Rehnquist has throughout his career exemplified the finest attributes of a citizen and attorney. A brilliant student, skilled and careful practitioner of his profession, involved member of his community, warm and compassionate person, Bill Rehnquist will make an outstanding member of the Supreme Court. I am confident that he will be confirmed by the overwhelming vote of this body.

Mr. BAYH. Mr. President, will the Senator yield.

Mr. HRUSKA. I yield.

Mr. BAYH. Mr. President, I have listened with great interest to my friend, the Senator from Nebraska. Inasmuch as he has referred to the Senator from Indiana in his eloquent remarks, I thought that it might be helpful for the record to show in broader perspective what the views of the Senator from Indiana are.

The Senator from Nebraska suggested that the best way to judge the nominee would be to study his attitudes and the testimony of those who have been personally associated with him.

Does the Senator from Nebraska feel that this is better than to rely on what the nominee himself has said or on what the nominee has written?

Mr. HRUSKA. Is the Senator's question whether I have taken those factors into consideration?

Mr. BAYH. Mr. President, I am just referring to what the Senator has said, that the best way to judge a nominee would be to study the testimony of those who personally associated with him. But if we can get the specific words of the nominee, we do not have to go to any intermediary, because we can see what he thinks and hear what he says.

Mr. HRUSKA. Mr. President, by all means. And the nominee was extraordinarily compliant and obedient to the wishes of one committee. All the speeches he has made are on file, as well as a number of other products of his pen and tongue. The committee considered those. That is right.

Mr. BAYH. The committee did consider them. But I must say that at least a minority of the committee, including the Senator from Indiana, have come to a different conclusion than did the majority.

The Senator from Nebraska referred to that magnanimous and open-hearted gesture that the nominee made when he supported that uniform antidiscrimination statute. Has the Senator from Nebraska read the transcript of the discussion and debate during the time that particular uniform antidiscrimination code was being formulated?

Mr. HRUSKA. I reviewed the transcript, and I read it carefully and with great interest.

Mr. BAYH. I am glad that to hear that, inasmuch as I can point to at least two significant passages in which the nominee opposed parts of that statute. I hope the Senator from Nebraska can point to at least one instance in the debate and the transcript in which the nominee was for something positive. Did he testify or argue in support of any of the provisions? If so, I would like to know. I have studied the transcript and I cannot find one instance where he used his great intellect to get his colleagues on that Commission to support such legislation.

Mr. HRUSKA. The fact is that after the report of that Commission was completed he voted in favor of it as his entire delegation did. I do not know what else the Senator from Indiana would ask him to do.

Mr. BAYH. We have ample testimony to his opposition to the antiblockbusting provision. Blockbusting is an insidious tactic which the Senator from Nebraska knows of, and which I am sure he opposes, in which realtors go into a neighborhood and play on the racial frustrations of people and make a fast buck. He was opposed to outlawing this. We have chapter and verse, and I would be glad to put it in the RECORD. The Senator heard it in the committee. There was not a single word from Rehnquist supporting any single provision of the proposed antiblockbusting statute. The Senator mentioned that in the end he voted for it. That is not much proof of anything to me. Only two votes were against it during the final tabulation, Alabama and Mississippi.

I wish the Senator would—or could—find one statement by Mr. Rehnquist in the transcript which can fairly be interpreted to say, "I am in favor of civil rights."

Mr. HRUSKA. The testimony in the transcript is clear on that. He has done that several times. Given a little time, the Senator from Nebraska will respond by page and line.

I might suggest Mr. Rehnquist's opposition to that blockbusting provision during debates on provisions of the uniform law was based on constitutionality, in the first place; and second, relevance to the legislation being considered by the Commissioners. It was not, as I understand it, based on the merits. A perfectly frank argument was made. He was outvoted and he abided by the result.

Now, perhaps the opponents of Mr. Rehnquist want someone who will respond and be in their image, and in the activist ranks of civil rights, without reference to the constitutional bases that should be considered in any civil rights legislation.

Mr. BAYH. Mr. President, will the Senator yield at that point?

Mr. HRUSKA. And they also would want him to correspond to their mold so that there would be no objection on their part.

Let me suggest that a long time ago we have come to that bridge and crossed it back and forth. The plain fact is, as the Senator from Mississippi pointed out a little while ago, that Presidents over a long period of time have made the personal philosophy and political philosophy of their nominees one of the tests as to whether they would be chosen.

Mr. BAYH. How can the Senator from Nebraska make the assessment in light of the fact that only 1 hour ago, on the Powell nomination, only one Senator dissented. I voted for Lewis Powell. He is not exactly in the mold of the Senator from Indiana, and neither is the distinguished Chief Justice, Mr. Burger, but I voted for him and Justice Blackmun. How can the Senator say you have to have someone who marches along in lockstep?

Mr. HRUSKA. Because the Senator from Indiana persists in making a big point out of the two instances in which Mr. Rehnquist opposed what eventually turned out to be the final word of the Commissioners on the uniform law. Because of his initial opposition to those two provisions he is therefore unqualified to be a President's nominee. That is the argument as I understand it.

To finish my thought, I recall when Justice Whittaker retired in the spring of 1962 and two very distinguished and well-known brothers sat down to discuss the proposition of who should be nominated as Justice of the Supreme Court. The President and the Attorney General sat down and studied the matter. This is the way James E. Clayton, in his book "The Making of Justice—The Supreme Court in Action" describes it on page 51:

> As the two brothers studied the situation, they realized that they wanted the new Justice to be one who looked at the problems he would face from the same perspective as they did. Thinking back on the process months later, the Attorney General tilted back in his chair and said:
>
> You wanted someone who generally agreed with you on what role government should play in American life, what role the individual in society should have. You didn't think about how we would vote in a reapportionment case or a criminal case. You wanted someone who, in the long run, you could believe would be doing what you thought was best. You wanted someone who agreed generally with your views of the country.

Mr. President, my purpose in reading that excerpt is simply this. It describes an effort to try to measure up a nominee by a President, with some of the thoughts

that were expressed by the man I just quoted. That is the privilege of the one who appoints the nominee. That is the proof of the proposition in the excerpt which I just read from Mr. Clayton's book.

So I say here there is opposition to a Supreme Court Justice based on statements he made in a debate during the consideration of a uniform law, raising contentions which were not finally agreed to. In the last analysis, however, he supported the final result of the Commissioners and made that report to the State of Arizona. But I think we are a little off base in asking for complete unanimity and conformance to that artificial mold in regard to qualifying a man to be a nominee for the Supreme Court.

Mr. BAYH. My colleague apparently misinterprets what I said, or maybe I cannot articulate my thoughts precisely enough for him. I have never said that the President should not consider philosophy. It is an accepted fact that he does. All Presidents do. I think we have laid to rest the proposition that the Senate should not consider philosophy; indeed, the nominee himself has stated repeatedly that he feels philosophy should be considered.

If one looks at Rehnquist's position, particularly in light of the Newsweek article and the memorandum that the then clerk, William Rehnquist, wrote for then Justice Jackson, in which he opposed overruling Plessy against Ferguson, he is far to the right of Richard Nixon. The President of the United States is against blockbusting, but Mr. Rehnquist was not.

What concerns the Senator from Indiana is that we have a situation that goes beyond getting agreement on everything, which I would not require. We have a man who has been consistently opposed to the direction which this country ought to go in the broad area of human rights.

Since the Senator from Nebraska referred to the 1966 joint meeting of the Commissioners as evidence of his support on civil rights—I suggest the record will show otherwise—let me point out he vigorously opposed two provisions of that act. I want to read what the distinguished reporter, Prof. Robert Braucher, who was a distinguished professor in Harvard and who is now on the Supreme Judicial Court of Massachusetts, had to say about the blockbusting provision Mr. Rehnquist wanted to root out of there. The majority of those Commissioners shared the opposition. He said:

> However, I would like to speak for just a moment to the merits of this. The practices that are dealt with in this provision are practices that have no merit whatever. They are vicious, evil, nasty, and bad. These are people who go around—and this is not a hypothetical situation; this is something that has happened in every big city in the United States—and run up a scare campaign to try to depress the value of real estate. They will, if possible, buy one house, and then they will throw garbage out on the street; they will put up "For Sale" signs; they will perhaps hire twenty badly clad and decrepit-looking Negroes to occupy a single-family house, and so forth; and then they go around to the neighbors and say: Wouldn't you like to sell before the bottom drops out of your market?
>
> And the notion that that type of conduct should be entitled to some kind of protection under the bans of free speech is a thing which doesn't appeal to me a tiny bit.

This is why the Senator from Indiana is concerned about the nominee. I am convinced that he is a very intellectual man. I am convinced he is honest. I am convinced he is articulate. Indeed, his appearance before the committee showed that. But everything I have seen and everything I have read indicate that there are some very unscrupulous practices that Mr. Rehnquist will not use the Constitution to prohibit, and blockbusting is one of them. I do not think that our guarantees of free speech entitle one to go down and ruin a neighborhood and put white people against black people. Yet that was Mr. Rehnquist's position. And if there is an instance in the record in this commissioners' meeting that would lead me to feel otherwise, I wish the Senator from Nebraska would ferret it out for me. I have read every word of the transcript, and there is not one word in favor of civil rights. In fact—I have not mentioned it; I do not want to beat this to death—the fact is very clear that, in addition to opposing these two provisions of the uniform act, Mr. Rehnquist led a successful effort which prohibited those two provisions from being put into a uniform act, but made it a model act. A model act does not have the same force and effect and does not represent the same unanimous, dynamic commitment to the subject of the act. There is not one single word in those hearings to controvert that, and if the Senator from Nebraska has any, I hope he can give it to me because it would certainly make the Senator from Indiana rest a bit easier.

Mr. HRUSKA. The Senator from Nebraska will just make this observation: One of the statements in his principal remarks was that the opponents of Mr. Rehnquist find fault with him because he has not been a rabid activist in the field of civil rights. They have come to expect that a nominee to the Supreme Court should be such an activist, Mr. President, and for 30 years—certainly since 1961—that has been one of the qualifications in the appointments that have been made. That is one of the propositions with which I dealt in my principal remarks.

Inasmuch as there are others who wish to speak yet tonight before the hour gets late, I shall yield the floor to give them an opportunity.

Mr. BAYH. I hope that the Senator from Nebraska will permit me to examine some of the other statements he made with reference to the Senator from Indiana.

Mr. HRUSKA. Not at this time, because obviously it is a rehash of many of the things which we have debated before. Out of consideration and out of courtesy to some of my colleagues I propose to give them a chance to make opening statements. At a later time if the Senator from Indiana still desires further colloquy with this Senator, the Senator from Nebraska will be here all week, and all next week if need be.

Mr. BAYH. And maybe the week after that. Does not the Senator from Nebraska feel that perhaps it would be more helpful to those who are trying to study this, since he has made certain charges, for the Senator from Indiana to have a chance to have a colloquy right now?

Mr. HRUSKA. I am convinced that the Senator from Indiana will embrace the situation where the debate and discussion will be sufficiently extended that he will not be foreclosed at a later time from going into enlightening briefs. For the time being I think it would be only fair to our colleagues to yield to their desire to be in on the opening statements, to which the opening hours of a debate normally are dedicated.

I yield the floor, Mr. President.

Mr. GOLDWATER and Mr. BAYH addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from Arizona.

Mr. GOLDWATER. Mr. President, I thank the Chair. I do not intend to indulge in the colloquy that just went on. I am not a lawyer, but I do have some feelings about this matter, because Mr. Rehnquist is not only a resident of my State, he is a friend of mine of long standing.

To get to my point quickly, Mr. President, I wish to read paragraph D from a statement that was just given us by the distinguished Senator from Indiana. Paragraph D on page 2 reads:

> *Alleged Harassment of Voters.* There are competing affidavits before the Senate as to whether Mr. Rehnquist personally harassed voters in 1964. The factual dispute is not resolved by any evidence before the Senate. Therefore, each Senator will have to decide for himself what weight—if any—to give either the charges or the blanket denials. But this uncertainty should not obscure the fact that Mr. Rehnquist, although he has tried to disassociate himself from the tactics used, held a high and responsible position in the Republican election day apparatus during several election years which saw very substantial harassment and intimidation of minority groups voters.

Mr. President, I will just comment briefly on that. I happen to live in Arizona. I have spent my whole life there. I know something about the political processes there. I have been deeply involved in them, as have my family for over 120 years, and anybody who makes the statement "which saw very substantial harassment and intimidation of minority groups voters" does not know what he is talking about, because this is not the case. It is as far from the truth as the truth can be.

To set the stage, Mr. President, I want to read the State law and the State constitution, even though I have to admit that rightly it has been affected by the Voting Rights Act of 1964 and subsequent decisions.

Article I, section 16–101, is "Registration Requirements":

> QUALIFICATIONS OF ELECTOR
>
> A. Every resident of the state is qualified to become an elector and may register to vote at all elections authorized by law if he:
>
> 1. Is a citizen of the United States.
>
> 2. Will be twenty-one years or more of age prior to the regular general election next following his registration.
>
> 3. Will have been a resident of the state

one year and of the county and precinct in which he claims the right to vote thirty days next preceding the election.

4. Is able to read the Constitution of the United States in the English language in a manner showing that he is neither prompted nor reciting from memory, unless prevented from so doing by physical disability.

5. Is able to write his name, unless prevented from so doing by physical disability.

I will admit, and we all admit, that in a Federal election the State had to conform to the Civil Rights Act of 1964 which required that a literacy test in writing not be given unless it applied to each and every voter. Thus, it was given to no one, in practice in 1964 or later.

Continuing to read from our laws, Article II:

SEC. 16–921. GROUNDS FOR CHALLENGING VOTER

A person offering to vote may be orally challenged by any registered elector of the county upon any of the following grounds:

1. That he is not the person whose name appears upon the register.

2. That he has not resided within the state for one year next preceding the election.

3. That he has not resided within the county or precinct for thirty days next preceding the election.

4. That he has voted before at that election.

5. That he has been convicted of a felony and has not been restored to civil rights.

6. That he has made a bet on the result of the election.

7. That not being prevented by physical disability from doing so, he is unable to read the constitution of the United States in the English language in such manner as to show he is neither prompted nor reciting from memory, or he is unable to write his name.

Again, this was affected by the 1964 Civil Rights Act, which requires that the test be applied to every voter in writing, or none at all. Also, the 1965 Voting Act requires that a sixth-grade education shall constitute literacy. But it was in effect without qualifications in elections prior to 1964.

Mr. President, we do have challenges in Arizona. I imagine most States have them. I think it is very wise.

Section 16–922, entitled "Challengers Representing Political Parties," reads as follows:

At each voting place, one challenger for each political party may be present and act, but no challenger may enter a voting booth except to mark his ballot.

Mr. President, that is a matter of our law, and each election year it is customary for a county chairman to submit a list of members of his party who are willing to act as poll watchers at each polling place, some 600 in the case of the county in which I live, and those poll watchers are to be found, usually in every single polling place, and they act as interested Democrats and interested Republicans. And, Mr. President, notwithstanding the size of the State, and the fact that we have Indians, Mexican-Americans, Negroes, and other minority groups living in the State, we have had no serious disputes arising from that. I will have to admit that in New Mexico, in one election, there was a problem that arose relative to the Indian voters, but it had no bearing on Arizona.

Mr. President, I think that constitutes enough of our law to indicate that having political watchers is not something unusual. In my State, it has been practiced pursuant to law for many years.

Mr. President, I wrote a letter to the Washington Post the other day. I hope they will print it, because I would like to see the record kept clear, both in the public print and in the CONGRESSIONAL RECORD. It involved a letter that had been written by Mr. Mitchell on this supposed violation of a person's voting rights. The letter I wrote says:

Dear Sir:

The time is long past due that the lie be put to the repeated observations of people who should know better relative to the supposed action of Mr. Rehnquist in preventing a person from voting.

Contrary to what Mr. Mitchell, Senator Bayh, Mr. Rauh and others might contend, this supposed event did not take place as they describe. Mr. Rehnquist has so stated many times and furthermore, Mr. Editor, I was there so I can speak with considerably more authority than any of the supposed experts can.

And, Mr. President, I was there. I remember a few incidents we had where a team of lawyers gathered in a central office, and Mr. Rehnquist happened to be one of those lawyers, together with some other very prominent members of the Arizona Bar from both parties. The lawyers were gathered in this office so that a watcher who had a suspicion that something might be wrong could, if he challenged and the challenge met with opposition, phone into the central office and get a legal opinion.

There were occasions, not including the incident mentioned, where lawyers would drive to the polling place to settle the thing as amicably as possible.

To continue the letter:

Let's develop the history of this whole situation. Under Arizona's Constitution prior to the Civil Rights Voting Act, a man had to be literate to vote and the test generally was to read the first line of the Constitution and write one's name. Although this was a part of the Constitution, I cannot recall more than a few instances of it ever being brought into play at the polling place. The matter that both parties in Arizona became concerned with this grew from our antiquated registration laws which have long since been changed.

Under these laws a person would not have his voting precinct automatically changed when he moved from one place to another. Because of this it was possible to find some voters registered in as many as six different precincts. It was the practice in some isolated instances for these people to be looked up and taken to the places where they could vote and if they were not challenged, they could have their vote recorded as long as they were not challenged.

Mr. President, the main purpose of our watchers in Arizona has been, in the past, to determine whether or not the person voting—whether he was a Republican or a Democrat, white, black, or brown, did not make any difference—had previously voted in that election. I might say that since that time, as I shall recite, our registration setup has been changed, and now it is impossible, although we do require poll watchers to check and see if the name that is signed coincides with the name in the registration book.

To continue with the letter:

Before going into the watcher setup, let me tell of another practice that prevailed in Arizona in some precincts before we changed our paper ballot. The ballot used to be printed with the names appearing in the same order throughout, so it was a simple task for someone to take a string and tie knots in it so that when placed beside the names to be voted it would show who to vote for, and this string would be given to the illiterate voter who merely went into the voting poll, placed the string beside the ballot and marked his X where each knot appeared. This was subsequently corrected by alternating the names on about every two hundred ballots as they came off the press, so the string trick didn't work after that.

I recite that as a rather humorous illustration. It has been done in other States as well. But this is another reason why I think it is wise for both parties to provide watchers.

To get on with the letter:

Now to prevent unqualified voters from casting a ballot each party, the Democrats and Republicans, set up what we call poll watchers. At each polling place, even today with voting machines we have them and they are applied to every polling place in the State regardless of whether they may be in a predominantly Mexican-American neighborhood, Negro neighborhood or White neighborhood. We are interested in honest voting regardless of race, creed, color or location and that is the whole purpose of watching teams in each party, and they are approved by the County Board of Supervisors in Arizona.

Now to correct the allegations being brought out by his detractors concerning the specific operation in which Mr. Rehnquist was involved, he was appointed along with several other attorneys from both parties by the County Chairman of both parties to give advice and guidance to assure that voting was done only by properly registered voters. The statutes of Arizona recognized the need for polling challengers to assure that only properly registered voters cast a ballot so Mr. Rehnquist and others were seated at a central location. When a challenge was called in from a poll watcher, legal advice was given, not only by him, but by other lawyers gathered for this specific purpose.

I don't believe that Mr. Mitchell, Mr. Rauh or Senator Bayh stretching their liberal thoughts as far as they can can find anything wrong with this as illegal voting, whether it touched upon a man's right to vote because of literacy or illiteracy or his right to vote in more than one precinct or his right to use a string with knots in it. I don't believe these three gentlemen would condone dishonest voting in their precincts anymore than the Republicans and Democrats in Arizona would condone it in their precincts.

I offer this letter, and I hope you will publish it, because if I ever heard a repetition of an outright lie day after day by the newspapers and in Senate speeches, it is this, and if it is raised on the Senate floor it will be charged precisely as that.

Mr. President, to make this part of the RECORD abundantly clear—and I shall not address myself to anything else tonight—I want to move into this matter of how Mr. Rehnquist supposedly got involved in all of this.

There was an affidavit offered by a Mr. Jordan Harris, of 1825 Appache Street, Phoenix. He testified that on Tuesday, November 3, 1964:

I was present as a deputized challenger for the Democratic Party in Bethune Precinct, a predominantly black precinct in South Phoenix, and witnessed the following incident.

Keep this date, 1964, in mind. It has a great bearing upon whether we should pay any attention to this or not.

I appeared at the polling place, Bethune Precinct, at approximately 11 a.m. on the above mentioned date, deputized, by Judge Flood. When I arrived at the precinct I met with the election board committee and presented my official papers to them as a challenger for the Democratic Party. I met the Party challenger for the Republican Party, Mr. William Rhenquist at that time. I met with Mr. Rhenquist because I noticed him harassing unnecessarily several people at the polls who were attemping 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 requests. The persons involved were Mrs. Mitchell, Mrs. Campbell and Mrs. Miller. When I noticed he was pulling these people out of the line I then approached him and argued with him about his harassment of the voters. We then engaged in a struggle and the police were called in. Mr. Bob Tate came to my assistance during the struggle. The police then escorted him into the principal's office, Mr. Rhenquist and the police then left by the side door. I know that this man was Mr. Rhenquist because the election board introduced him to me as a challenger for the Republican Party. I believe that he did not leave the polling precinct altogether because I saw him across the street a short time later. He remained at the polling place well after 5 p.m.

JORDAN HARRIS.

It is signed "Jordan Harris," and it is witnessed by a notary public. I think the notary's signature is "Jeanne Warner," but I cannot read it very well.

Mr. President, this affidavit is followed by another affidavit from Mr. Robert Tate, describing about the same actions, and I will not bother to read that at this time. But he goes on to say, in the last paragraph of his affidavit:

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 that time, however, wear glasses.

That is the end of the affidavit from a Mr. Robert Tate, and it is witnessed by the same notary public.

Mr. President, it is interesting, because, as I said, Mr. Rehnquist was not at that polling place at all.

The AP had a story out of Arizona. The AP reported that Judge Hardy, who was a very prominent and fine judge of our State, said in an interview he had advised Democratic Party challengers and poll watchers in the same years that Rehnquist advised Republicans. Judge Hardy said there was an incident at Bethune precinct in which a Republican challenger got into a scuffle and was escorted from the polling place by two sheriff's deputies, but the judge said it was 1962, and not 1964, and the challenger was not Rehnquist.

Mr. President, I know it was 1962. I was there. I was called because we felt that any attempt—even though our statutes applied at that time—that involved a bodily effort to refuse the right of a person to vote would reflect badly upon the party, and we were not pleased with it. and we made public announcement of it at the time. But this is 1962; it is not 1964. In 1964, a different set of rules applied, and our Attorney General ruled the State practices must conform to the Civil Rights Act of 1964, something which all our attorneys and watchers knew.

"I have nothing to hide," Harris told the Arizona Republic, although he declined to tell his age or to answer a number of other routine questions about himself. I find nothing wrong with that. This is from the newspaper story, which continues.

Some of the details of his life came to light upon examination of files of past news stories published in the Republic and the Phoenix Gazette.

One showed that in March, 1964, Harris, then 52, admitted in Maricopa County Superior Court that he had sold beer to a 19-year-old youth. At the time Harris was the owner of the Friendly Seven Food Market, at 1853 South Seventh Avenue.

He was fined $500 on a plea of guilty to selling spirituous liquor to a minor. Judge Henry S. Stevens sentenced Harris and allowed him to pay off his fine at the rate of $50 per month.

At the time of his plea, Harris acknowledged a prior conviction for a similar offense in 1960.

Newspaper records then showed that Harris had been a railroad cook. Last night Harris said he had once worked for the Atchison Topeka and Santa Fe Railroad, but he declined to tell a reporter what kind of a job he had at the railroad.

Again, that is his right.

Another story in the Republic shed more light on Harris' past.

The article reads: "It was a September 15, 1961 news account of his being severely wounded in the abdomen by a bullet fired by an irate, 21-year-old woman whose $107 welfare check Harris cashed, withholding $81 he said the woman owed on her grocery bill.

Mr. President, I offer all this material merely as background; because if we are going to hear a repetition of the charge that Mr. Rehnquist denied or attempted to deny anyone of his right to vote, I am going to have to repeatedly stand up on this floor and challenge the veracity of it, because I was there, and it is just not true.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. GOLDWATER. I am happy to yield.

Mr. BAYH. I had not intended to interject this incident into the debate. However, one Member of this body did include it in the RECORD. It was one point, and we said the evidence was quite inconclusive. However, since the Senator from Arizona has gone very close to suggesting that some of us were not being kind with the truth, I ask unanimous consent to put the clippings of that era into the RECORD, for all Senators to read, and then they will judge for themselves whether there was any voter intimidation or alleged harassment.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Arizona Republic, Nov. 4, 1962]

CHALLENGERS TO WORK AT POLLS

Maricopa County voters yesterday were urged to make sure they are properly registered, and that they vote at the right polling place to avoid a slow-down in voting.

George Erhardt, director of the County Election Bureau, said election boards have been schooled in handling challenges to avoid as much delay as possible. But Republican Party officials have warned they will challenge every Democratic voter whose qualifications can be questioned.

Erhardt said inspectors have been instructed to take any challenged voter from the line so it can continue to move while the judges handle the challenge.

Meantime, Democratic Party officials said they will have watchers at the polls for the purpose of seeing that voters' rights are protected.

A spokesman for the Republicans said a return address letter has been mailed to many registered Democrats in some areas of Maricopa County, and the challengers will be on hand to question eligibility of every voter where this letter came back undelivered.

Vince Maggiore, Democratic county chairman, an attorney said the Democrats have organized a committee of some 100 attorneys to try to protect the right of every citizen to vote, and he accused the Republicans of using the challenge to delay voting and keep Democrats from the polls.

Under the law, Arizona voters who change their place of residence from one precinct to another before the deadline for registration and do not reregister are disqualified, but if the residence change occurred after the deadline, they may vote in their old precinct.

Under general procedure, a challenged voter is questioned by the election board officials, and he may be required to sign an affidavit that he is a resident of the precinct and eligible to vote under threat of prosecution for perjury.

Republican officials denied any intent to hold up or delay voting, and said they are merely seeking to prevent abuse of voting laws.

[From the Phoenix Gazette, Nov. 6, 1962]

CHALLENGERS TEST VOTERS' LITERACY

(By Bill Herman)

Balloting was slowed down for a while this morning in at least three South Phoenix precincts by challengers who demanded that voters read from portions of the U.S. Constitution to prove they were literate.

Two assistant U.S. district attorneys, an FBI agent, a deputy county attorney, and attorneys for both political parties investigated the incidents.

The challenges were based on an Arizona law which requires a person to be able to read and write in the English language as a condition of voting.

There were no arrests, and the challengers withdrew after conferring with the lawyers.

The county elections bureau said the incidents were reported at Bethune Precinct, 1510 S. 15th Ave.; Okemah, 3146 E. Weir, and Sky Harbor, 3801 E. Washington. There was also an unconfirmed report that similar activity took place at Broadway Precinct, 1701 W. Roeser.

George Erhardt. county elections chief, called the challengers "over zealous."

At Bethume School precinct, Carl Sims, 1821 W. Madison, a former state legislator, said a Republican challenger "was trying to disenfranchise our citizens down here by subjecting voters to a literacy test."

When the U.S. attorney's representatives arrived, Sims told them: "If you don't get that man out of there I'll get some people up here to get him out. He's stopping us from voting."

Mrs. Bessie Bass, 1213 S. 12th Ave., the election marshal, said 13 voters out of 565 had been challenged by 11:30 a.m.

Another voter was challenged on the literacy basis by Jordan Harris, 1825 W. Apache, a Democratic challenger.

Twelve voters were challenged, most of them on their ability to read the U.S. Constitution, by Wayne Bentson, a Republican challenger, of 3550 W. Seldon Lane.

Mrs. Lillie Mae Hall, 1317 W. Pima, an inspector, said none of the challenged voters failed the test though one did refuse to take it and left the polls.

"We also did not hold them to exact pronunciation of the harder words, like tranquility,' Mrs. Hall said.

Mrs. Bass said many of those challenged were upset or angered by the request.

The precinct has a total registration of 1,119.

Most of those being challenged were Negroes and persons of Mexican descent.

J. D. Holmes, a Negro and member of the Arizona House of Representatives, charged that Republicans were "using Mississippi tactics."

He said they were trying to "thwart the minority vote in the state."

Holmes claimed 15 to 20 persons, angered at the delay, left the polls without voting.

[From the Arizona Republic, Nov. 7, 1962]

VOTER CHALLENGES BRING PROBE

A number of Negroes and Spanish Americans attempting to vote in south Phoenix yesterday were challenged on their literacy and residential qualifications.

The challenges, made by Republicans, led to a brief scuffle in one precinct.

The challengers in seven south side Phoenix precincts were so aggressive that Sen. Carl Hayden, D-Ariz. asked the FBI and the U.S. district attorney's office to investigate.

A Democratic official claimed such tactics have been used in Maricopa and Pima counties for several years. Challengers demanded that would-be voters read a portion of the U.S. Constitution to prove their literacy and show proof of legal residence.

Some persons said the challenging obstructed their right to vote and caused delay for those waiting to vote.

The scuffle came at the polling place in Mary McLeod Bethune School, 1510 S. 15th Ave., where opposing party pollwatchers struggled briefly inside and an angry crowd gathered outside.

Police hustled the combatants inside the nurse's office and Mrs. Ellen Jane Greer, deputy county attorney, restored order.

The U.S. district attorney's office made two checks at the polling place after receiving repeated complaints. The first was made at 11 a.m., and the second—at the request of Sen. Hayden—at about 4:30 p.m.

The first investigation was made by William J. Poudsen Jr. and James J. Brosahan, assistant district attorneys on reports that the voting line was being delayed by the challenge.

Several of the voters, mostly Negroes, declared they felt discrimination was involved, it was reported.

About 17 potential voters had been challenged. Witnesses said many were asked to read parts of the U.S. Constitution.

Shortly after the first inquiry, word of the situation reached Sen. Hayden in Washington.

Carl Muecke, U.S. district attorney here, said last night that his office was then contacted by Hayden's Phoenix office. The latter relayed Hayden's request to join the FBI in a further check of the incidents.

Muecke said he and two FBI agents went to the school and "talked to people who wished to make statements." He said the investigation included talking to those involved "on both sides."

The district attorney said it was reported that 50 would-be voters had turned away from the polls without casting ballots. He said their reasons were not known. They apparently did not include rejection for failure to pass the literacy test, however.

Muecke said the FBI is continuing the investigation and should make its report to his office by the weekend. He said his office will then evaluate the report to see if any federal law or laws have been violated.

In the middle of the fracas at The Bethune School were Wayne C. Bentson, 3550 W. Seldon Lane, a Republican challenger, and Pat Marino, 6439 S. Fourth Ave., a Democratic party representative.

Bentson told police he wanted to file an assault complaint. He insisted Marino intercepted him as he left the nurse's office after making a phone call to party headquarters.

"He grabbed me by the arm and twisted me around," Bentson said. "He grabbed me by the belt and pulled me up against the wall. I hit at him and I meant to."

Marino claimed it all happened when Bentson shoved him as he was entering the nurse's office.

"He hit me in the mouth," Marino said. "I didn't lay a hand on him."

Police made no arrests, suggested both see the county attorney today.

Mrs. Greer, making her second call of the day at the precinct, advised the election board it could exclude anyone of either party who was causing a disturbance.

The board voted to exclude both men, along with another Democrat and another Republican challenger. Both challengers were quickly replaced with substitutes acceptable to the board.

Republican challengers were reported active in seven south side precincts. Mrs. Greer reported she responded to complaints from three others, Sky Harbor, Parkview and Okeman.

Other troubles were quickly settled.

Richard G. Kleindienst, state GOP chairman, guessed that 90 per cent of some 300 challengers in Manicopa and Pima counties were Republican.

"These challengers are the same persons, under the same instructions, who have been doing this is Maricopa and Pima counties since 1956," he said.

But Vince Maggiore, county Democratic chairman, insisted that some Republican challengers were assuming authority reserved to election board officials.

"The tactics being used by Republican challengers in minority areas reflect discredit on a great national party," he said.

"There should be no place in Arizona for deliberate attempts to impede the voting of groups which have fought so hard for their rights."

Responded Kleindienst:

"We challenge in precincts where it has been demonstrated in the past that some parts of the Democratic organization in Maricopa County try to crowd into the polls at the last minute people who are not qualified to vote.

"Our success is the thing that's got them upset. I should think they'd be a little bit embarrassed to point at us."

He challenged Democrats to show where one qualified voter was kept from the polls by challenges.

Democrats claimed that in one or more precincts Republican challengers were calling upon voters to read sections of the constitution "containing a lot of big and difficult words."

They also were demanding an explanation of the word "tranquility," and challenging voters who hesitated, Democratic poll watchers claimed.

Under state law, voters must be able to read from the U.S. Constitution unless they are physically unable to do so. Typed passages are provided for election officials, who are the sole judges of the voter's qualifications.

[From the Arizona Republic, Nov. 8, 1962]

TEMPERS COOL, PROSECUTIONS FADE IN WAKE OF INCIDENTS AT POLLS

Nobody asked for prosecution yesterday in the wake of interparty incidente at the polls during Tuesday's election, Ellen Jane Greer, deputy county attorney, said.

"I guess tempers cooled when the polls closed," she said.

Mrs. Greer said the law prohibits anyone from illegally interfering with the election process.

She declined to say whether anything reported to her during the hectic events of Tuesday would be deemed unlawful.

Meanwhile, the FBI had nothing to report on its investigation into claims of intimidation of electors by one or more Republican challengers at one polling place.

Carl A. Muecke, U.S. attorney, said he hadn't received an investigation report from the FBI. He ordered the probe at the request of Sen. Carl Hayden, D.-Ariz.

In Tucson, the chairman of the Pima County Democratic Central Committee charged harassment and abuse of the right of challenge by Republicans Tuesday.

But the Republican county chairman defending it, and the county attorney reported finding no law violations.

Joe Huerta, Democratic chairman, claimed Republicans challenged as a "slow-down tactic" to discourage voters waiting at heavy turnout precincts.

In Spanish-American areas it drove many voters from the polls, he claimed.

"They are proud people," Huerta said, "and this embarrassed many of them."

The GOP chairman in Tucson, John Leonard, denied the law was abused while saying that 30 to 45 challengers were successful in one area.

County Attorney Jack Podret of Tucson said his office investigated dozens of complaints from both parties, "just the same complaints we get every election day."

Most challenges were made on the voters ability to read the U.S. Constitution, as required by state law, or the claim the voter no longer lives in the precinct he wants to vote in.

[From the Arizona Republic, Oct. 21, 1964]

BALLOT SECURITY OFFICER NAMED

William H. Rehnquist, Phoenix attorney, has been named chief ballot security officer in the Nov. 3 election by the Maricopa County Republican Committee.

"We intend to challenge voters in some of the precincts in which claimed irregularities have occurred in the past," said Wayne E. Legg, committee chairman.

Rehnquist, cochairman of the 1960 ballot security program, said schooling sessions have been scheduled for Oct. 29 and 30 to train workers who will be assigned to the polls.

[From the Phoenix Gazette, Oct. 22, 1964]

GOP PLANS CHALLENGE SCHOOLING

Voters will be challenged in some precincts where irregularities have been claimed in the past, Wayne E. Legg, chairman of the Maricopa County Republican Committee, declared today.

Legg announced the appointment of William H. Rehnquist, Phoenix attorney, as the chief ballot security officer.

Rehnquist, who is also general counsel for the county GOP committee, said two schooling sessions have been scheduled to train workers who will be assigned to various precincts for challenging purposes. He said one school will be held Oct. 26 and the other Oct. 29.

In 1960 Rehnquist was cochairman of the ballot security program and in 1962 headed a committee of lawyers formed to protect legal ballot procedures. Don Froch heads the lawyer group this year and Fritz Randolph, also a Phoenix lawyer as well as a former aide to Senator Goldwater, is serving as coordinator of the program.

[From the Arizona Republic, Nov. 4, 1964]

MOST MARICOPA VOTERS PLAY THE WAITING GAME—BALKING MACHINES CAUSE COMPLAINTS

It was a waiting day and night of aching feet and frustration at many polling places in Maricopa County yesterday.

Voters stood in line for as long as four hours as election officials grappled with the problem of malfunctioning voting machines and charges of harassment of voters.

At 10 p.m., at least 500 voters still waited to cast their ballots at a half-dozen precincts in Phoenix and suburbs, all that were left after as many more quit the waiting game in disgust when their radios projected Lyndon Johnson as the presidential winner.

Attendants at Glendale Precinct 4 said the discouraged voters went home, convinced that their votes were not needed to determine the winner.

Precinct 4 was still pushing a line at 10:30 p.m. with more than 200 voters to go. Some had waited since shortly after 6 p.m. Many had not eaten their evening meal and lightly clad women complained of the evening chill. One couple said they had come to the polls, in the Civic Center, three times during the day in hopes of avoiding the long lines.

At Tempe No. 7, there were 253 voters lined up at 10:30 p.m. and voting was expected to continue for at least three hours.

Everywhere during the evening, reporters and election officials said voters were fighting the boredom of waiting with guessing games and good-natured joking, while they swallowed hot coffee from thermos jugs and snuggled in coats and parkas to ward off the cold.

Democratic Party leaders Charged "substantial harassment of Democratic voters" in six Phoenix precincts. State Chairman Robert H. Allen said reports reached his office indicating the harassment consisted mainly of "indiscriminate mass challenging of voter residency."

He named the precincts as Murphy, Riverside, Butler, Sierra, Vista, Sullivan and Glendale No. 4, all with a substantial percentage of voters in Negro and Mexican-American categories. He indicated that most of the trouble caused by the complaints was resolved.

Republican voters in Brown Precinct were among the first to charge that a voting machine was not registering properly. A woman voter said that when she pulled the lever for Goldwater, the Johnson lever kicked out and she presumed her vote went to Johnson. The next voter in the booth came out without complaint.

The third voter made a complaint similar to the first—the machine voted Democratic when the Republican lever was pulled. The trouble was soon corrected.

At the West High Precinct, more than 100 voters were forced to wait when one machine would not function at all. * * *

Complaints of malfunctioning were fairly common. Republican headquarters in Phoenix said many elderly persons had to stand in line for two hours at Youngstown Precinct because of trouble with the machines.

By scheduled closing time, only 1,302 of 1,600 registered voters had pulled the levers at the Sungold Precinct in Palo Verde School.

Avalon and Suncrest Precincts had long lines at closing time and the two machines at Deer Valley Precinct in Church of the Nazarene had not yet served more than 200 voters at 7 p.m.

At Deer Valley, the two machines handled 35 voters an hour during the long day and election judges complained they had no access to telephones so they could call out for help—presumably for more machines.

Some precincts reported smooth sailing all day with no complaints or problems. Long Precinct had only 350 voters to go at 2:30 p.m. out of 948 registered, and Alhambra Precinct had only 300 out of 1,060 voters on the yet-to-vote list by 3:30 p.m.

The Maricopa County Registration and Elections Bureau looked at the day of heavy voting and some confusion with a less-than-worried air.

Complaints were "unusually light," officials said, in view of the tremendous outpouring of voters. The chief complaints involved voters whose affidavits had not been filed with the bureau. The bureau blamed registrars for the oversight.

Mr. GOLDWATER. I will put them into the RECORD at a further point. In case the Senator cared to dwell on this at greater length, and he evidently has intended to——

Mr. BAYH. The Senator brought it up.

Mr. GOLDWATER. Mr. President, I have the floor.

He outlines that as one of the reasons, and has three pages on it in his minority report memorandum. I want to establish a firm understanding among Senators as to what took place. There are some allegations that I cannot support because I do not have any knowledge of them. But I do know in this case what happened, and, from personal knowledge, know that nothing happened that could in any way reflect on Mr. Rehnquist.

Mr. BAYH. The Senator from Arizona said there was no voter harassment.

Mr. GOLDWATER. That is right.

Mr. BAYH. Is the Senator not aware, since he was there, that there was sufficient harassment to have the FBI called into the Bethune precinct? If he would like to read the FBI field report—it is about a 36-page document—I am sure the chairman of the Judiciary Committee will make it available. If there was no harassment, why did the FBI do that?

Mr. GOLDWATER. The Senator does not understand what I have been trying to talk about. We have had the right in Arizona—and I think most States have it—to appoint two poll watchers to every precinct or to any precinct we care to. If these poll watchers see some person in line who they suspect has voted before or is voting not in consonance with the law, they have the right to challenge. This will happen. The entire line stops while that challenge is corrected.

But I will say this: We have found in the predominantly Republican districts at times, not often—neither side has abused this—the Democrats would challenge a Republican because they knew the whole line was going to vote Republican. When we challenged down in these districts, or up north in the districts where we had reason to believe, in the days before the 1964 Civil Rights Act and the 1965 Voting Act, that a man could not read or write, we had the legal right to challenge that. I think it was demanded upon us to make sure that no illegal votes were cast.

I will go back one more step: There may have been incidents at Bethune—the only case I can recall was a case of a man—certainly not Mr. Rehnquist—being moved out of the polling place by the police. There is no record of this man ever having been booked; there is no record of any charge being made against him. It was merely to settle an argument that had arisen between a Democratic watcher and a Republican watcher, before either took the trouble to call into headquarters and say, "What should we do?"

Mr. BAYH. Looking through some of the statements supporting Mr. Rehnquist, I find the name of Judge Charles Hardy. Is the Senator from Arizona familiar with Judge Hardy?

Mr. GOLDWATER. I know him very well.

Mr. BAYH. What is his capacity? Could the Senator tell the Senate what it is now?

Mr. GOLDWATER. He was judge of the superior court at that time, I believe. I think he possibly has been elevated now, but I would not swear to it.

I have great confidence in him. He is a Democrat. We think very highly of him. He is the one that stated, and I read it, that the alleged incident in question took place in 1962 and not 1964.

Mr. BAYH. I would like to read the statement in the brief that was referred to by the Senator from Arizona. In fact I was sufficiently unimpressed with this particular incident compared to everything else that I have not included it in my speech which I shall make tomorrow. I rise only because the Senator from Arizona takes issue here, and this is the only point he stressed. He seems to have indicated that anyone who thinks otherwise is not telling the truth. If there was no intimidation during the period in which Rehnquist was involved as a ballot security officer, then why did Judge Hardy write this?

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 next preceding the election and that he was unable to read the Constitution of the United States in the English language. In each precinct the Republican challenger had the names of persons who were listed as registered voters in that precinct but who apparently had not resided there for at least thirty days before the election. In precincts where there were large numbers of black or Mexican people, Republican challengers also challenged on the basis of the inability to read the Constitution of the United States in the English language. In some precincts *every* black or Mexican person 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 waiting to vote and asking for their names. There is no doubt in my mind that these tactics of harassment, intimidation and indiscriminate challenging

were highly improper and violative of the Spirit of Free elections.

That is not BIRCH BAYH, that is Judge Hardy.

Mr. GOLDWATER. The Senator made a very important observation when he quotes Judge Hardy's letter in 1962; but that was in 1962, remember. And Judge Hardy made clear that Mr. Rehnquist never attempted to challenge voters at any polling place. The Republican watchers—not Mr. Rehnquist—had made challenges. We had to challenge them to get the Democratic boards of supervisors to approve of the watchers, and we finally did. Remember that in 1962, under the Arizona constitution and statutes, a man could be challenged as to whether he could read or write or there was reason to question whether he was registered in more than one precinct. I do not know Judge Hardy well enough to know what he would call harassment. There was only one incident that I can recall, and it may have been in Bethune where one man, I do not remember whether he was a Democrat or a Republican, was questioned and the police got him outside.

The Senator will notice, if he reads Judge Hardy's letter, that in 1962 the statutes of Arizona at that time had not been changed by the Civil Rights Act of 1964, so it still prevailed. The Republican Party, being the minority party in those days by, I would judge, 3 to 1, wanted to see that no votes were cast against us that should not legally be. We wanted to make every vote count, naturally, just as the Democrats put watchers in Republican districts.

Mr. BAYH. The Senator is relying on the rather strong letter from Judge Hardy. He does not question the judge's qualifications when he suggests that Mr. Rehnquist should be on the Supreme Court.

Mr. GOLDWATER. That is right.

Mr. BAYH. That same man testifies here about the blatant and unauthorized intimidation. Yet the Senator from Arizona says is a lie to make the accusation that there was intimidation going on in the precinct.

Mr. GOLDWATER. It is definitely a lie that Mr. Rehnquist was ever involved. I can only take Judge Hardy at his word, and can only rely on my own personal observations. He thinks highly of Mr. Rehnquist and has approved of him for the Supreme Court. I have respect for Judge Hardy. I do not know him intimately. I am not a lawyer, but I have great respect for him. If my memory serves me correctly, I believe I voted for him, even though he was a member of the other party. Occasionally we do that.

I would say this as to what the Senator says, which I believe to be correct, that this will not be made an issue so that we have then eliminated one little facet of this debate and perhaps we can close the door on that, if the Senator will tell his comrades in arms who want to debate this. If he will do that, I will be happy to sit down and say that this evening has been well spent.

Mr. BAYH. I believe that both sides have presented this clearly. The only reason I rose to engage in this colloquy was that I thought I heard the Senator say that he would say it was a lie if anyone on this floor said there had been any voting harassment in those precincts.

Mr. GOLDWATER. I intend to do that every time Mr. Rehnquist's name is brought into it. Mr. President, I ask unanimous consent to have the entire letter from Judge Hardy printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

PHOENIX, ARIZ.,
November 11, 1971.

Hon. JAMES EASTLAND,
Senate Office Building,
Washington, D.C.

DEAR SENATOR EASTLAND: I am informed that at a hearing conducted by the Senate Judiciary Committee on Tuesday, November 9, 1971, Mr. Clarence Mitchell appeared in behalf of the National Association for the Advancement of Colored People and testified in opposition to the confirmation of the appointment of the Honorable William H. Rehnquist as an Associate Justice of the Supreme Court. I am also informed that in the course of his testimony Mr. Mitchell stated that Mr. Rehnquist had in the past been guilty of improper challenging of black voters during a general election a number of years ago and that his organization had received information from me which contradicted the statements which Mr. Rehnquist may have made regarding this matter.

In fairness to all concerned, I feel that I should inform you of my recollection of the events in question. I have also inquired of a number of friends who were Republican party workers in an effort to obtain further information.

To my knowledge, no one representing the National Association for the Advancement of Colored People has ever discussed Mr. Rehnquist with me.

I am informed that Mr. Mitchell testified that the events in question occurred during the general election of 1964. It is my recollection and the recollection of a number of others, both Democrats and Republicans, that actually 1962 was the correct year.

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 next preceding the election and that he was unable to read the Constitution of the United States in the English language. In each precinct the Republican challenger had the names of persons who were listed as registered voters in that precinct but who apparently had not resided there for at least thirty days before the election. In precincts where there were large numbers of black or Mexican people, Republican challengers also challenged on the basis of the inability to read the Constitution of the United States in the English language. In some precincts every black or Mexican person 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 waiting to vote and asking for their names. There is no doubt in my mind that these tactics of harassment, intimidation and indiscriminate challenging were highly improper and violative of the spirit of free elections.

Arizona Statutes provide grounds for challenging voters, appointment of challengers, proceedings on challenge and rules for determining the residence of a voter upon challenge. In addition to having a challenger at each voting precinct, each political party is also entitled to have a party representative present at all times. In every general election disputes arise concerning the interpretation of the Arizona Statutes or their application.

During the past several years both of the major political parties have had a committee of lawyers available at party headquarters on election days to assist in resolving any disputes which arise. Usually when a party headquarters is notified of a dispute in a voting precinct, one of the lawyers is dispatched to the scene to discuss the matter with the party representative there and to provide him with legal advice and assistance.

In 1962 I was in charge of the lawyers who acted in behalf of the Democratic party and Mr. Rehnquist in charge of the Republican lawyers.

I never observed Mr. Rehnquist attempting to challenge voters at any polling place. I understand that there was testimony that he had challenged voters at Bethune and Granada precincts. I can state unequivocally that Mr. Rehnquist did not act as a challenger at Bethune precinct. Because of the disruptive tactics of the Republican challenger at that precinct I had occasion to be there on several occasions. The same Republican challenger was there continuously from the time that the polls opened at 6:00 o'clock a.m. until about 4:00 o'clock in the afternoon. About that time, after a scuffle, he was arrested and removed from the polling place by sheriff's deputies. Thereafter there was no Republican challenger at Bethune.

With respect to Granada precinct, I cannot give credence to any charge that Mr. Rehnquist was challenging black voters there. In 1962 there were relatively few black voters residing within that precinct.

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 assignment to the various polling places. The person who was in charge of recruitment and assignment was Mr. Gordon Marshall who is not a lawyer and obviously was not under Mr. Rehnquist's direction as a member of the committee of lawyers. I have confirmed this by talking to Mr. Marshall.

I am informed by Mr. Marshall and others that before election day, Mr. Rehnquist met with all of the challengers to explain the voting laws to them. All of these persons insist that the instructions given by Mr. Rehnquist did not in any way suggest that challenging be conducted in a manner to prevent properly qualified persons from voting.

A day or two after the election Mr. Rehnquist and I had lunch together and discussed the events of election day. He expressed strong disapproval of the tactics which I have mentioned above. I felt then and I feel now that his expressions of disapproval were genuine.

Yours very truly,

CHARLES L. HARDY,
Judge, Superior Court.

Mr. COOPER. Mr. President, I am very much interested in this colloquy. I am sure that this sort of thing goes on in many States of the Union, and possibly in the State of the Senator from Indiana. I have served as an election officer and a challenger at polling places in Kentucky. We do that to protect the interests of our

own party. So do the Democrats. There is nothing wrong with that.

Mr. GOLDWATER. There is nothing wrong with that. It is done, in my opinion, in most of the States of the Union. It is customary.

Mr. COOPER. I may say that I had to make some difficult challenges many years ago. We did not make many friends doing that, but it was our duty to do so. I recall in a precinct in western Kentucky where there were not many Republicans and in some counties there were less than 100 Republicans. Of course, we had to protect ourselves and we depended upon the honesty, in many cases, of the other party, to preserve the purity of the election, and in other counties we had to send people in from other precincts and sometimes people from other precincts would come into ours. There were precincts where we had to have poll watchers. That is true in every State, unfortunately.

The adoption of voting machines has helped in that regard to remedy many of those conditions, but I repeat that poll watchers and challenging are not only common practices but are proper practices.

Mr. GOLDWATER. The Senator is so correct. I can recite one instance that took place in a State adjoining ours where some Indians were allowed to vote merely by making a mark with their thumb print, or an X, and one of the Republicans who spoke their language very well stood the legal distance from the polling place and in a loud voice told the Indians that the man they were going to vote for had destroyed their horses. I do not say that that was right, but had there been a Democratic challenger there he would have challenged that. The man made the statement.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. COOPER. I yield.

Mr. BAYH. Mr. President, the Senator from Kentucky is such a legend across the river from my home State of Indiana that I wonder if I might ask him a question. He has been a judge, an ambassador, and a Senator.

I am very well aware of the fact that we all have to take certain precautions to keep the other side from stealing the election. I wish I could say that our side is pure on this matter. However, it is not.

When I first ran for the Senate, I became very distressed that in the small towns they would say that the big cities are stealing all the votes and in the cities they would say that the small towns are stealing the votes.

It seems to me that we have to have protection in both places. In the case to which the Senator from Kentucky alluded, has there ever been anything that in his judgment could be categorized as a well-organized campaign of outright harassment and intimidation to discourage persons from attempting to vote?

Mr. COOPER. I am sure that the Senator from Indiana has been in many races. I do not know how many but, he has been in a number of them. I think I have been in 20 campaigns, beginning with my race for the State legislature.

I have been through elections where we used to come to the precincts and bring the ballot boxes back to the courthouse. I have been in elections when we had voting machines.

I have never seen an election when there was not some feeling and some emotion. Of course, there is a great interest in the candidates and in the parties. However, we come sometimes to situations where passions are aroused and fights take place at the polls. I am sure that the Senator knows that this happens. There are great feelings on the part of both parties to protect their rights.

There have been times when efforts would be made to transport voters, who would first vote in their own precincts, and try to have them vote in a second and third precinct. Unfortunately, those practices have occurred.

I suppose that in many cases one side or the other does feel itself being harassed. If the poll watchers are doing their duty, it cannot be properly called harassment. I should note that Kentucky voting laws did not require a test—such as a literacy test. The use of poll watchers and the practice of challenging at the polls can be called an effort to protect the rights of both parties and to insure their equal treatment.

Mr. GOLDWATER. Mr. President, one important part of Judge Hardy's letter which has not been read aloud states:

> A day or two after the election, Mr. Rehnquist and I had lunch together and discussed the events of election day. He expressed strong disapproval of the tactics which I have mentioned above. I felt then and I feel now that his expressions of disapproval were genuine.

Thus, Mr. President, these practices may have existed, but it had never been under Mr. Rehnquist. He has never been associated with it. And he has expressed strong disapproval of any challenge that might involve any physical force or intimidation at any time that I can think of. There is only one time in my memory that this took place and he definitely was not involved.

Mr. BAYH. Mr. President, I appreciate the statement, but there was a time when Judge Hardy's letter makes it rather clear that it did occur.

Mr. FANNIN. Mr. President, I could speak at length on the outstanding qualifications of William H. Rehnquist and also of his record which refutes all the accusations that have been made against him. But I think it would be repetitious. The CONGRESSIONAL RECORD is replete with this coverage. I will just speak for a few minutes this evening.

President Nixon has stated that Mr. Rehnquist has "one of the finest legal minds in the whole Nation." In the past few weeks since his nomination this conclusion has been overwhelmingly seconded by his former professors, his colleagues in private practice and in public service, and significantly, from those who have been his legal and political adversaries through the years. Throughout his career this relatively young man has demonstrated again and again that he has exceptional intellectual and professional competence. In addition, those who have been the closest to him attest to his strong character, fairness, and objectivity.

His intellectual excellence was first demonstrated by outstanding academic accomplishments as an undergraduate and as a law school student. When he received his B.A. degree from Stanford in 1948, it was "with great distinction" and as a member of Phi Beta Kappa. He also received an M.A. in political science from Stanford in 1949 and an M.A. in government from Harvard in 1950.

He returned to Stanford to attend law school from which he graduated first in his class in 1952. While there he served as an editor of the Law Review and was elected to the Order of Coif. In its report to the Judiciary Committee, the American Bar Association's standing Committee on the Federal Judiciary stated of his law school record:

> "[H]e was highly respected by the faculty and fellow students as a gifted scholar. A classmate who is now a partner in a leading west coast firm, at our request, interviewed several other members of Mr. Rhenquist's class. Their evaluation, in part, is as follows:
>
> "Mr. Rhenquist is of exceptional intellectual and legal ability. He was a law student among law students, * * *. From the standpoint of intellectual and legal ability, there cannot be question among reasonable men on his exceptional qualifications.
>
> "His personal integrity is not subject to challenge. While various of the interviewees, including myself, by no means agree with some of the political and social views of Mr. Rehnquist, each of us is completely satisfied, that he will approach his task with objectivity, that he will decide each case that comes before bim on the thorough analysis of applicable law and a careful study of the facts."

Mr. Rehnquist's former professors share the opinions voiced by his fellow classmates. One has stated that "he has that all important capacity for steady continual growth" and another that "He was the outstanding student of his law school generation." Among the several letters to the Judiciary Committee on behalf of Mr. Rehnquist the following one from Phil C. Neal, a former professor at Stanford, and now dean of the University of Chicago Law School, is typical:

> 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 tbe School over a number of years. He has remained in my mind as one of the most impressive students I have had in some twenty-two years of teaching.
>
> 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.

Following law school, Mr. Rehnquist came to Washington where he served as law clerk for Mr. Justice Robert H. Jackson during the years 1952–53. Typically, the ABA found that his fellow clerks during this period respected his ability.

In 1953, Mr. Rehnquist moved to Arizona and entered private law practice in Phoenix. He was a partner in various Phoenix law firms from 1955 to 1969. In addition to his varied legal practice in Phoenix, Mr. Rehnquist was quite active in bar association activities. These in-

cluded a term as president of the Maricopa County Bar Association which includes the Phoenix area and at that time had a membership of approximately 1,200. He was also active in the State bar association and its many activities including the Arizona Law Institute and membership on the Committee on Uniform Laws. When he left Phoenix his rating in Martindale-Hubbell was the highest, and as the ABA report states:

He was clearly a person of recognized professional quality who, for his age, was highly regarded.

This conclusion is supported by the statements of fellow practitioners who came to know and admire Mr. Rehnquist's legal abilities during his 16 years as a practicing attorney in Phoenix. C. A. Carson III, a former law partner and a member of the ABA board of governors and House of Delegates, characterized the nominee as "a wonderful man, a great lawyer, and a scholar with a fine mind." Another former law partner, James Powers, described Mr. Rehnquist as "a first rate legal scholar," adding:

He is the ultimate reasonable man. * * * I'm sure he'll make an excellent Justice.

I think that the views of the Arizona legal community are aptly summarized by the statement to the Judiciary Committee of Howard Karman, president of the Arizona State Bar Association:

I have known Bill Rehnquist professionally for a number of years. After his nomination by President Nixon, I talked to a great many people in Arizona, Republicans and Democrats, liberals and conservatives. To a man they had nothing but praise for Bill Rehnquist. I was surprised that no lawyer I spoke with had an unfavorable comment to make, even those who find themselves at the opposite end of the political spectrum.

He concluded his statement as follows:

I believe that Mr. Rehnquist is admirably qualified by virtue of intellect, temperament, education, training and experience to be confirmed * * *.

The collective views of Arizona attorneys on this nomination are also reflected in the unanimous endorsement given Mr. Rehnquist by the board of governors of the State Bar of Arizona. They praised him for having "continually demonstrated the very highest degree of professional competence, integrity, and devotion to the ends of justice."

At the national level, the conclusion of the American Bar Association's standing Committee of Federal Judiciary speaks for itself:

The present conclusion of the Committee, limited to the area described above, is that Mr. Rehnquist meets high standards of professional competence, judicial temperament, and integrity. To the Committee, this means that from the viewpoint of professional qualifications, Mr. Rehnquist is one of the best persons available for appointment to the Supreme Court.

The qualities that earned these plaudits for Mr. Rehnquist from practitioners were also known to the academic community in Arizona. Dean Willard H. Pedrick of the Arizona State University College of Law felt that these qualities would make him an excellent professor of law and approached him on the subject about a year ago. Because of his commitment to the Department of Justice, Mr. Rehnquist declined to consider such a post. Dean Pedrick wrote to notify the Judiciary Committee of the intelligence and integrity of the nominee and warmly endorsed his nomination to the Court. He stated:

The qualities that would, in my judgment, have made him an excellent law professor should make him an excellent Justice of the United States Supreme Court. On that Court, charged with responsibility to serve the interests of all of the people in interpreting the Constitution of the United States and the laws of Congress, I am confident he will serve his country with great distinction.

In addition to the support of colleagues who have worked closely with him in the daily practice of law, public officials throughout the State of Arizona have added their warm support for Mr. Rehnquist. Arizona Gov. Jack Williams described Mr. Rehnquist as a "real scholar, an outstanding attorney." Vice Chief Justice Jack D. H. Hays, of the Arizona Supreme Court, noted that Mr. Rehnquist is "a very outstanding young man, a tremendous legal scholar." Former Arizona Supreme Court Judge Charles Bernstein stated:

I couldn't think of a better choice. * * * He has an extremely well-balanced philosophy. * * * A sense of feeling for human beings, especially for the little man.

Gary Nelson, attorney general of Arizona, noted:

I was ecstatic at the announcement of his nomination. * * * I think he's outstanding.

State Senator Sandra D. O'Connor, a law school classmate, stated:

He has the potential to become one of the greatest jurists of our highest court.

She noted that as a law student:

He quickly rose to the top of the class, and, frankly, was head and shoulders above all the rest of us in terms of sheer legal talent and ability.

Arizona State Republican Chairman Harry Rosenzweig remarked:

The President * * * has made a very fine selection. He is not only a lawyer but a student of the law.

Herbert L. Ely, the State Democratic chairman, also supports the confirmation of William Rehnquist as do the Arizona Republic, the Phoenix Gazette, and the Tucson Daily Citizen newspapers.

As the hearings and the letters to the Judiciary Committee on this nomination make clear, the tributes to Mr. Rehnquist from his fellow Arizonans go on and on. It is also clear that the tributes have flowed equally from those who have worked with him in his capacity as Assistant Attorney General in the Office of Legal Counsel. The principal area of expertise of this Office is in matters of constitutional law. As you know, the Office—often called the President's law firm—assists the Attorney General in serving as legal adviser to the President and his staff. It also drafts the formal opinions of the Attorney General and gives informal opinions and advice to agencies within the executive branch of the Government. In short, Mr. Rehnquist is, as President Nixon described him, the President's lawyer's lawyer.

As I indicated earlier the endorsement by the people who have worked with the nominee in this position is as strong as that given by those who knew him in Phoenix. Mr. Rehnquist's first assistant in the Office of Legal Counsel, Martin Richman, a former clerk to Chief Justice Earl Warren, and who was in the Office during Ramsey Clark's tenure as Attorney General, but who stayed on during the first 4 months when Mr. Rehnquist came to the Office, had this to say:

I need not dwell on Mr. Rehnquist's legal abilities. He has an incisive grasp for the key issues in a complex problem, the ability to learn a new subject quickly and an exceptional gift for expressing legal matters clearly and forcefully in writing. Though long out of the academic atmosphere, he has a fine scholarly bent, with an inquiring mind on subjects ranging beyond legal matters.

In terms of character, he is strong, honorable, straightforward in his actions and positions. I thought he showed exceptional sensitivity and decency in his decisions on administrative and personnel matters within the Office. While these traits do not necessarily bear on legal ability, they speak deeply of the character of a man.

Mr. Rehnquist approaches legal problems thoughtfully, with careful personal study. He is responsive to persuasive argument, and contributes to it by the articulate presentation of his own views. He brings his considerable legal ability to bear when the issues are broad questions of constitutional law, as well as on more technical matters.

Mr. Richman's successor as first assistant, Thomas E. Kauper, who is now a professor of law at the University of Michigan Law School, also notified the committee that he believed Mr. Rehnquist to be "exceptionally well qualified" for the Court, adding:

William H. Rehnquist is as fine a lawyer as I have encountered. He has a scholarly, intellectual approach to legal problems which is not found in many practicing lawyers. While he and I did not always agree on the resolution of legal issues, I always received a fair hearing and found him eager to learn all that he could before making a decision. In addition to a powerful legal mind, and perhaps equally as important, Mr. Rehnquist has abiding interest in and concern for the development of the law and legal institutions. He has all the qualities to become a truly great judge, and to assume a substantial degree of intellectual leadership on the Court for a number of years to come.

These conclusions are echoed by members of the career legal staff in the Office of Legal Counsel.

Mr. President, I think it is worth emphasizing that those who have known the nominee personally and have worked closely with him throughout his legal career have been unanimous in their praise. Whether they are former classmates, former professors, fellow practitioners in Phoenix, or colleagues in the Justice Department, these people, regardless of political or philosophical persuasion, have given their full support to his nomination and recommend his speedy confirmation.

Mr. President, the qualifications character, and philosophy of William H. Rehnquist have been under microscopic examination for more than a month. Members of the Senate Judiciary Committee had ample opportunity to probe his background and his performance as

an attorney and as an administration official.

The most ardent of investigators and investigative reporters have left no stone unturned in examining Mr. Rehnquist's past.

There has been a concerted effort by opponents of the nomination to turn up some tangible evidence why Mr. Rehnquist should be rejected.

These efforts have failed.

Nothing has been put forward that casts any doubt on the qualifications of William H. Rehnquist to be an Associate Justice of the Supreme Court. His qualifications are superb.

It has been proven that William Rehnquist has not involved in any voter harassment as has been alleged by his opponents. Mr. Rehnquist has denied the charge. Others who were connected with the elections in question also have said that Rehnquist could not have been involved.

Allegations that William H. Rehnquist was a member of an extremist group in the early 1960's are without foundation. He has denied belonging to the group in question, and no evidence has been offered to support the vicious rumor spread by opponents of the nomination.

There has also been a thorough investigation of the legal philosphy of William H. Rehnquist.

Opponents say he lacks an appreciation of civil rights and that he is prone to support more police powers for the government.

Mr. President, neither of these is true.

Mr. President, some interesting observations concerning the debate over the Rehnquist nomination were made by Tom Wicker in the Sunday editions of the New York Times. He places in perspective the question that we are considering here today.

I ask unanimous consent to insert Mr. Wicker's column in the RECORD at this point:

There being no objection, the column was ordered to be printed in the RECORD, as follows:

IN RE REHNQUIST

(By Tom Wicker)

WASHINGTON.—The Senate apparently will confirm Lewis Powell next week as an Associate Justice of the Supreme Court. After that, it will either face up to or delay the far more controversial and difficult matter of William Rehnquist, President Nixon's other nominee to the Court.

As it now appears, Mr. Rehnquist will be confirmed, too, unless those who oppose him are determined enough and able to put together something like the filibuster that, in 1968, prevented confirmation of Abe Fortas as Chief Justice.

This is at least a long-shot possibility because of Mr. Rehnquist's comparative youth (47) and his reputation as a skilled, active and intent champion of strongly conservative causes. Liberals fear he may become for many years the vigorous leader of a reactionary Court, but their dilemma is that no ethical or professional charges sufficient to warrant Mr. Rehnquist's rejection have so far been proved.

That means that the battle has to be fought, if at all, on the tricky ground of Mr. Rehnquist's political views—whether it is called his "judicial philosophy" or his "constitutional approach." The view was put forward in this space on Nov. 11 that this kind of opposition was "dangerous business"—that it suggested the existence of a kind of political orthodoxy, would tend to politicize the Court, would punish some people for their ideas while frightening others out of having any and would lead inevitably to political retaliation.

On balance, with full awareness that Mr. Rehnquist's views on the Bill of Rights seem antilibertarian, and despite weighty arguments from many who disagree, it still is "dangerous business" to reject him for his political views. Is it seriously to be asserted that conservative—even arch-conservative—views disqualify a man for service on the Supreme Court? If so, then what prevents some other Senate from disqualifying a man for strongly liberal views or for being a "new leftist" or a "neo-isolationist" or some other stereotype?

This is not to deny that the Senate has a duty to consider the qualifications of a nominee to sit upon the Court. Or that among the qualifications it ought to consider is his general political, constitutional and judicial view of things. Judge Carswell, for instance, was judged to be lacking in intellectual and legal competence, a judgment that could be solidly documented.

But can it be shown that Mr. Rehnquist lacks fidelity to the Constitution? No, only that in his view it allows more power to the state and less to the individual than many other Americans believe to be the case.

Can it be shown that Mr. Rehnquist's views are factually in error or substantively wrong? No, it is a matter of interpretation, and it is late in the day for liberals to start asserting that the Constitution is an absolute document not subject to interpretation or differing ideas. It is, in fact, the prime duty of the Supreme Court to decide what the Constitution means, on given subjects at given times in history.

Nor is the political aspect of the Rehnquist nomination an open-and-shut affair. No doubt Mr. Rehnquist will be a formidable conservative force on the Court (although that remains a supposition that only time can justify). Even so, the damage he might do to liberal causes could well be less than the political consequences of a third rejected Nixon nominee, a third defeated conservative, in a Senate dominated by liberal Democrats. Just as the Court itself must sometimes practice "judicial restraint," so it may be that the Senate ought to practice some political restraint. This, of course, is a value judgment that each Senator must make for himself.

That also is true of the really crucial question about Mr. Rehnquist, which can best be explained by reference to Mr. Powell. Those who know the Virginia lawyer, a former American Bar Association president, concede that his views in many ways are as conservative as those of Mr. Rehnquist—and that fact was documented in an article by Mr. Powell recently reprinted on this page.

But Mr. Powell, it is said, is an experienced and fair-minded man of judicial temperament who, in deciding legal and constitutional questions, will put aside any personal or political preferences and prejudices that can't be squared with the law and the facts of a case. He might, for instance, generally approve wiretapping as a law-enforcement tool—yet be willing to rule against it when, in some particular case, the facts showed that the law and the Constitution had been violated.

It is to be hoped that that is true—of Mr. Powell and of any nominee, liberal or conservative. Whether or not it is true of William Rehnquist is the vital question about his nomination, and one that each Senator must judge for himself. If Mr. Rehnquist can put his personal views aside when they can't be fairly justified by the law and the facts, then those views should not be the deciding factor; but if any Senator feels that Mr. Rehnquist, or any other nominee, could not so discipline himself intellectually, voting to reject him would surely be a duty.

Mr. FANNIN. Mr. President, William H. Rehnquist is a very human person. A man who has a deep respect for human rights and human dignity. If anyone is in the mainstream of American thought when it comes to the rights of man, it is William H. Rehnquist.

He has stated clearly that he believes in the Bill of Rights. He has said that the Government must be restrained in exercising police powers which could threaten our rights as free men.

Mr. President, I could go on at great length and delve into the reams of material that have been produced in the past month concerning the nomination. I do not think that this is necessary. It is obvious that the overwhelming mass of the material produced makes it clear that the nomination should be confirmed.

William H. Rehnquist is equipped as legal scholar, and as man of human compassion to be an outstanding Associate Justice of the Supreme Court.

It is with great pleasure that I recommend his confirmation.

MR. WILLIAM REHNQUIST AND BROWN AGAINST BOARD OF EDUCATION

Mr. BAYH. Mr. President, new and disturbing information concerning Mr. William Rehnquist's commitment to equal justice in this country was revealed today. According to Newsweek magazine, Mr. Rehnquist, while a law clerk to Mr. Justice Jackson, wrote a memorandum which argued that the rule of "separate but equal" of *Plessy* vs. *Ferguson* should be "reaffirmed." Fortunately for the Nation, Mr. Justice Jackson disregarded his law clerk's advice and voted with the rest of the Court to overrule Plessy and hold in *Brown* vs. *Board of Education* that segregation in the public schools was "inherently unequal."

That case, Mr. President, was perhaps the most significant decision the Court made this century. It was the decision which at long last made the great promise of the 14th amendment—"no State shall deny to any person the equal protection of the laws"—into a realizable goal. And, importantly, it was a unanimous decision.

Mr. Rehnquist was a 28-year-old law clerk when he wrote to Mr. Justice Jackson a memorandum entitled "A Random Thought on the Segregation Cases." In it, he argued that Plessy "was right and should be reaffirmed." He responded to the appellant's argument—made by the present Mr. Justice Thurgood Marshall—this way:

To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction. To the argument made by Thurgood, not John, Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such

rights have been sloughed off, and crept silently to rest. If the Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy* v. *Ferguson* was right and should be reaffirmed. If the Fourteenth Amendment did not exact Spencer's *Social Statics*, it just as surely did not exact Myrdahl's *American Dilemma*.

It is distressing indeed that Mr. Rehnquist placed property rights on the same plane as human rights in this memorandum. But it is more distressing that he had the same view 10 years later when, in 1964, he opposed a local public accommodations ordinance on the ground that it was an unjustified imposition on the property rights of owners who wished to discriminate on racial grounds. And Mr. Rehnquist insisted even at his confirmation hearings that property rights are as important as human rights.

Perhaps even more distressing, however, is Mr. Rehnquist's view that the Court's efforts "to protect minority rights of any kind" were doomed to failure. His prediction about the Brown case itself—that the Court "must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men"—was, fortunately, quite inaccurate. But the plain implication of the statement is that Mr. Rehnquist does believe the Supreme Court has a significant role to play in protecting the rights of individuals and minority groups. This sadly fits into the later pattern of Mr. Rehnquist's actions with respect to civil rights. He has persistently been hostile to efforts by court or legislature to use law to correct the racial injustices of the past two centuries.

Mr. Rehnquist realized even in 1953 that his was "an unpopular and unhumanitarian position." And so it was. But more important, it is a position which reflects a cramped and narrow view of the role of the Supreme Court in modern American life. It reflects a view of the Court inconsistent with its high role in the protection of the constitutional rights of every American citizen.

Mr. President, I ask unanimous consent that the full text of the memorandum by Mr. Rehnquist to Mr. Justice Jackson which has been made public by Newsweek be printed in the RECORD.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

A RANDOM THOUGHT ON THE SEGREGATION CASES

(Memorandum by Mr. Rehnquist to Mr. Justice Jackson)

One-hundred fifty years ago this Court held that it was the ultimate judge of the restrictions which the Constitution imposed on the various branches of the national and state government. *Marbury* v. *Madison*. This was presumably on the basis that there are standards to be applied other than the personal predilections of the Justices.

As applied to questions of inter-state or state-federal relations, as well as to interdepartmental disputes within the federal government, this doctrine of judicial review has worked well. Where theoretically coordinate bodies of government are disputing, the Court is well suited to its role as arbiter. This is because these problems involve much less emotionally charged subject matter than do those discussed below. In effect, they determine the skeletal relations of the governments to each other without influencing the substantive business of those governments.

As applied to relations between the individual and the state, the system has worked much less well. The Constitution, of course, deals with individual rights, particularly in the First Ten and the Fourteenth Amendments. But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. *Fletcher* v. *Peck*, in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. *Scott* v. *Sanford* was the result of Taney's effort to protect slaveholders from legislative interference.

After the Civil War, business interest came to dominate the Court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. Championed first by Field, then by Peckham and Brewer, the high water mark of the trend in protecting corporations against legislative influence was probably *Lochner* v. *NY*. To the majority opinion in that case, Holmes replied that the Fourteenth Amendment did not enact Herbert Spencer's Social Statics. Other cases coming later in a similar vein were *Adkins* v. *Children's Hospital*, *Hammer* v. *Dagenhart*, *Tyson* v. *Banton*, *Ribnik* v. *McBride*. But eventually the Court called a halt to this reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

In these cases now before the Court, the Court is, as Davis suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction. If this Court, because its members individually are "liberal" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction. To the argument made by Thurgood, not John, Marshall, that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy* v. *Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's *American Dilemma*.

THE NATIONAL CONFERENCE OF BLACK LAWYERS OPPOSES THE NOMINATION OF WILLIAM REHNQUIST

Mr. BAYH. Mr. President, I received today an eloquent and persuasive statement by the National Conference of Black Lawyers in opposition to the confirmation of William Rehnquist to be an Associate Justice of the Supreme Court. The group concluded:

There exists today a great crisis of confidence in the American judicial system. If those who are striving for justice through the use of the legal system are to continue to hope, that system must give them reason to hope. In these critical times, such hope is not served by placing on the Nation's highest court a man of Mr. Rehnquist's background and views.

I commend to every Senator this entire statement, and I ask unanimous consent that it be printed in today's RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT OF THE NATIONAL CONFERENCE OF BLACK LAWYERS ON THE SUPREME COURT NOMINATION OF WILLIAM REHNQUIST

The National Conference of Black Lawyers (NCBL) wishes to go on record as firmly opposed to the confirmation of Mr. William Rehnquist as an Associate Justice of the United States Supreme Court. NCBL is an organization of Black attorneys formed to challenge racism in our legal system and to provide the legal expertise necessary in the Black American's struggle for justice. We number in our ranks attorneys representing the entire spectrum of both the private and public bar, as well as elected government officials from the local, state and national levels. It is the view of our organization that Mr. Rehnquist is fit neither professionally nor personally to sit on the nation's highest court.

Perhaps to a greater extent than any other single community of persons in the United States, the Black community knows the need for persons of quality on the bench. We have known judges without humanity or wisdom who could look at fellow human beings and find them less than human because their skins were Black. We have suffered the predations of greedy slaveholders who had as their ultimate support the approval of the highest court in the land. We have been long suffering. We suffer still. But we have also known the power of justice in this country. We have felt the exhilaration of seeing the courts vindicate truth crushed to the earth. In our struggle we have on numerous occasions been heartened by the performance of the Supreme Court, which through the wisdom and courage of some of its judges has dared to protect the rights of the poor, the Black, politically unpopular in the face of hostile national opinion.

Mr. Rehnquist, in our view, does not possess the qualities we have a right to expect from a member of the United States Supreme Court, in whose bands may rest the freedom of future generations. He is a man of technical intelligence without sound judgment; a man of deeply held prejudices, apparently, without the capacity to recognize them. In short, this proposed appointee to the high bench is a man without vision. In support of this judgment we ask that the Senate take note of the following examples of Mr. Rehnquist's views and actions.

In 1964, the City Council of Phoenix, Arizona was considering passing an ordinance guaranteeing to all minority groups equal rights of access to public accommodations. Mr. Rehnquist's position vis a vis the ordi-

nance was that it would be an indignity to the proprietors of such public facilities to require them to open their doors to Black people. Said he, "It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this."

Despite this position, Mr. Rehnquist purports to be dedicated to a free society in which every person is equal before the law. These professions of belief in equality, however, do not stand up very well in the light of the relative weights Mr. Rehnquist accords to the white proprietor's right to discriminate racially, as against the right of Blacks to equal access to public accommodations. When confronted with this conflict, Mr. Rehnquist has made it quite clear that it is his view that if the white man desires to discriminate against the Black, it is acceptable because "each man (should be) accorded a maximum amount of freedom of choice in his individual activities." (Letter to the Editor, Arizona Republic, September 9, 1967.) What of the Black man's rights? What of the rights of the Mexican-Americans, the American Indian, the Puerto Rican, the Chinese, Japanese or Filipino-American?

Even if, in the face of controversy over his nomination, Mr. Rehnquist has now modified his public views on the question of race and the law, his overall record and long standing insensitivity in this area make him an inappropriate choice for the Supreme Court of the United States.

Mr. Rehnquist's lack of vision is not limited to the area of race. Nor is the damage such lack of vision can do confined to Black Americans. Consider his views on First Amendment freedoms. Mr. Rehnquist has expressed his view in support of government surveillance of persons engaged in political expression—including lawfully protected activity. The "Big Brother" state in which the decision to engage in surveillance of anyone and everyone is secret and unexamined will not, Mr. Rehnquist maintains, "chill" political dissent (See, Speech, "Privacy, Surveillance, and the Law," March 19, 1971). Since we operate in this society on the theory that more police "surveilling" neighborhoods will deter or chill crime, it is difficult to see why surveillance would not have a similar effect on political dissent. Apparently, Mr. Rehnquist's answer to this is that political dissenters have nothing to fear since dissent itself is not outlawed. But this is an insufficient response. The specter of more unlawful arrests such as those involved in the May Day Demonstrations, where mass arrests were in Mr. Rehnquist's view justifiable (although his would-be brothers in the District of Columbia Courts strongly disagreed) would in fact "chill" almost anyone. Secondly, even assuming that the demonstrators' fear of unlawful prosecution is unjustified, the question remains whether the government may use fear of prosecution, even if not the reality of it, to stifle protest. The heart of the Constitution centers around the First Amendment freedoms. This government is built on the right of the people to petition the government for change when that government no longer serves them. To "chill" or destroy this is to destroy the very foundation on which this society is supposed to be built. If Mr. Rehnquist does not see and honor this, the society should not dare take the risk of letting him play havoc with our democratic form of government.

Consider, as well, Mr. Rehnquist's views in the criminal justice area. Basically his formula for dealing with the complexities of this country's burgeoning crime and law enforcement problems is only to strengthen the hand of the people. No one disputes, least of all Black people who are most frequently the *victims* of serious crimes, that crime is a dread malignancy which must be cut from the body politic. The question is how to do so. Any thinking person, any unbiased person, sees that there are several levels of problems involved and that fairness cannot be attained simply by giving more power to the police, Furthermore, preventive detention and curtailment of bail privileges for "dangerous" offenders (whoever they are and however identified) is no answer to the underlying ills which cause crime.

The experience of many Black Americans in this society is that of deprivation, disrespect by whites, social ostracism, and political persecution. Can it seriously be expected that in any scale of values that a Black person treated so lawlessly will respect the very law he views as an instrument of his oppression? And what of the lawlessness which police operating without meaningful constraints engage in and foster? Is there no value to be placed on keeping the hands of the state clean? Little or no consideration is given these concerns by Mr. Rehnquist in any of his writings. Instead his views in this area betray more blind spots, more lack of vision.

It is the view of NCBL that it is imperative that a Justice of the Supreme Court have the capacity to analyze and weigh competing values fairly, with an eye to doing justice. Through his prejudice, his authoritarianism, his mechanical approach to serious social problems Mr. Rehnquist has demonstrated that he lacks this capacity—this judgment. We do not maintain that opinions which vindicate civil liberties are *ipso facto* opinions reflecting vision, but we do insist that a person who sits as a Supreme Court Justice possess that critical faculty necessary to judge issues openly and freely. A person as wedded to ideology as Mr. Rehnquist does not possess that faculty. Under the guise of not "rewriting" the Constitution, he misconstrues its function in an evolving society, and seeks the solace of a simpler day when simple shortsightedness such as his dictated simplistic analyses of events and laws.

There exists today a great crisis of confidence in the American judicial system. If those who are striving for justice through the use of the legal system are to continue to hope, that system must give them reason to hope. In these critical times, such hope is not served by placing on the nation's highest court a man of Mr. Rehnquist's background and views. Those who have historically suffered the pains of legally sanctioned and legally implemented class, caste, and political bias, view with alarm the possible ascendance to the bench of a man so cruelly insensitive to the legal rights of the poor, the Black and the politically unpopular. Those who, throughout the world, respect the American effort at constitutional democracy look on in wonder as the nation appears to be moving in a direction that will diminish the stature of the Supreme Court and diminish the role of the Supreme Court as an Institution on the side of liberty.

For all the foregoing reasons, the National Conference of Black Lawyers vigorously urges the Senate of the United States to disapprove the nomination of William Rehnquist as an Associate Justice of the United States Supreme Court.

MESSAGE FROM THE HOUSE—ENROLLED BILLS SIGNED

A message from the House of Representatives by Mr. Berry, one of its reading clerks, announced that the Speaker had affixed his signature to the following enrolled bills:

H.R.11334. An act to amend title 38 of the United States Code to provide that dividends may be used to purchase additional paid-up national service insurance;

H.R.11651. An act to amend title 38 of the United States Code to liberalize the provisions relating to payment of disability and death pension, and for other purposes; and

H.R.11652. An act to amend title 38 of the United States Code to liberalize the provisions relating to payment of dependency and indemnity compensation.

LEGISLATIVE SESSION

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the Senate return to legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR ADJOURNMENT TO 9 A.M. TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that, when the Senate completes its business today, it stand in adjournment until 9 o'clock tomorrow morning.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR RECOGNITION OF SENATOR KENNEDY TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that, following the remarks of the Senator from Kansas (Mr. PEARSON) tomorrow, the distinguished Senator from Delaware (Mr. ROTH) be recognized for not to exceed 15 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR RECOGNITION OF SENATOR KENNEDY TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that at the conclusion of the remarks by the Senator from Delaware (Mr. ROTH) tomorrow, the distinguished Senator from Massachusetts (Mr. KENNEDY) be recognized for not to exceed 15 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR RECOGNITION OF SENATOR BYRD OF WEST VIRGINIA TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that at the conclusion of the remarks by the distinguished Senator from Massachusetts (Mr. KENNEDY) tomorrow, the junior Senator from West Virginia, now speaking (Mr. BYRD), be recognized for not to exceed 15 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR TRANSACTION OF ROUTINE MORNING BUSINESS TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that at the conclusion of the remarks by the junior Senator from West Virginia (Mr. BYRD) tomorrow, there be a period for the transaction of routine morning business for not to exceed 15 minutes, statements limited therein to 3 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

western part of Everglades National Park. This action will also assure an adequate water supply to the growing communities on Florida's west coast, because the swamp is a natural water storage area.

To guarantee the continued availability of Big Cypress to the people, I propose that, upon acquisition of those private lands whose development would destroy the watershed, the Secretary of the Interior be authorized to enter into an agreement with the State of Florida for the management of Big Cypress. The State is in the process of acquiring other public areas nearby and is the logical agency to provide single unified management. The Nation, as a whole, will benefit through the protection of Everglades National Park and through the addition of another major wildlife haven and recreation area.

[From the New York Times, Nov. 30, 1971]

ENVIRONMENT IS GOOD POLITICS

When political rivals compete to perform a sound service, a grateful public can afford to give ample credit all around. The country finds itself in this position with respect to the simultaneous efforts of the Nixon Administration and a group of Democratic Senators to save Florida's Big Cypress Swamp "from private development that would destroy it," as the President said. Destruction of the swamp, as it happens, would also mean destruction of the Everglades National Park, which depends on the Big Cypress watershed, not to mention the loss of much of South Florida's water supply.

What the Administration proposes is to buy the 547,000 acres of the swamp from the 21,000 individuals, real estate companies and businesses that now own it. For some $156 million the Federal Government would acquire this entire area, designating it as the Big Cypress National Fresh Water Reserve but leaving its management to the State of Florida. Technically a recreation area, it would be open to hunters, fishermen and campers—as some of it is now—but would be permanently closed to any kind of construction, which has been the major threat.

The Senate Interior Committee, headed by Senator Jackson of Washington, is considering a bill introduced by Senator Chiles of Florida which is substantially the same as the Administration's proposal. Such is political life that both the White House and the Senators supporting Mr. Chiles are angling for the major share of kudos in the matter—and the claims of both sides are valid.

Senator Jackson's interest grows out of hearings he held in 1969 concerning the jetport that was to have been built in the Big Cypress area. The Administration's goes back to Walter Hickel's visit to the Everglades as one of the first acts of his tenure as Secretary of the Interior as well as to Mr. Nixon's ultimate action in forcing abandonment of the jetport.

More important than this little tug-of-war itself is the fact that environmental progress has so clearly become a political asset. The White House fortunately realizes that even in this year of financial stringency a long-term investment in the environment can be at once a national need, a wise economy and a popular move.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Is there further morning business? If not, morning business is closed.

EXECUTIVE SESSION—NOMINATION OF WILLIAM H. REHNQUIST TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session for further consideration of the nomination of Mr. William H. Rehnquist, to be an Associate Justice of the Supreme Court.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

PRIVILEGE OF THE FLOOR

Mr. BAYH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BAYH. I ask unanimous consent that during the debate on the Rehnquist nomination, Mr. P. J. Mode and Mr. Michael Helfer of my staff be permitted access to the Senate floor at all times.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HRUSKA. Mr. President, the Senator from Nebraska was unable to hear the semiaudible voice of the Senator from Indiana. Would he favor the Senator from Nebraska with an idea of what his request was?

Mr. BAYH. Mr. President, I am glad the Senator from Nebraska is interested in the semiaudible words of his colleague from Indiana, and I am glad to repeat the request. It is very similar to one that my friend from Nebraska made.

Mr. President, I ask unanimous consent that two of my staff members, Mr. P. J. Mode and Mr. Michael Helfer, be permitted access to the Senate floor during the remainder of the debate on the Rehnquist nomination.

Mr. HRUSKA. Mr. President, I have no objection.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

Mr. BAYH. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. GRIFFIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question is on agreeing to the confirmation of the nomination of Mr. Rehnquist to be a Justice of the Supreme Court.

Mr. GRIFFIN. Mr. President, I will save the Senator from Indiana any embarrassment at this particular moment; but I want to tell him—or at least serve notice on him—that if he is going to conduct a filibuster, he had better stay on the floor and be talking, or the Senator from Michigan is going to ask for the question.

Mr. BAYH. Mr. President, I appreciate the courtesy of the Senator from Michigan. He has every right to do what he wishes. I think perhaps there have been times during his tenure in office when he has had a moment or two of delay, in which he has been required to ask the Senate to give him the normal courtesy. If the Senator from Michigan does not want to grant that, it is within his right to do so.

The PRESIDING OFFICER. The question is on agreeing to the confirmation——

Mr. BAYH. Mr. President, I should like to suggest that the Senator from Indiana has not said anything or done anything that would lead the Senator from Michigan to believe that he is conducting a filibuster. It is probably one of the least verbose filibusters in the history of the country.

CALL OF THE ROLL

Mr. BAYH. Mr. President, I respectfully suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. GRIFFIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question is on——

Mr. BAYH. Mr. President, I respectfully suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. GRIFFIN. Mr. President, I call for the regular order, there having been no transaction of business.

The PRESIDING OFFICER. We are in the midst of a quorum call.

Mr. GRIFFIN. I ask unanimous consent that the order for the quorum call be rescinded.

Mr. BAYH. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard. The clerk will continue the call of the roll.

The legislative clerk resumed and concluded the call of the roll, and the following Senators answered to their names:

[No. 440 Ex.]

Allen	Ellender	Mansfield
Bayh	Griffin	Sparkman
Byrd, W. Va.	Hruska	

The PRESIDING OFFICER (Mr. ALLEN). A quorum is not present.

Mr. BYRD of West Virginia. Mr. President, I move that the Sergeant at Arms be directed to request the attendance of absent Senators.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from West Virginia.

The motion was agreed to.

The PRESIDING OFFICER. The Sergeant at Arms will execute the order of the Senate.

After some delay, the following Senators entered the Chamber and answered to their names:

Aiken	Cranston	Javits
Allott	Curtis	Jordan, N.C.
Anderson	Dole	Jordan, Idaho
Baker	Eagleton	Kennedy
Bellmon	Eastland	Long
Bentsen	Ervin	Magnuson
Bible	Fannin	McClellan
Boggs	Fong	McGovern
Brock	Fulbright	McIntyre
Brooke	Goldwater	Metcalf
Buckley	Gravel	Mondale
Burdick	Hansen	Montoya
Byrd, Va.	Harris	Muskie
Cannon	Hart	Nelson
Case	Hartke	Packwood
Chiles	Hatfield	Pastore
Cook	Hollings	Pearson
Cooper	Hughes	Proxmire
Cotton	Jackson	Randolph

Ribicoff	Spong	Talmadge
Roth	Stennis	Thurmond
Saxbe	Stevens	Tunney
Schweiker	Stevenson	Weicker
Scott	Symington	Williams
Smith	Taft	Young

Mr. BYRD of West Virginia. I announce that the Senator from Georgia (Mr. GAMBRELL), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Hawaii (Mr. INOUYE), the Senator from Wyoming (Mr. MCGEE), and the Senator from Rhode Island (Mr. PELL) are necessarily absent.

I further announce that the Senator from Utah (Mr. Moss) is absent on official business.

I also announce that the Senator from Idaho (Mr. CHURCH) is absent because of illness.

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. BENNETT) and the Senator from South Dakota (Mr. MUNDT) are absent because of illness.

The Senator from Colorado (Mr. DOMINICK), the Senator from Florida (Mr. GURNEY), the Senator from Iowa (Mr. MILLER), the Senator from Illinois (Mr. PERCY), the Senator from Vermont (Mr. STAFFORD), and the Senator from Texas (Mr. TOWER) are necessarily absent.

The Senators from Maryland (Mr. BEALL and Mr. MATHIAS) are detained on official business.

The PRESIDING OFFICER. A quorum is present.

SUPPLEMENTAL APPROPRIATIONS, 1972 (H.R. 11955)—ADDITIONAL CONFEREE

Mr. ELLENDER. Mr. President, as in legislative session, I ask unanimous consent that the Senator from New Jersey (Mr. CASE) be added as a conferee in the consideration of the supplemental appropriation bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

MESSAGES FROM THE PRESIDENT

Messages in writing from the President of the United States, submitting nominations, were communicated to the Senate by Mr. Leonard, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session, the Presiding Officer (Mr. BURDICK) laid before the Senate messages from the President of the United States submitting sundry nominations, which were referred to the appropriate committees.

The nominations received today are printed at the end of the Senate proceedings.)

NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

Mr. BAYH. Mr. President, I regret any inconvenience to the Senate resulting from this live quorum call. In retrospect, perhaps it was not such a bad idea. I admit that my original intention was not to give a majority of the Senate the opportunity to hear some of the arguments of this case. I acted because of my feeling that the Senator from Michigan was totally out of order even to suggest that a filibuster was in progress, and if that was the kind of game he wanted to play, then two can play the same game. I was not proud of that feeling, but as Senators came into the Chamber I could not help but think of the irony that confronts the Senate at this particular moment.

We are in the process of debating a nomination to the highest Court in the land—a nomination that has not been without significant controversy. This nominee, if confirmed, will probably sit on the Supreme Court of the United States for 30 years. During that time he will interpret every piece of legislation that is passed in this body throughout the next three decades or so. Not wanting in any way to limit the tenure of any of our colleagues here today, I suppose it is only realistic to suggest that there will not be too many of us around in this body when the present nominee, if he is confirmed, leaves the Supreme Court of the United States.

Each Supreme Court Justice has one-ninth of the weight of the judicial branch of the entire country, whereas the Senator from Indiana finds that he has—and is proud to have, but nevertheless is limited to—only one one-hundredth of the vote of the U. S. Senate.

Yet I must admit that I find a feeling—albeit understandable—in the Senate that a great number of our colleagues are much more interested in things other than who should fill this seat on the Supreme Court.

It has been a long session. We all are tired. We all are impatient. We all are anxious to be elsewhere with our families, with our constituents. But I should hope that my colleagues will give the kind of attention to this nomination that is deserved, using as a frame of reference the amount of time that the Senate has expended in this last year on other items which will have a lesser long-range impact on the history of this country.

A number of matters are of deep concern to the Senator from Indiana. I became involved in a colloquy last night following the speech of my friend and colleague from Nebraska, Senator HRUSKA, about some assertions that he made about the feelings of the Senator from Indiana. It is a rather dangerous business for one Senator to try to interpret the feelings of another. It is sometimes a full-time job to determine one's own feelings—as I admitted here in explaining my motives for insisting on a live quorum call. The Senator from Nebraska was unwilling to continue that colloquy at that time. I hope we shall have the opportunity to do so continue this colloquy before this debate is over, because there were several points that the Senator from Nebraska raised relative to the opinions and statements of the Senator from Indiana that were simply erroneous. I am sure the Senator from Nebraska did not do that intentionally, but that is the case, nevertheless.

One of the assertions he made was that the Senator from Indiana and the others who signed the minority report were opposed to the nominee because we felt that his philosophy was simply out of step with ours. As I suggested at that time, were that the case, we would hardly have voted earlier that afternoon to confirm the nomination of Lewis Powell. Not only did I vote for him yesterday, but I had been urging for almost a month that we come to an immediate vote on the Powell nomination. He could have been sitting on that Court for almost a month if we had done that. Yet political maneuvering behind the scenes somehow kept Lewis Powell off the Court.

Why was I urging that Lewis Powell be placed on the Court? Was it because I agreed completely with his philosophy? Even the most casual student of Lewis Powell's thoughts and mine would find that there is nowhere near unanimity of thought on some of the major issues.

Lewis Powell and I agree generally on some of the basic elements that I feel constitute the necessary prerequisities and qualifications for a Supreme Court nomination. Lewis Powell is an exemplary lawyer. He is an intelligent, honest human being, and I think he has the kind of sensitivity and humaneness in the area of human rights and civil rights that any Supreme Court nominee must possess. That is why I wanted Lewis Powell on the Court. I did not support him because I agreed with him on all issues.

To one degree or another the same can be said about the nomination of the distinguished Chief Justice, Chief Justice Burger, and Justice Blackmun. The Senator from Indiana does not believe that a Supreme Court Justice should have to agree with him on every issue, or even a majority of issues. However, there are a number of tests which any nominee must pass if he is to get my vote; and I am only one Member of the Senate, but I feel very strongly about this.

One matter has been brought to our attention over the past 48 hours which under normal circumstances, if the Senate were not so involved in returning to our families and our homes and our constituencies, would have been a matter of extreme alarm to most Members of this body. But the matter to which I refer, and to which I will refer at length this morning, hardly received any notice in this body. I am referring to the recent disclosure that the nominee urged, when he was a law clerk, Justice Jackson to vote against Brown against Board of Education. Not only did he urge him to vote against Brown against Board of Education, but some of the reasoning, and some of the rhetoric in that page and a half memo is almost impossible to believe. So permit me, if I may, to explore thin for the consideration of my colleagues this morning.

I must admit, Mr. President, that the issues involved in the nomination of William Rehnquist are not headline-making issues. They are not startling revelations of incompetence or lack of personal integrity, which, unfortunately, marred previous nominations to the Court. We do not have a nomination here of a man who has said:

I yield to no man in my belief in white supremacy.

We do not have a nominee here who has been characterized by his chief proponent in the Senate as being mediocre, nor an effort to try to rationalize what mediocrity would mean on the Supreme Court. We do not have a nominee here who is involved in a whites-only covenant. We do not have a nominee here who took part in an effort to try to transform a public golf club into a private golf club so as to avoid the Supreme Court prohibition of segregation in the former.

No, we do not have the type of issue that lets our friends in the press write headlines. We do not have a blatant, easily explained, 2 plus 2 equals 4 insensitivity to human rights and civil rights, as was the case in one of the previous nominations which came before the Senate.

The issues involved in this nomination are subtle, but in the judgment of the Senator from Indiana they are crucially important, for without doubt they, indeed, call into question the nominee's views of the relationship between the individual and the Government, and between the branches of the Government itself.

A long struggle which involves the basic question of the relationship between one individual citizen and his government has existed in this country since the first Supreme Court case. In all probability it will continue to exist throughout the history of this democracy, and may it be long. How much power does the Government have to take away individual rights? On the other hand, how much power does the Government have to guarantee the citizen certain inalienable rights? "One nation, under God, indivisible, with liberty and justice for all," is a phrase familiar to every schoolchild in this country, but the means of implementing that stimulating phrase into meaningful opportunity for each of our citizens have often not been so well understood.

To my mind, the chief concern with which the Senate must and should deal, and hopefully will deal, in considering this nomination is, how important is the individual citizen to William Rehnquist? What responsibility do we in Congress have to see that the individual citizen has a full opportunity to obtain the blessings of this country? What responsibility does a State legislature have to see that the individual citizens of a given State are given similar protection? Indeed, what responsibility does a local government have to protect the same individual rights and opportunities?

These are questions that are called into focus by the Rehnquist nomination, and although they are not the headline-making type of question, in the long history of this country they will have a far greater impact than some of the more sensational items which have been before the Senate in reference to other Supreme Court nominations.

The President has promised us strict constructionists and judicial conservatives on the Supreme Court of the United States. As I said in debating this matter with my friend from Nebraska yesterday, I do not quarrel with the President's picking a man of his own philosophy. It would be rare indeed, if that were not the case. Certainly this is not the first time. It is true that a number of Justices have been appointed because of their philosophical views. But I have searched history, and I have seen no other time when a President has conducted an election campaign on the basis of his upcoming Supreme Court nominations and what they would do. Nor have we ever been privileged to witness a TV extravaganza like that involving the two nominations that have been and are now before us.

So the President has caused us to focus on the philosophies of the nominees he presents to the Senate. Anyone who has studied Frankfurter, Brandeis, and Holmes would be hard put to find a reasonable comparison between them, the ideals of our distinguished President, and the present nominee. But that, of course, is the prerogative of the President, and he has decided in favor of Mr. Rehnquist.

But while talking in terms of strict constructionists and judicial conservatives, whatever those terms may mean, Mr. President, it seems to me that the President has sent us a man in the person of Mr. William Rehnquist, whose views on the Constitution are strangely elastic. I am not quite certain, Mr. President, what the terms "judicial conservative" or "strict constructionist" mean. In the case of the Carswell nomination, we were told that he was a strict constructionist, yet he did not follow the letter of the law, and did not follow stare decisis. Instead, he injected his own personal philosophy, without regard to the precedents and higher courts.

Although I do not think the Rehnquist nomination can be compared on all fours with the Carswell nomination, I do not believe that the record of Mr. William Rehnquist can lead one to any other conclusion than that his views of the Constitution are strangely elastic. He is a man who analyzes questions involving the Bill of Rights in a way which is very hostile to individual liberties. He is a man who has repeatedly demonstrated a marked preference for executive power over judicial or congressional power, and he is a man whose record reveals a persistent distaste for governmental efforts to correct the injustices that 200 years of racial discrimination have wrought.

One is hard put to understand how a man who is presented to the Senate as a judicial conservative, to fill the shoes of the great jurist Harlan, could have so little regard for the individual. It is in the finest tradition of the conservative tradition that the individual citizen be protected from the executive branch, that the Government dare not invade our boudoirs or our offices, or take from us the right to free speech.

Yet, if one examines the record of Mr. William Rehnquist, one has reason to pause. I defy anyone to dispute the evidence of his statements, his actions, his deeds, and his unquestioned support of this administration's efforts to permit the Government of the United States, particularly the executive branch, to have an alarmingly increasing power to inject itself and to impose its will on the individual citizen of this country.

The last 24 hours, Mr. President, have brought us fresh evidence of Mr. Rehnquist's record on civil rights, and I wish to spend just a little time incorporating into this record, for anyone who dares to read it, more detail about the matter that I mentioned a moment ago.

As I said earlier, under normal circumstances, if it were not the tail end of a session, if all of us were not so preoccupied with our own responsibilities, and if all of us were not so anxious to return to our constituents and our families, I would think that the Senate would be up in arms, with the facts disclosed in the newspapers of this country and the article initiated by Newsweek. That magazine has uncovered a memorandum of Mr. William Rehnquist written to then Justice Jackson.

I want to look at what this memorandum means and how it fortifies the feeling that the minority of the Judiciary Committee had when they wrote the rather extensive minority views. The great thrust of our argument in opposition to Mr. Rehnquist was not that he was intellectually incompetent, not that he was mediocre, not that he had ethical conflicts, not that he was a conservative, not that he was a strict constructionist. We were concerned instead that William Rehnquist did not really understand the importance of keeping this system open to minority citizens, of letting every American, regardless of where he lived or what he looked like or where he went to church or the ancestry of his parentage, have a chance to climb up the ladder.

We in Congress, and every State legislator and every councilman, have not only the right but also the responsibility to search out and to wipe away those instances in which arbitrary roadblocks are thrown in the way of those citizens who feel that America holds promise for them.

I think that the evidence that has been brought to light in the last 24 hours or so sustains in unequivocal terms the concerns that we expressed in the minority views. At that time we pointed out that Mr. Rehnquist's record is far from a record of affirmative commitment to equal rights for all citizens. Rather, as we said, it is a record of hostility to the use of law to eliminate racial injustice in the United States. We already knew of three separate occasions throughout his career when Mr. Rehnquist displayed this hostility.

Perhaps "hostility" is too harsh a word, as I read over our report. But I do not think so. I do not think this is hostility in a malicious sense of the word, but the impact and the results are the same. William Rehnquist has absolutely refused—and I fear that if he is placed on the Court, he will continue to refuse—to allow the law to be used as a tool for justice and opportunity for those who are now denied it.

As we look at the previous instances in which Mr. Rehnquist's record is found wanting in the area of human rights and sensitivity to opportunity for all our citizens, I think the pattern is rather clear. In 1964, he opposed a local ordinance prohibiting racial discrimination in public accommodations. Yesterday, when I tried to question the Senator from Nebraska on some of these areas—

and I hope we have a chance to continue that dialog, because it certainly was not completed—the answers were not forthcoming. The Senator tried to make light of this.

In 1964, this country was up in arms. People from all walks were gathering in Washington, peacefully, in the summer of 1964; and there was the greatest peaceful demonstration down Constitution Avenue that we have ever had. Why was this? This was because most American citizens, God-fearing and concerned citizens, had determined that the time had come to wipe away discrimination once and for all.

That was the environment of the day. Yet, in that environment, Mr. Rehnquist testified before the Phoenix City Council, saying that black people should not be permitted in the drugstores of Phoenix. Now he has said—let me hasten to add—that he has changed his mind. He said this in the record before the committee, and I do not want to lead my colleagues to believe otherwise. But I want them to look at the record of the hearings. He did not say he changed his mind because he thought it was wrong. He did not say he changed his mind because he thought it was right and proper for such ordinances to exist—ordinances very similar to the equal accommodations law that was passed in the Federal statute at the same time. No, Mr. Rehnquist said he changed his mind because, one, he previously had not felt that the ordinance could be implemented that easily as it was, and, two, that he really did not understand at the time that minority citizens were that concerned about recognition of these rights.

Therein, Mr. President, lies the main cause for the concern of the Senator from Indiana about the qualifications of Mr. Rehnquist.

If, in the mid-1960's, a leading attorney in Phoenix, Ariz., was not aware of what was going on in the hearts and minds of black and brown and yellow citizens of this country, is he going to be any more concerned about the problems which may confront us tomorrow or a year from now or 5 years from now, as a Supreme Court Justice?

Of course, the Senator from Nebraska relied upon the fact that in the model act which was passed while Mr. Rehnquist was a member of the National Conference of Commissioners on Uniform State Laws there was an equal accommodations provision. But the colloquy between us will show that Mr. Rehnquist only voted for that act after opposing several of its provisions and, indeed, helping to lead the opposition so it was not adopted, with only two dissenting votes, as a uniform act, but had been degraded to the stature of a model act. I am still waiting for the Senator from Nebraska to come forth with one positive word in the transcript of that meeting which shows that Mr. Rehnquist stood up one time and said, "I think we ought to have strong antidiscrimination features in our State laws."

Let me turn in more detail to the 1966 meeting of the Commissioners on Uniform State Laws which Mr. Rehnquist attended. At that time, the Commissioners were meeting to approve a model State antidiscrimination act which could be suggested and urged upon the State legislatures of this land so that they could follow the example that had been set 2 years earlier by Congress. Mr. Rehnquist, as the minority views show, opposed two important provisions of this antidiscrimination measure. First of all, he opposed implementing into the model act—what became a model act due to Mr. Rehnquist's and others opposition to it being a uniform act—a provision by which employers would be entitled to or given the opportunity to compensate voluntarily for past discriminatory hiring practices.

Let me give an example of what this would be. In other words, here is an employer who in the past has denied employment to blacks and browns and other minority groups. This provision would permit him to compensate in future employment so that he could ultimately have a balanced work force. This is the whole philosophy of the Philadelphia plan, Mr. President. I find it significant and inconsistent that Mr. Rehnquist's record for civil rights is sustained because he supposedly was one of the advisers within the administration recommending the Philadelphia plan, but in 1966 when he was a Commissioner on Uniform State Laws from Arizona, he did everything he could to root out this very provision of the uniform act before the Commissioners at that time.

The other item which was then before the Commissioners on Uniform State Laws which Mr. Rehnquist opposed was the antiblockbusting provision. I cannot understand how Members of the Senate who are sensitive about human rights and concerned about people who try to play on the passions and human frailties in order to make a fast buck, could not give great significance to Mr. Rehnquist's position on this particular provision.

Blockbusting is that insidious, inexcusable tactic which is followed by, unfortunately, only a few—and they are unscrupulous—realtors in which they go into a community that is primarily or totally a white community and buy one house, and then they will move in a large number of black citizens and they will degrade the looks of the premises by throwing garbage and junk around in such a way as to devalue the property. In fact, I think that perhaps the best way to describe the blockbusting technique is to read into the record the response of Robert Brancher, then chairman of the Special Committee on the Model Antidiscrimination Act, and a professor at Harvard Law School, who is now a justice of the Supreme Judicial Court of Massachusetts. When Mr. Rehnquist suggested that constitutional rights as well as policy decisions were involved, and therefore, this particular provision should be rooted out, Professor Brancher said:

> However, I would like to speak for just a moment to the merits of this. The practices that are dealt with in this provision are practices that have no merit whatever. They are vicious, evil, nasty, and bad. These are people who go around—and this is not a hypothetical situation; this is something that has happened in every big city in the United States—and run up a scare campaign to try to depress the value of real estate. They will, if possible, buy one house, and then they will throw garbage out on the street; they will put up "For Sale" signs; they will perhaps hire twenty badly clad and decrepit-looking Negroes to occupy a single-family house, and so forth, and then they go around to the neighbors and say: wouldn't you like to sell before the bottom drops out of your market?
>
> And the notion that type of conduct should be entitled to some kind of protection under the bans of free speech is a thing which doesn't appeal to me a tiny bit.

The vote was then taken and Mr. Rehnquist's effort to delete this provision was unsuccessful.

But this is the concern that the Senator from Indiana has about Mr. Rehnquist's approach to his responsibility as a Supreme Court Justice. As we look into some of the statements that Mr. Rehnquist has made, we see, I think, that he sometimes wants to restrict free speech and association but, apparently, where he wants to protect it is in a place where it has absolutely no purpose.

Do we say that realtors who want to go into a community to destroy it, to get one neighbor hating another, in order to feather their own nests, have a constitutionally protected right to free speech in order to accomplish the goal? Of course, we do not.

If the Senate and House of Representatives and State legislatures want to say that this is bad practice by realtors, it is not for the Supreme Court, it is not for William Rehnquist to say that there is a free speech question which prevents it from doing so.

The Senator from Indiana feels that this certainly is not an area where free speech should be protected. It is like former Justice Holmes, in defining the limits of free speech, who said that no one has the right falsely to yell "fire" in a crowded theater.

I suggest that anyone who has sensitivity enough to sit on the Supreme Court of the United States should be able to recognize that what was yelling "fire" in a crowded theater 30, 40, 50, 60 years ago is blockbusting today.

This is causing the inflammation, the hatred and the fears, and exacerbating them by letting the blockbusting tactic proceed.

I would be willing to wager that if we took a vote in the Senate as to whether there was any validity in the policy of blockbusting, let alone the constitutional question involved, 100 Members of this Senate would vote against blockbusting.

Yet Mr. Rehnquist suggests that it should not be banned both on constitutional and policy grounds, that to strike down blockbusting is bad policy and is also a constitutional violation.

I hope to have the opportunity, before this debate is over, to deal with these questions in greater detail; but, before proceeding to the main matter of concern, I want to touch on one other matter that was enumerated in the minority views and that had been previously brought to our attention before the alarming disclosures of yesterday. This is the evidence that in 1967 the nominee opposed what were moderate plans for combating de facto segregation in Phoenix with the comment that, "We are

no more dedicated to an integrated than to a segregated society."

When I asked the nominee about this opposition to the efforts of the school superintendent in Phoenix to provide some integration in the Phoenix school system, Mr. Rehnquist said that the reason was he was then opposed to long-distance busing and that he is still opposed.

I think there are grave questions that can be raised about long-distance busing but the fact is that long-distance busing was not even involved then. It was not the question. It was a very moderate integration plan. But no matter what sort of plan it was, it cannot justify the suggestion that we are no more dedicated to an integrated society than to a segregated society. Now Mr. Rehnquist also said that we are a free and open society in which every individual should be given a maximum amount of freedom in it, and I of course agree with that. But I do not think that a black boy or girl student has a maximum amount of freedom in a society that will not let them into a schoolroom because of their race.

Yesterday's Newsweek magazine disclosed a fourth and perhaps an even more shocking event.

That was Mr. Rehnquist's active opposition to the Supreme Court decision in Brown against Board of Education. In 1953 Mr. Rehnquist was at that time, I think, 28 years of age. He was a law clerk to Mr. Justice Jackson.

The school desegregation cases were pending. The appellants in those cases, black and white alike, argued that racial segregation in public schools violated the great promise of the 14th amendment that, "No State shall deny any person within its jurisdiction the equal protection of the laws."

The school boards and States argued that segregation was permitted under the separate but equal doctrine of Plessy against Ferguson.

Mr. Rehnquist, we now know, wrote a memorandum to Mr. Justice Jackson entitled, "A Random Thought on the Segregation Cases." In it he stated his personal opinion that Plessy against Ferguson was rightly decided and should be reaffirmed. Fortunately for the history of this Nation, Mr. Justice Jackson did not take the advice of his law clerk. Instead he joined with a unanimous Court in Brown against Board of Education in holding that separate educational facilities are inherently unequal.

Mr. Rehnquist's memorandum is a rather extraordinary document, for the arguments he used to oppose the Court's historic decision in Brown are distressing. He suggests that to overrule Plessy was to read into the Constitution the Justices' own sociological view of the Constitution; that personal rights are no more sacrosanct under the Constitution than property rights; and that the Supreme Court has little or no meaningful role to play in protecting the rights of minorities.

Mr. President, I think it is important for the Senate to know and for the country to know the significance of that memorandum. Brown against Board of Education is not just any little old case that happened to appear before the Supreme Court.

In the almost 200-year history of this Nation, few cases have been more significant than Brown against Board of Education. This is a space age Marbury against Madison. It was so apparent that the issue involved should be decided on the side of opening up our schoolrooms that nine Justices—a unanimous court—joined together in striking down discrimination in our public school system. But we now see that Mr. Rehnquist was so out of touch with the important issues of that day that he was urging one of the justices to vote on the other side of the issue.

I think this is of particular significance, Mr. President, because as a legislator I hold the legislative process to some degree jealously. And I do not like to see the Supreme Court become involved in lawmaking. *Brown* was not lawmaking; it was dedication in the face of public pressure to principles of equality. As a legislator and as a lawyer, I am well aware that one of the strengths of the Constitution of the United States is the fact that it has flexibility, it has within its provisions the opportunity for change. That must come as times change, as problems change, and as people change.

Since it is impossible to change the words of the document except by constitutional amendment, the principle, the relevance of the Supreme Court comes from the interpretation that is placed on the Constitution year after year in case after case by the Justices that sit on the Court. And unless those Judges have the sensitivity to look at the country, to come down from the ivory tower of the highest Court in the land and to look at how the laws and conditions affect human beings, then that great document, the Constitution of the United States, may just as well be locked in the Archives and never again seen.

It is Mr. Rehnquist's inability to realize and implement the great promises of this document and to permit them to have the broad scope they need that is a matter of deep concern to the Senator from Indiana. Apparently this same concern was expressed by the nine sitting Judges of the Supreme Court at that moment, because by a unanimous vote they rejected the position of then law clerk Rehnquist.

In looking at the memorandum, there are certain items of interest that indicate, I think rather dramatically, the philosophical bent or, indeed, the philosophical roadblock that appears in Mr. Rehnquist's reasoning as to how he feels the Constitution should be interpreted.

Let me just read from the memorandum significant factors or items. In referring to past Supreme Court cases, Mr. Rehnquist says of the Court:

> Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

I do not think that any reasonable interpretation of those past cases can reach that same conclusion. Surely it is never the role of the Court to thwart public opinion; it is the role of the Court to interpret the Constitution notwithstanding public opinion.

He goes on further and says:

> For, regardless of the Justice's individual views of the Constitution on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction.

I think it is rather evident—the fact that nine Judges ruled otherwise—that segregation of our schools, just as segregation of our lunch counters and public facilities, was one of those extreme cases. And fortunately the Court did intervene. And fortunately it was not just the so-called liberals of the Court, but quite contrary to Mr. Rehnquist's admonition, those of all political persuasions on the Court who said that this kind of desegregation should be struck down.

There is one other item in this memorandum that I want to read before proceeding. It reads as follows:

> To those who would argue that personal rights are more sacrosanct than property rights, the short answer is that the Constitution makes no such distinction.

Mr. President, I wonder if we really want a man on the Supreme Court of the United States who believes that after looking at all of the facts of a given case, the cold hard property rights should be weighed on the same scale as sensitive human rights.

Mr. Rehnquist proceeds further:

> One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I have never been a Jehovah's Witness, and I have never been a slaveholder, and I have never been a businessman—unless one can call owning a family farm a business, which perhaps it is, but not in the frame of reference of Mr. Rehnquist—but to suggest that these rights to protect individuals and groups and classes have been sloughed off by the Supreme Court is just to totally misread what has happened.

However, I must admit that there is a strange irony in the fact that William Rehnquist should write this brief back in 1952 to a Justice of the Supreme Court of the United States saying that—

> If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of the transient majority of nine men.

The fact that that transient majority may be diminished by the presence of William Rehnquist increases the chance that these individual rights will in fact be sloughed off, as Mr. Rehnquist himself predicts.

Finally, Mr. Rehnquist concludes in this infamous brief:

I realize that it is an unpopular and unhumanitarian position—

He admits he is espousing an unhumanitarian position—

for which I have been excoriated by "liberal" colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's *American Dilemma*.

Before this debate is through I hope to try to bring into proper focus and into proper perspective just what the implications are of William Rehnquist's view that the Constitution enacted Myrdahl's American Dilemma.

Here is a Swedish social scientist who came to this country and looked at the tensions that existed, and the troubles that appeared over the horizon relative to the differences between the races, and as he describes the American dilemma in his book. This is not a wildly revolutionary extreme presentation of the facts, but a very moderate presentation of what we can expect and what we had better do about it. Yet Mr. Rehnquist, who is supposed to be moderate in his views, apparently feels that Myrdahl's American Dilemma is too liberal and too extreme.

Mr. Rehnquist's memorandum, as I have mentioned earlier, is indeed an extraordinary document. Let us look in detail at the matters of concern that I have previously mentioned. The arguments he uses to oppose the Court's historic decision in Brown are distressing. He suggested that to overrule Plessy was to "read [the Justice's] own sociological views into the Constitution"; that, as I said earlier, personal rights are no more "sacrosanct" under the Constitution than property rights; and that the Supreme Court has little or no meaningful role to play in protecting the rights of the minority.

It is amazing to me that someone who could have espoused that particular theory or that philosophy is not a matter of increased concern to the Members of this body, who personally themselves have shown great concern for the rights of minorities and have at all time been willing to place human rights above property rights.

The best answer to Mr. Rehnquist's first point—essentially a claim that to decide Brown as it was decided was unprincipled—comes from the unanimous Court itself. In the opinion by Mr. Chief Justice Warren, the Court first pointed out that the legislative history of the 14th amendment was "inconclusive" on the question of issue, then noted that first cases construing the 14th amendment "interpreted it as proscribing all State imposed discrimination against the Negro race." The Court concluded:

To separate [children in grade and high school] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

The Court continued in conclusion later in the decision by saying:

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

One should also point out that Mr. Justice Frankfurter, a man who was dedicated to the principles of judicial self-restraint and reason, instead of personal decisionmaking, joined the decision. Surely Mr. Justice Frankfurter did not think he was imposing his "own sociological views" onto the 14th amendment, as Mr. Rehnquist suggested the Court would do if they held it was unconstitutional for a State to say that black boys and girls should not be permitted to go to school with white boys and girls.

Mr. Rehnquist's second point was that property rights are as important as personal rights under the Constitution. He said:

To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction. To the argument made by Thurgood, not John Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are.

This is the same view which led Mr. Rehnquist to oppose a public accommodations ordinance in Phoenix in 1964. At that time, as the nominee himself admitted at the hearings, he "felt that personal property rights were more important than individual freedoms, the individual freedom of the black to go up to a lunch counter." And it is a view to which Mr. Rehnquist clings. In response to a question from Senator Tunney, Mr. Rehnquist said:

I am certainly not prepared to say, as a matter of personal philosophy, that property rights are necessarily at the bottom of the scale.

This view, of course, taken in reference to personal rights.

And if we are talking about the distinction between personal rights and property rights, and if the nominee says that property rights are not at the bottom of the scale, it seems to me that it is a foregone conclusion that personal rights are.

I wonder if the Senate wants to turn the clock of justice back so that cold, calculating property rights ascend and take a preferential position to the rights of each individual human being and his personal opportunity to explore and attain the values of full citizenship.

My belief is that our legal history shows that there are many interests which can override property rights—take zoning as a mundane example—but there are precious few which can override fundamental personal rights of free speech or association, or the equal protection of the laws. Personal rights and property rights simply do not hold an equal place in our jurisprudence. If Mr. Rehnquist thinks they do, then I submit he is outside the mainstream of modern American thought.

But perhaps the most significant point to be drawn out of the memorandum is Mr. Rehnquist's view of the role of the Supreme Court in our system of Government. He argued that the Court ought not take an active role in protecting the individual rights of minorities, and that if it did take such a role it was doomed to failure. He said:

One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

He concluded by saying:

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's *American Dilemma*.

Mr. President, this is a view of the role of the Court wholly at odds with its great traditions. It is, and was designed to be, the institution that protects individual rights. It is, and was designed to be, the institution to which minority groups can turn for vindication of their rights, regardless of the transient views of the majority. I cannot imagine the Senate confirming a man who thinks that the Court ought not play this role. And if the Senate does confirm such a man, we will all be the poorer.

I, like millions of Americans, cannot agree with Mr. Rehnquist that the Supreme Court's attempts to protect the constitutional rights of minority groups and their members have been failures. I, like millions of Americans, think that the Court has had great success. And I, like millions of Americans, think that Brown against Board of Education was a landmark case—a decision which reflects the fairness and justice that is at the heart of the Constitution. It is deeply distressing to me that Mr. Rehnquist thought that Brown was wrongly decided.

Perhaps it would be less distressing if Mr. Rehnquist had given some indication either at the hearings or since the Newsweek article appeared that he had changed his mind about Brown. At the hearings he recognized, as any lawyer would have to recognize, that Brown was the established constitutional law of the land. But he never said that he agreed with the principle of Brown, or the decision in that case. He would only say that the decision was justified because nine Justices became convinced that Plessy was wrongly decided. Thus for all we know, he may still be of the view that separate but equal satisfies the demands of the 14th amendment.

And, of course, that is a true test of a Justice—how he is going to interpret the Constitution in future cases.

I sincerely hope he has changed his mind, but there is no indication before the Senate that he has.

Mr. President, Mr. Rehnquist's opposition to Brown against Board of Educa-

tion fits into the pattern the other evidence before the Senate revealed. It is a pattern of a man who does not believe that the law should be used to erase the injustices that 200 years of racial discrimination have wrought. And there is nothing in Mr. Rehnquist's record which rebuts the inferences of this pattern of hostility to the use of law to promote racial justice. At a critical time of our history, we should not agree to place a man on the Supreme Court who has consistently been insensitive to the role that a law must play in achieving a fair and just society.

Mr. President, Brown against Board of Education is past. That particular issue will never again be decided by the Supreme Court. At least, I hope and pray it will not be. I hope it has been laid to rest. But the question that concerns the Senator from Indiana is, What about the future? What about the next Brown against Board of Education? What do I mean by that? Well, Brown was the Supreme Court of the United States coming to grips with a deep, divisive, devastating social problem which existed at that moment in history. It was a recognition that the past had been wrong, that steps had to be taken to put this country on a different path if the Court was to protect the rights guaranteed by the Constitution, the provisions of the 14th amendment, to all of our citizens. What concerns the Senator from Indiana is that if William Rehnquist was opposed to making that kind of a dramatic, necessary change in the mid-1950's, when the evidence was tumbling around us that it had to be done and that the Constitution required it, and nine Justices of the Supreme Court recognized it, where, pray tell, will Mr. Justice Rehnquist be on the next occasion when the Court and the country are confronted with a Brown against Board of Education decision?

It was little solace to my mind that Mr. Rehnquist told us that the Brown decision was justified because nine Justices had decided that Plessy had wrongly interpreted the intent of the framers of the amendment.

I would like to think—and I phrase the statement thus because I have never had the privilege of sitting on the Supreme Court of the United States—that the decisionmaking process in the Supreme Court is not totally unlike the decisionmaking process in the U.S. Senate: That the critical decisions, as in this body, are hammered out, not by unanimous consent, but because one or two Senators or a handful of Senators are willing to stand up for what they believe, after study, the law demands and risk the animosity of their constituency or of the country to argue the positions that they feel are morally right or legislatively right or legally right, although from the standpoint of politics and past practice they may be wrong.

This has been my experience in the legislative process both as a State legislator and as a Member of this distinguished body. The times when the U.S. Senate has been most revered and most respected have been those times when it has not just gone along, but when it has come to grips with unfinished business, when it has come to grips with critical problems that have not been solved, when it has dared to depart from the past and chart new policy—new policy based on old principles which had not been fully realized under the older policy.

I have seen this body move, in the 9 years it has been my good fortune to serve here. I have see it change its mind, so that what was once the view of a narrow minority is now the majority will of the Senate. I cannot help but recognize the coincidence that in some of the great issues, some of the general policy problems that have torn us asunder in this country, the distinguished present Presiding Officer, the junior Senator from Florida (Mr. CHILES) is a part of this vocal majority in the Senate today, though I can remember the time when it was an equally vocal minority.

It has been the willingness of a few Members of the Senate and the willingness of our colleagues to listen, and not to enter a debate with closed mind, that has made it possible for the Senate to be responsive to the problems of our country and the people we govern.

Is this totally dissimilar from the process that exists in the Supreme Court of the United States? I think any student of the Court must come to the conclusion that this is not the case, that the precedent cited by William Rehnquist in his memorandum to Justice Jackson has been properly destroyed, has been properly overturned, because those justices who have sat on the Supreme Court have been willing to listen and have been willing to change their minds. Indeed, the former occupants of the two seats which we now fill, Justice Black and Justice Harlan, were two persuasive voices in the movement to change the direction of the Court, and to make a Court majority on the same issues on which, in 1896, there was only a lone dissent.

I am concerned, Mr. President, that the Senate not place on the Court a man whose philosophy, as expressed by every word and deed, is so dedicated to outdated ideas that he is either unable or unwilling to recognize that that great document, the Constitution, has as one of its high purposes the elimination of injustice and inequality.

Mr. President, I want the record to be clear on this: When I say that it is the judgment of the Senator from Indiana that Mr. Rehnquist will remain intransigent, dedicated to outdated ideas and precedent, unwilling to change, and fulfill the great promises of the Constitution, I have no evil feelings in my heart toward Mr. Rehnquist. That may be hard for him to believe, or for some of his supporters to believe, but as I have talked with him personally, and as I have talked with some who know him well in Arizona whose judgment I respect, and as I have heard him testify, I have thought, here is a man who is basically honest. His academic record shows that he has great intellectual capacity; indeed, his appearance before the committee, both by what he said and by his great ability not to say anything in a number of areas, discloses a high degree of articulation.

I suppose I could go on to say that I feel deeply that it is terribly difficult for an individual Senator to be called upon to judge another human being. Each of us possesses his own frailties, and certainly the Senator from Indiana is painfully aware of his own. But the Constitution calls upon us to judge others, and if we are to fulfill our constitutional as well as our moral responsibility, we have to struggle with the problem as best we can.

I have to say that I think Mr. Rehnquist's motives, as he envisions them, are pure. Each of us is the product of his own background. We are all the sum and substance of our own past experiences. And rather than feel that Mr. Rehnquist will reach the wrong decisions for the wrong reasons, I think, because of his past experience, because of what he has said and what he has written philosophically, and his general interpretation of the Constitution, that he will reach the wrong decisions for what he conceives to be the right reasons.

He will use his intellect and his capacity, I fear, to write, speak, and articulate—to put the face of dignity upon and to add an acceptability to—those philosophies and those practices which the Warren Court had laid to rest, and he will in the process, I fear, do so feeling in his heart of hearts that he is right. And although I think each of us must be given credit for doing what we think is right, for that is about the best we can do; those of us who are called upon to judge others, particularly to judge others who would judge the country and the direction in which it is headed, must be concerned about more than the pureness of heart and the kindness of motives. We had better be concerned about results, because the results, not the motives, are going to determine the kind of life and the kind of opportunity our grandchildren are going to have in this democratic society. For these reasons, and others I will bring out in later debate, I urge the Senate to reject this nomination.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. JAVITS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. CHILES). Without objection, it is so ordered.

Mr. JAVITS. Mr. President, I ask unanimous consent to proceed as in legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The remarks of Mr. JAVITS as in legislative session, when he introduced S. 2962 are printed in the RECORD under Statements on Introduced Bills and Joint Resolutions.)

ORDER FOR YEAS AND NAYS ON S. 2676

Mr. BYRD of West Virginia. Mr. President, as in legislative session, I ask unanimous consent that it be in order, at this time, to order the yeas and nays on

to Trinidad and Tobago, which was referred to the Committee on Foreign Relations.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Hackney, one of its reading clerks, announced that the House insisted upon its amendments to the bill (S. 18) to amend the United States Information and Educational Exchange Act of 1948 to provide assistance to Radio Free Europe and Radio Liberty, disagreed to by the Senate; agreed to the conference asked by the Senate on the disagreeing votes of the two Houses thereon, and that Mr. MORGAN, Mr. ZABLOCKI, Mr. HAYS, Mr. FASCELL, Mr. MAILLIARD, Mr. FRELINGHUYSEN, and Mr. BROOMFIELD were appointed managers on the part of the House at the conference.

The message also announced that the House had disagreed to the amendments of the Senate to the bill (H.R. 11955) making supplemental appropriations for the fiscal year ending June 30, 1972, and for other purposes; agreed to the conference asked by the Senate on the disagreeing votes of the two Houses thereon, and that Mr. MAHON, Mr. WHITTEN, Mr. ROONEY of New York, Mr. BOLAND, Mr. NATCHER, Mr. FLOOD, Mr. STEED, Mr. SMITH of Iowa, Mrs. HANSEN of Washington, Mr. MCFALL, Mr. BOW, Mr. CEDERBERG, Mr. RHODES, Mr. MICHEL, Mr. SHRIVER, and Mr. MCDADE were appointed managers on the part of the House at the conference.

The message further announced that the House had passed the following bills and joint resolution of the Senate, severally with an amendment, in which it requested the concurrence of the Senate:

S. 602. An act to provide for the disposition of judgments, when appropriated, recovered by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, in paragraphs 7 and 10, docket numbered 50233, United States Court of Claims, and for other purposes;

S. 671. An act to provide for division and for the disposition of the funds appropriated to pay a judgment in favor of the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, and the Gros Ventre Tribe of the Fort Belknap Reservation, Montana, in Indian Claims Commission docket numbered 279–A, and for other purposes;

S. 1237. An act to provide Federal financial assistance for the reconstruction or repair of private nonprofit medical care facilities which are damaged or destroyed by a major disaster;

S. 2042. An act to provide for the apportionment of funds in payment of a judgment in favor of the Shoshone Tribe in consolidated dockets numbered 326–D, 326–E, 326–F, 326–G, 326–H, 366, and 367 before the Indian Claims Commission, and for other purposes;

S. 2887. An act authorizing additional appropriations for prosecution of projects in certain comprehensive river basin plans for flood control, navigation, and for other purposes; and

S.J. Res. 176. Joint resolution to extend the authority of the Secretary of Housing and Urban Development with respect to interest rates on insured mortgages, to extend and modify certain provisions of the National Flood Insurance Act of 1968, and for other purposes.

The message also announced that the House had passed the following bills, in which it requested the concurrence of the Senate:

H.R. 8708. An act to extend the authority of agency heads to draw checks in favor of financial organizations to other classes of recurring payments, and for other purposes;

H.R. 8856. An act to authorize an additional Deputy Secretary of Defense, and for other purposes;

H.R. 9019. An act to provide for the disposition of funds appropriated to pay a judgment in favor of the Jicarilla Apache Tribe in Indian Claims Commission docket numbered 22–A, and for other purposes;

H.R. 9526. An act to authorize certain naval vessel loans, and for other purposes;

H.R. 9886. An act to amend the Act of July 24, 1956, to authorize the Secretary of the Army to contract with the city of Arlington, Texas, for the use of water supply storage in the Benbrook Reservoir;

H.R. 10384. An act to release certain restrictions on the acquisition of lands for recreational development and for the protection of natural resources at fish and wildlife areas administered by the Secretary of the Interior;

H.R. 10702. An act to declare that certain federally owned land is held by the United States in trust for the Fort Belknap Indian Community;

H.R. 11570. An act to amend the Manpower Development and Training Act of 1962 by postponing the expiration of title II thereof for one year;

H.R. 11738. An act to amend title 10, United States Code, to authorize the Secretary of Defense to lend certain equipment and to provide transportation and other services to the Boy Scouts of America in connection with Boy Scout Jamborees, and for other purposes; and

H.R. 11809. An act to provide that for purposes of Public Law 874, Eighty-first Congress, relating to assistance for schools in federally impacted areas, Federal property transferred to the United States Postal Service shall continue to be treated as Federal property for two years.

ENROLLED BILLS AND JOINT RESOLUTION SIGNED

The message further announced that the Speaker had affixed his signature to the following enrolled bills and joint resolution:

S. 952. An act to declare that certain public lands are held in trust by the United States for the Summit Lake Paiute Tribe, and for other purposes;

H.R. 5068. An act to authorize grants for the Navajo Community College, and for other purposes; and

S.J. Res. 149. Joint resolution to authorize and request the President to proclaim the year 1972 as "International Book Year".

The enrolled bills and joint resolution were subsequently signed by the President pro tempore.

HOUSE BILLS REFERRED

The following bills were severally read twice by their titles and referred, as indicated:

H.R. 8708. An act to extend the authority of agency heads to draw checks in favor of financial organizations to other classes of recurring payments, and for other purposes; to the Committee on Government Operations.

H.R. 8856. An act to authorize an additional Deputy Secretary of Defense, and for other purposes;

H.R. 9526. An act to authorize certain naval vessel loans, and for other purposes; and

H.R. 11738. An act to amend title 10, United States Code, to authorize the Secretary of Defense to lend certain equipment and to provide transportation and other services to the Boy Scouts of America in connection with Boy Scout Jamborees, and for other purposes; to the Committee on Armed Services.

H.R. 9019. An act to provide for the disposition of funds appropriated to pay a judgment in favor of the Jicarilla Apache Tribe in Indian Claims Commission docket numbered 22–A, and for other purposes; and

H.R. 10702. An act to declare that certain federally owned land is held by the United States in trust for the Fort Belknap Indian Community; to the Committee on Interior and Insular Affairs.

H.R. 9886. An act to amend the act of July 24, 1956, to authorize the Secretary of the Army to contract with the city of Arlington, Tex., for the use of water supply storage in the Benbrook Reservoir; to the Committee on Public Works.

H.R. 10384. An act to release certain restrictions on the acquisition of lands for recreational development and for the protection of natural resources at fish and wildlife areas administered by the Secretary of the Interior; to the Committee on Commerce.

H.R. 11570. An act to amend the Manpower Development and Training Act of 1962 by postponing the expiration of title II thereof for one year; and

H.R. 11809. An act to provide that for purposes of Public Law 874, Eighty-first Congress, relating to assistance for schools in federally impacted areas, Federal property transferred to the United States Postal Service shall continue to be treated as Federal property for 2 years; to the Committee on Labor and Public Welfare.

EXECUTIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now return to executive session.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate resumed the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. The Senator from California is recognized.

Mr. TUNNEY. Mr. President, I am here today to exercise a responsibility which I consider to be the most important a Senator has before him—the advice and consent to a nomination to the Supreme Court.

In the 11 months since I became a Senator, I have already had this opportunity once. That was yesterday, when I joined 88 other Senators in approving the nomination of Lewis F. Powell.

The full burden of this constitutionally imposed responsibility did not fall upon me with respect to the nomination of Mr. Powell, because, after examining his record, I found him to be a man of outstanding caliber, worthy of the position to which he has been summoned. There was no question, on those facts, of withholding my consent to his nomination. Unfortunately, the nomination of Mr. Rehnquist is another matter entirely.

First, I believe it important to meet a number of general issues which have

been part of this controversy as they were of past confirmation debates. I do feel that great weight must be given to the initial choice of a President in evaluating a nominee to the Court, and I would vote against a nominee only reluctantly. Also, I quite agree that it is unhelpful to attempt to predict how a given nominee would vote on a particular case. Moreover, although the Senate has frequently engaged in the baldest inquiries into the political views of nominees, I believe this kind of review does not well serve the interest of keeping the Court insulated from the ordinary run of politics. Finally, because of the responsibility we must exercise in nominations, I believe it particularly important to act cautiously after full deliberation.

A STANDARD OF REVIEW

Having said all this, I believe equally strongly that there is a fundamental standard against which a Senator must measure a nominee. Mr. Justice Felix Frankfurter, himself a renowned judicial conservative, stated it most eloquently:

> In good truth, the Supreme Court is the Constitution. Therefore, the most relevant things about an appointee are his breadth of vision, his imagination, his capacity for disinterested judgment, his power to discover and suppress his prejudices.

I think that standard is particularly meaningful for our task today. It reaches far beyond any issue of judicial conservatism or liberalism. It is a standard which speaks of our deepest hopes for equal justice under law, for a government which might be one of laws and not of men. We have gone to great lengths to make that vision a reality: we share a written Constitution; we have sought to disperse economic and political power wherever possible; we are skeptical of uncontrolled administrative discretion. Rightfully, we love law and justice, and honor our judges. I believe we accept, whatever our hopes, that any government of laws must also be a government of men. We must therefore at our peril seek out, above all for our courts, fair-minded men and women of imagination and disinterested judgment. That is why the standard expressed by Mr. Justice Frankfurter expresses those values which I believe we must demand of any Justice on the highest court, regardless of region, political views, or judicial philosophy.

Mr. BAYH. Mr. President, will the Senator from California yield?

Mr. TUNNEY. I yield.

Mr. BAYH. I should like to ask the Senator if he would care to, in the words of one of our leading public officials, make one thing perfectly clear, and that is the last point the Senator from California mentioned relative to the judgment of the minority in the Judiciary Committee Report; namely, was it the judgment of the four minority members of the Judiciary Committee that we would oppose Mr. Rehnquist because he did not agree with us in all things or we had a broader objection.

The suggestion was made by our distinguished colleague from Nebraska yesterday that we were unwilling to endorse anyone unless the prospective nominee would approve of everything that this small group of liberals thought was important. I should like for the Senator from California, if he would, for those who read the RECORD, to give us the benefit of his thinking on whether that was the judgment we made, or whether our objection was for a more basic reason.

Mr. TUNNEY. Mr. President, it is quite clear that the minority views express the point that Mr. Rehnquist was not being evaluated on the basis of narrow political views but was being judged on the basis of his overall judicial philosophy—the breadth of his vision, of his imagination, the way he reacted to the most fundamental of our liberties—and that is the Bill of Rights—in his opinions as a member of the Department of Justice. We were evaluating also the way he felt about racial equality, the fact that Mr. Rehnquist has not demonstrated an understanding of the fundamental concepts so basic to a democratic society, that if a person does not have equality of opportunity he is in fact being denied the same democratic rights that the majority of citizens in our society enjoy.

I think that in the era in which we live, with changes taking place so quickly, with communications being so rapid, it is an absolute necessity that we have a man sitting on the Supreme Court who understands and reveres the most basic of our democratic tenets and principles. Among those basic principles is the equality of opportunity for every individual in our society and the extreme importance of the Bill of Rights for the defense of individual liberty against the interests of governmental control.

Quite clearly, from the discussions that took place in the Committee on the Judiciary, and from the dissenting views that were expressed by four members of the committee, we were not basing our decision on narrow partisan grounds, but on a broader vision of what the Court represents to all Americans; namely, an interpreter of the Constitution in the face of all of the conflicting values and interests which must be weighed.

Each man sitting on that Court, it seems to me, has got to have deep in his very being a true sense of the history of this country, where we have come from, whence we have sprung, and where we are going.

I do not feel that Mr. William Rehnquist, a man of great intelligence, a man of high personal ethics, has the sensitivity toward the needs of our society and its disparate elements which is required to enable him to sit in judgment on these broad constitutional principles.

Mr. BAYH. I appreciate the response of the Senator from California. What he says certainly reflects the feeling and opinion, and certainly the ideas, in the mind of the junior Senator from Indiana, as we discussed them in committee and afterward in the compilation of the minority views. Also, we certainly tried to explain the nominee's views which disturbed us. I think that the Senator from California has captured the feeling very well and I appreciate it.

Mr. TUNNEY. I thank the Senator from Indiana. As I progress in my remarks, I will be more specific as to why I feel that Mr. Rehnquist lacks the necessary qualifications to sit on the Supreme Court.

Mr. President, acting in its own coordinate role of reviewing nominees to the Supreme Court, the Senate, time and again, has exercised its responsibility to inquire both into a nominee's integrity and competence, and also into his attitude toward the fundamental values of our constitutional system.

Demonstrative are the remarks of former Senator Connally on the nomination of Charles Evans Hughes to be the Chief Justice of the United States:

> I have no quarrel with Judge Hughes as to personal character. I grant that he is a man of personal character. I grant that he is a man of personal integrity. I take no issue with the Senator from Illinois (Mr. Glenn) as to Justice Hughes' great ability as an advocate of the bar, but, Mr. President, a man who is personally honest, yet who has driven by an honest conviction to certain economic views, is a much more dangerous Judge and a much more dangerous man in this or any chamber than the weak or vacillating public servant.[1]

Former Senator Dill made a similar judgment:

> Mr. Hughes is a man of quality, a man of great ability. He honestly believes in the doctrine of property rights as superior to human rights under the law he has so ably advocated. That makes him all the more effective and from my viewpoint all the more objectionable.[2]

No one has ever doubted that a President as a matter of course takes into account a prospective nominee's attitude toward the issues of the day, including questions which have come or may come before the Supreme Court in deciding whether to lay his name before the Senate. Reason and logic, as well as the text of the Constitution, suggest no less breadth in passing on the nominee.

The relevance of a nominee's judicial philosophy becomes even more clearly spotlighted, however, when the President explicitly says that a nominee's philosophy is one of the factors in his having been chosen.

It is fair to say that no President has been more explicit than the present one in unfolding a plan for reshaping the Supreme Court by naming to that bench only men of a particular judicial philosophy. In announcing his two current nominations on October 21, the President recalled his campaign pledge:

> To nominate to the Supreme Court individuals who share my judicial philosophy, which is basically a conservative philosophy.

Hence the President singled out two criteria which guided his selections: excellence as a lawyer, and judicial philosophy.

The President has simply made plain what has been implicit all along in the process of making nominations to the Supreme Court—the consideration of a nominee's attitude toward the fundamental values of our constitutional system. Equally implicit is the Senate's duty. If the Senate is to "advise" as well as to "consent", then it is inconceivable that the Senators would deliberately bar themselves from considering the varied

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[1] 72 Cong. Rec. 3574 (Feb. 12, 1930).
[2] *Ibid.*

kinds of factors which the President invariably considers in choosing the nominee in the first place.

It is in the nature of the judicial process that those who nominate, and those who confirm or reject, a Justice of the Supreme Court must be concerned about the attitudes and values which the nominee may bring to bear on the decision of cases. Constitutions are not written with the specificity which one finds in a will or a contract. In particular, the great clauses of the Constitution, those in which the rights and liberties of the citizen are most bound up, are commonly clauses of notable generality. Phrases like "due process of law" or "equal protection of the law" invite—even demand—value judgments on the part of a judge. There is no litmus paper test to tell when a man has been denied due process of law. A judge must draw on history, on precedent, on experience, on the sum total of his own insights into the relation between state and individual.

No one could trace the evolution of the great clauses of the Constitution without being struck by the extent to which the judges of any generation are likely to read into that clause their understanding of how society will be best served by the interpretation that they are making.

How else can one account for the many and shifting uses to which the due process clause has been put, for example, the rise and decline of "substantive due process" in reviewing state economic and social legislation, or the more recent use of 14th amendment due process to "incorporate" and apply to the State various guarantees of the Bill of Rights?

Or how can one otherwise account for the many uses of the equal protection clause, ranging from its traditional application to bar racial injustice, to its use to implement other, emerging concerns, such as the dilution of the vote in legislative apportionment or the disabilities which indigency may place upon the accused in a criminal case.

Not only the language of the Constitution, but also the functioning of the Supreme Court as an institution, underscores the extent to which judges must make value judgments. Justice Jackson described how the Court is obliged to reconcile competing forces in our society:

> The Constitution, in making the balance between different parts of our government, a legal rather than a political question, casts the Court as the most philosophical of our political departments. It keeps the most fundamental equilibriums of our society such as that between liberty and authority, and between stability and progress. These issues underline nearly every movement in organized society.[3]

Justice Frankfurter emphasized the extent to which, as he saw it, a judge in interpreting the Constitution is necessarily thrown back upon his own set of values. The words of the Constitution, he wrote, are

> So unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life . . . . [M]embers of the Court are frequently admonished by their associates not to read their social and economic views into the neutral language of the Constitution. But the process of Constitutional interpretation compels the translation of policy into judgment.[4]

Strive as one will for the idealized notion that a judge should decide cases without reference to his own social or economic philosophy, it is hard to escape the implications of Jerome Frank's comment:

> When I woke up one morning a Federal Court Judge, I found myself about the same person who had gone to bed the night before an S.E.C. Commissioner.[5]

One of the great students of the judicial process, Benjamin Cardozo, himself later to sit on the Supreme Court, thought to puncture the myth that somehow when a man becomes a judge he is unaffected by the events which shape the thinking of other men:

> Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigate or judge. . . . [I]f there is anything of reality in my analysis of the judicial process, they [judges] do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.[6]

In short a man takes what he is and what he believes, to the Supreme Court. It is our duty to approve or disapprove him on that basis as I believe is made clear in the standard described by Mr. Justice Frankfurter.

B. MR. WILLIAM REHNQUIST

Mr. President, I come then to the present context—the nomination of William Rehnquist. Both of us are relatively young men. Both of us may live to see the end of this century and the beginning of the next millennium. As pointed out by the Senator from Indiana in another Supreme Court confirmation debate, Mr. Rehnquist may be serving on the Supreme Court in the year 2000.

Between now and then, there will be many profound political, social, and economic changes in this country. As a Justice of the Supreme Court, Mr. Rehnquist will be required to pass judgment on the constitutionality of much of that change as it relates to maintaining an equilibrium between freedom and order, equality and efficiency, justice and security.

And for that reason, in his testimony, in his speeches, in his writings, and in personal conversations with him, I have sought to measure, as Justice Frankfurter suggested, his breadth of vision, his imagination, and his capacity to put aside his prejudices.

William Rehnquist's record presents no threshold problem of personal integrity or intellectual ability. It is clear he is a man of superior intellect and great personal integrity. But it raises serious questions about all of those factors I have just listed.

Much of the basis for those questions can be found in the memorandum which three of my fellow members of the Judiciary Committee and I filed with our individual views. Contained in it is the substance of many of my objections to Mr. Rehnquist.

They can be summed up in this way: I believe that William Rehnquist places a very low value upon fundamental principles of equality and individual liberties, a value far lower than that which they are accorded by the Constitution and the Bill of Rights. I am particularly concerned with his willingness to discount or disregard the fundamental nature of basic human rights.

Mr. Rehnquist testified to the Judiciary Committee that he would put aside personal value judgments. Yet the comments of Justices Frankfurter, Jackson, and Cardozo, cited earlier, make clear that the very essence of a justice is his ability to make exceedingly difficult value judgments. And the record before us indicates that Mr. Rehnquist brings an exceedingly limited breadth of vision to those value judgments.

1. CIVIL LIBERTIES

In each instance when he has confronted a judgment involving competing interests of governmental power and individual liberty, he has demonstrated an uncritical willingness to place an overriding value on governmental control. On governmental surveillance, wiretapping, inherent executive power, rights of the accused, dissent by public employees, and many other instances which involve a balancing of governmental and private interests—the record is equally disturbing.

His justification of a vast expansion of the Subversive Activities Control Board, his defense of unrestricted governmental surveillance, his rationale for preventive detention—all demonstrate to me that he is quite the reverse of a "strict constructionist." Instead he is willing to read into the powers of the executive branch an unrestricted latitude which threatens the very basis of individual freedoms.

He reads the Bill of Rights, and decisions upholding them against competing interests, as narrowly as possible, with only a passing reference to their underlying concerns. At the same time, he reads provisions and precedents conferring executive power expansively to justify the most intrusive kinds of official interference with those rights.

An example is his analysis of the conflicting interests regarding Government surveillance. On the one hand, he rejects the notion of judicial control over surveillance on the ground that the very process of litigation will impede the investigative activities of the Executive and will—in Learned Hand's borrowed phrase "dampen the ardor of all but the most resolute" public officials. He does not explore the extent of the impediment, or consider available devices—such as ex parte or in camera judicial proceedings—which would minimize it.

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[3] Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York, 1941), pp. 312–13.

[4] "The Supreme Court," 3 *Parliamentary Affairs* (1949), p. 68.

[5] Quoted in Alpheus T. Mason, *The Supreme Court from Taft to Warren* (New York 1964), p. 192.

[6] *The Nature of the Judicial Process* (New Haven, 1921), pp. 167–68.

On the other hand, he denies that surveillance raises first amendment questions, rejecting the argument that it may "dampen the ardor" of political dissenters. In sum, the acknowledged possibility of abuse of surveillance does not call for judicial controls; but the possibility of abuse of judicial process calls for executive immunity from judicial controls. The Government's investigative interests must be protected from the "chilling effect" of litigation; but the first amendment interests of political dissenters need no protection from the "chilling effect" of the investigation.

Obviously, such conceptions as "possibility of abuse" and "chilling effect" have differing application to the facts and values on the two sides of the surveillance controversy; and, carefully analyzed, they may cut more heavily on one side than the other. But anyone who seeks fairly to resolve the controversy must fairly examine the applicability of these conceptions to the contentions on both sides, not just one. To be concerned with degrees of impairment of investigation that result incidentally from judicial supervision, but unconcerned with degrees of impairment of political expression that result incidentally from surveillance, bespeaks sensitivity to law enforcement values but none to the values of free speech.

2. CIVIL RIGHTS

In the area of civil rights, Mr. Rehnquist's record is especially disturbing, because of the substantial role played by the judicial branch in assuring equality of opportunity to all our citizens.

In recent days with public attention on his arguments as a Supreme Court clerk, against overturning the now infamous "separate but equal" decision, *Plessy* v. *Ferguson* (163 U.S. 537 (1896)), that record has become even more disturbing.

Of the three branches of the Federal Government, it was the judiciary which took the initiative in recognizing the moral and constitutional imperative of the civil rights movement in America. Nearly a century of inactivity followed the freeing of the slaves and the passage of the Reconstruction amendments to the Constitution. The high water marks of Reconstruction efforts to broaden civil rights and racial equality were Supreme Court decisions: The decision in the civil rights cases, overturning a public accommodations discrimination law was confirmed by the "separate but equal" decision of the Supreme Court in Plessy against Ferguson. Both these Supreme Court decisions stand at the beginning of decades of inactivity which ended only with another Supreme Court decision—*Brown* v. *Board of Education* in 1954 (347 U.S. 483). Only after Brown did the flood of civil rights legislation and other reforms begin.

Especially in the field of civil rights, therefore, the rule of law has depended on the actions of judges. The black man in America has pinned his hopes on that rule of law, and black leadership has repeatedly looked to the courts to redress grievances. As Mr. Justice Black put it so well in a 1940 opinion:

> Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.[7]

It is pointedly unfair, and in the long run futile, to ask a member of a minority group to have respect for law unless in return he has some reasonable assurance that he will share fully in the protections and promises that the Constitution holds out to him. If he loses faith in the constitutional system, the result is frustration, alienation, and eventually civil disorder or worse.

The powerless, the disadvantaged, the unpopular must not be without hope of redress. Even if the winds of political fortune from time to time foreclose legislative and executive channels, such people must be able to look to the courts. Recognizing the intimate relation between litigation and progress of civil rights in a 1963 opinion, the Supreme Court said that while litigation is not always a technique to resolve private differences; it can be—

> A means for achieving the lawful objectives of equality of treatment by all government, federal, state, and local, for members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of the New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.[8]

It is one thing for a court to take a "hands off" attitude when all that is at stake is a statute regulating the economy. Those who have money, power, or influence rarely find the courts to be their only hope. It is quite another thing to adopt a laissez-faire attitude to the rights of racial or other minorities.

Insuring that the American system is able to respond to the legitimate expectations of its diverse minorities is one of the compelling imperatives of our time. It is an imperative which will go unfulfilled if those on the Supreme Court are hostile, insensitive, or indifferent to the needs and aspirations of blacks and Chicanos and others who have so far not shared completely in the fruits of American democracy.

The legitimate aspirations of a minority group depend for their ultimate vindication on an open society: an unfettered franchise, freedom to express opinions no matter how obnoxious to the majority, a wide scope for State and Federal reform legislation—for example, congressional power under section 5 of the 14th amendment—and accessible justice in the courts. It is in just such areas as these that rulings of the Supreme Court in the past two decades have had the most impact. It is imperative that the Court continue to share with the Congress this trusteeship.

[7] *Chambers* v. *Florida*, 309 U.S. 227, 241 (1940).

[8] *NAACP* v. *Button*, 371 U.S. 415, 429–30 (1963).

I have measured the record of William Rehnquist on civil rights against this imperative and find it inadequate.

In accepting the Republican nomination for President in 1968, President Nixon said the following:

> Let those who have the responsibility for enforcing our laws and our judges who have the responsibility to interpret them be dedicated to the great principles of civil rights.

Yet Mr. Rehnquist displays, instead, a consistent hostility toward efforts to bring to all our citizens the full measure of their rights regardless of race or color or creed. His record is one of opposition to even modest efforts toward racial equality. The 1964 Phoenix public accommodations ordinance, the 1966 Model State Antidiscrimination Act, the 1967 letter to the editor of the Arizona Republic, and more fundamentally, his memorandum to Justice Jackson against the now infamous overturning Plessy against Ferguson, "separate but equal" decision of the Supreme Court—all demonstrate that he is a man who shrinks from dedication to those "great principles of civil rights" of which the President spoke.

All of these points are considered in great detail in our joint memorandum contained in the Judiciary Committee report with the exception of his memorandum to Justice Jackson, and I commend it to the Senate.

I believe, however, that the memorandum to Justice Jackson is highly significant, because it provides a strong indication of the manner in which Mr. Rehnquist approaches the proposition that all men are entitled to equality of opportunity regardless of race or color. And combined with his letter to the editor of the Washington Post regarding Judge Carswell in 1970, it demonstrates quite clearly that then and now, William Rehnquist believes that "constitutional conservatism" dictates resistance to "further expansion of constitutional recognition of civil rights."

In 1952, as the Supreme Court approached its unanimous decision in Brown against Board of Education in 1954 holding that racially segregated public facilities were inherently unequal, William Rehnquist said the following in his memorandum to Justice Jackson:

> Regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of these extreme cases which commands intervention from one of any conviction.

In 1970, in the face of demonstrated hostility to racial justice on the part of Judge Carswell, William Rehnquist wrote to the Washington Post as follows:

> Thus the extent to which his judicial decisions in civil rights cases fail to measure up to the standards of The Post are traceable to an over-all constitutional conservatism, rather than to any animus directed only at civil rights cases or civil rights litigants.

To my mind there is no clearer evidence that William Rehnquist at every point in time continues to regard affirmative commitment to principles of racial justice and judicial conservatism as mutually exclusive. He did so in 1952,

he did so in 1970, and I believe he does so now.

I believe that one point ought to be made very clear, and that is that it is possible to oppose such things as violent and disorderly demonstrations and still believe very deeply in the Bill or Rights, in the rights of assembly and free speech. I happen to oppose disorderly demonstrations and violence and the individual who decides to take the law into his own hands. Yet I believe equally passionately that the Bill of Rights must be protected in a mechanistic age in which men sense that their Government has no relevance to them.

What we are demanding of this nominee, as we did of Mr. Powell and other nominees before him, is that he give full consideration to all of the conflicting values and interests of society before making a judgment. One need not be a knee-jerk liberal to be concerned with a record such as that before us today. Concern for an ordered society, for the security of our governmental system, for protection against crime and lawlessness does not and cannot exclude an equal concern for the protection of individual liberties.

If there ever does come a time when concern for individual rights and concern for law and order with justice become mutually exclusive, I fear for our society.

Thus, I reject utterly and completely the notion that opposition to this nomination is based upon any kind of political litmus test between the parties, Republican and Democratic, in this country. I think that it is very clear that Mr. Powell has demonstrated in his record that he has the sensitivity to the Bill of Rights, that he has an understanding of the individual's value in an ordered society. I also believe it is clear that Mr. Rehnquist has not demonstrated such an understanding.

I, for one, reject wholly the thought that because in the Constitution life, liberty, and property are mentioned together, and that because the Federal Government, in recent years, has exercised ever-greater control over property rights, correspondingly the Government should have the right to control ever more completely the freedom of the individual. I believe that one of the things most dangerous about the present age and most dangerous to our democratic way of life is the fact that our political institutions are becoming free-floating aggregates of power, not anchored into the conscience of the individual citizen. I believe that the average citizen feels increasingly that his life has no universal moral significance.

It is ironic that a person such as myself, who has what could be called by some a liberal voting record, should be arguing what has traditionally been in this country a conservative viewpoint; namely, that the right of the individual is superior to the right of a government to exercise more than necessary control.

I do not feel that the Government has the right to exercise casual control over the individual. I feel that the Government obviously has the right to maintain order, and obviously the Government has the right to incarcerate those who break the law, and to punish those who show such contempt of their fellow citizens that they are willing to violate their rights. But everything is a balance. I, for one, am not predisposed to favor justices on the Supreme Court of the United States who feel that the Federal Government has an unlimited right to maintain order in the society, even where the most basic rights of the individual are held in jeopardy.

I never want to see the United States of America become a political community such as exists in the Soviet Union. I do not want to see truth based upon an opinion of the leader of the society as to what truth should be. I disagree with the basic philosophy of Jean-Jacques Rousseau that the general will as interpreted by the leader of the society is determinative of what the individual has the right to think and do.

In that kind of a political community, what really counts is who is the leader, and what are his personal political predilections. The rights of the minority are meaningless, because in the total political community, the general will as expressed by the leader is morally right, and those who disagree are apostates, under conditions such as those that prevailed during the Inquisition, and can be disposed of, and those who do the disposing are morally justified in so doing.

I do not want to see that type of society develop in the United States. But I think we have to recognize that in recent years we have moved far down the line. I think that when we see, as we did in recent history, men called figurative traitors, because they disagreed with a President's foreign policy in Southeast Asia, or when we move a little bit farther back in history and recall the era of Joe McCarthy, we begin to realize that increasingly we are moving toward a political community where the individual's worth to the society is determined by the political philosophy of those in power.

I feel, in that sense, that Mr. Rehnquist's philosophy as it relates to the exercise of government power is quite radical, and it seems to me that my own predisposition is conservative, if conservative means recognizing the importance and the value of individual rights and judgments.

It is my very sincere hope that the nomination of Mr. Rehnquist will not be confirmed by the Senate. He certainly is not a bad man. He certainly is not a man who is going to espouse principles which would incite revolution. But to my mind, he believes and articulates a sense of values which, if it were realized in this country, would mean a sharp departure from what we have known in the past. Considering the judicial system that we have in this country and considering the long tradition in Anglo-Saxon common law of innocence until proved guilty, I cannot imagine why a man as knowledgeable of the law as William Rehnquist would advocate, and be an architect of preventive detention. If you think about it for a moment, preventive detention turns the burden of proof upside down, it forces the defendant to prove his innocence, because he is jailed until trial. The only factual question that has to be determined by a judge before jailing is whether the defendant has had a certain number of convictions in the past. I would agree that if one were going to use the odds of a gambler, a long criminal record may make it more likely that a person arrested for another similar crime may be guilty of that crime—more likely at least than a person who has never been arrested before. But still it represents a very significant departure from the fundamental concept that a man is innocent until proven guilty, and that when a man is arrested and jailed prior to trial, he will have the right of bail.

Mr. Rehnquist apparently feels that preventive detention is a satisfactory means of keeping a man off the streets until trial. I wish that in analyzing the competing interests on that issue, Mr. Rehnquist had shown a corresponding willingness to analyze the effect of other, less restrictive alternatives—alternatives such as swifter trials, more judges and streamlined procedures, so that justice could be expedited—expedited in a way that is consistent with the Constitution which every American citizen treasures. That, I believe, is the essence of the value judgments which a Justice must make, and it illustrates the narrowness of his vision and imagination. I recognize that he is a man who is a consummate technician, but I feel that where he fails is that he does not have that breadth of spirit which encompasses the very essence of our democratic way of life. Although I feel that Mr. Rehnquist is perfectly entitled to have his point of view—and I would defend his right to express that viewpoint—that does not mean that I feel that he should be sitting on the Supreme Court of the United States, one of nine Justices, making decisions which are dramatically going to affect the rights of 200 million other citizens.

Mr. President, I should like to read into the RECORD at this time the memorandum that Mr. Rehnquist drafted for Justice Jackson in 1952 in which he analyzed the conflicting values which confronted the Court as it approached a decision on a half century of racial segregation.

I believe it illustrates and confirms the fact that, in the mind of William Rehnquist, judicial conservatism operates in opposition to the dedication to civil rights of which President Nixon spoke in his nominating speech.

A RANDOM THOUGHT ON THE SEGREGATION CASES

One-hundred fifty years ago this Court held that it was the ultimate judge of the restrictions which the Constitution imposed on the various branches of the national and state government. *Marbury* v. *Madison*. This was presumably on the basis that there are standards to be applied other than the personal predilections of the Justices.

As applied to questions of inter-state or state-federal relations, as well as to inter-departmental disputes within the federal government, this doctrine of judicial review has worked well. Where theoretically co-ordinate bodies of government are disputing, the Court is well suited to its role as arbiter. This is because these problems involve much less emotionally charged subject matter than do those discussed below. In effect, they determine the skeletal relations of the government to each other without influencing the substantive business of those governments.

As applied to relations between the individual and the state, the system has worked much less well. The Constitution, of course, deals with individual rights, particularly in the First Ten and the Fourteenth Amendments. But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. *Fletcher* v. *Peck*, in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. *Scott* v. *Sanford* was the result of Taney's effort to protect slaveholders from legislative interference.

After the Civil War, business interest came to dominate the Court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. Championed first by Field, then by Peckman and Brewer, the high water mark of the trend in protecting corporations against legislative influence was probably *Lochner* v. *NY*. To the majority opinion in that case, Holmes replied that the Fourteenth Amendment did not enact Herbert Spencer's Social Statics. Other cases coming later in a similar vein were *Adkins* v. *Children's Hospital, Hammer* v. *Dagenhart, Tyson* v. *Banton, Ribnik* v. *McBride*. But eventually the Court called a halt to this reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

In these cases now before the Court, the Court is, as Davis suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; *for regardless of the Justice's* individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from ons of any conviction.

I should like to interpose here: If segregation is not one of those extreme cases which commands intervention by the Supreme Court, what in the world would be one of those extreme cases?

To go on with the memorandum:

If this Court, because its members individually are "liberal" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction.

To interpolate again, apparently, if we follow this logic to its ultimate conclusion, we could have debtors prisons in this country. If property rights are always the equal of human rights, the Government could constitutionally establish such debtor prisons.

The Bill of Rights and the 14th amendment, if they stand for anything at all, stand for the proposition that there are occasions when rights fundamental to personal dignity do outweigh rights to property.

To go on with the memorandum:

To the argument made by Thurgood, not John Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy* v. *Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's *American Dilemma*.

Mr. President, I submit that the memo speaks for itself. It reveals a man who believes that judicial conservation can and should prevent a justice from undoing a half century of racial injustice and indignity. And taken together with Mr. Rehnquist's 1970 letter to the Washington Post in support of Judge Carswell it demonstrates that William Rehnquist believes that judicial conservation does, indeed, compel opposition to affirmative action against racial injustice.

When we couple his insensitivity in civil rights with his insensitivity to civil liberties, I believe his record shows that he is prepared to discount and disregard fundamental values which we as a Nation cannot discount and disregard.

Democracy is a very delicate balance between order on the one hand and liberty on the other. We can and we must demand that our judges be concerned to the utmost with the maintenance of that delicate balance. And thus I must oppose the nomination of William Rehnquist.

Mr. President, I yield to the Senator from Massachusetts.

Mr. MANSFIELD. Mr. President, will the Senator yield to me for a unanimous consent request?

Mr. BROOKE. I yield.

UNANIMOUS-CONSENT AGREEMENT ON S. 2676

Mr. MANSFIELD. Mr. President, I ask unanimous consent that at the conclusion of any special orders for any Senators tomorrow, there be a period of not to exceed one-half hour set aside for the consideration of calendar No. 537, S. 2676, a bill to provide for the prevention of sickle cell anemia; and that the time be equally divided between the majority and the minority leaders or whomever they may designate.

The PRESIDING OFFICER (Mr. HANSEN). Does the Senator wish to waive rule XII?

Mr. MANSFIELD. Yes, indeed. I thank the Chair for reminding me.

Mr. FANNIN. Mr. President, what is the time limitation?

Mr. MANSFIELD. The time limitation is not to exceed one-half hour, the time to be equally divided between the two leaders or whoever they may designate. It is my further understanding that the yeas and nays have been ordered on the measure.

The PRESIDING OFFICER. The Senator is correct. Without objection, it is so ordered.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Berry, one of its reading clerks, announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 29) to establish the Capitol Reef National Park in the State of Utah.

The message also announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2007) to provide for the continuation of programs authorized under the Economic Opportunity Act of 1964, and for other purposes.

ENROLLED BILLS PRESENTED

The Secretary of the Senate reported that on today, December 7, 1971, he presented to the President of the United States the following enrolled bills:

S. 1116. An act to require the protection, management, and control of wild free-roaming horses and burros on public lands; and

S. 2248. An act to authorize the Secretary of the Interior to engage in certain feasibility investigations.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

Mr. BROOKE. Mr. President, inscribed on the portico of the Supreme Court are four words: "Equal Justice Under Law." In all likelihood, few Americans have ever noticed this inscription. But through the centuries, millions of Americans have relied on the Court to follow this dictum. And in the past two decades, a disillusioned minority of Americans have become increasingly reliant on this, the Nation's highest tribunal, to accord them the rights they have for so long been denied. The Court has responded to their aspirations for justice and sustained their faith that our Nation remains intent on realizing the noble and necessary goal of equality for all its citizens.

The confidence of the people in the Supreme Court must ever be renewed and never be diminished. This confidence is derived from the actions, opinions and bearings of nine individuals. We in the Senate are charged with sustaining this confidence by properly advising and consenting on the President's judicial nominations. We must insure that only the best men and women serve on the Supreme Court of the United States. And there must be no doubt in any American's mind that the U.S. Senate will accept anything less than the best on the Court.

Our quest for the best justices must be considered with a special set of circumstances in mind: The time limits which apply to most other Presidential appointments do not pertain to Supreme

Court Justices. A justice once nominated and confirmed in the last third of the 20th century could well serve into the 21st century and shape the destiny not only of our children but of our children's children and, indeed, their children.

In this context, I am reminded of Justice Felix Frankfurter's observation after many years of service on the Court:

> The meaning of "due process" and the content of terms like "liberty" are not revealed by the Constitution. It is the Justices who make the meaning. They read into the neutral language of the Constitution their own economic and social views. Let us face the fact that five justices of the Supreme Court are the molders of policy rather than the impersonal vehicle of revealed truth.

Five Justices, a majority of the Court, are indeed the "molders of policy." The law is not eternal, immutable; it changes as it is perceived by men. And it is our duty, the Senate's duty, no less than the President's, to insure for the people of the United States that the law is perceived by wise and fair men and women. In carrying out our duty we must measure the men and women nominated by the President against the highest possible standards. I have done so to the fullest extent possible.

During the 35 months of his incumbency, President Nixon has had an opportunity with few precedents. He has had the opportunity to fill four vacancies on the Supreme Court. In so doing, he has nominated six men—one to be Chief Justice and five to be Associate Justices of the Court. I supported the nominations of Warren E. Burger to be Chief Justice and Harry A. Blackmun to be an Associate Justice. At the time of their confirmations I believed each would sustain the people's confidence in the Court. Their records to date have substantiated my belief.

At the same time, I felt compelled to vote against two Presidential nominees to the Supreme Court: Justices Clement Haynsworth and G. Harrold Carswell.

Both of these men should be spared as far as possible a review of the circumstances that led to the rejection of their nominations.

I intend to discuss their confirmation proceedings only to the extent that it is necessary to delineate my criteria for supporting the confirmation of a nominee to the Supreme Court.

In 1948, Mr. Carswell had advocated a doctrine of racial superiority. As repugnant as this concept is to me, I would not have voted to reject him on the basis of the 1948 speech if anywhere in the 22 years which followed there was convincing evidence that he had changed his views. In my search for such evidence, I was mindful of the presence on the Court of Justice Hugo Black, who had taken the oath of a Klansman early in his political career, but who before and during his service on the Court became one of the greatest defenders of personal liberties in American history. Judge Carswell's personal and professional record gave no evidence of a similar ability to grow and change.

In fact there was clear evidence that his views of 1948 were his views in 1970. My search was for more than evidence. I searched for a measure of the man and found he did not measure up to the standard the Senate must set if public confidence in the Court is to be sustained.

I asked: "What kind of man is he?" That is a difficult question. The answers are not readily found. But the question is valid and the answers essential as a Senator weighs his decision and votes on a Supreme Court nomination. It is imperative that we measure the total man.

In this regard, I repeat today what I said on March 19, 1970, during the debate on the Carswell nomination:

> In short I say our responsibility goes far deeper. We are concerned not only with the integrity and honesty of the nominee, but also with the competence, ability and qualifications above and beyond the man's moral fitness to sit on the highest bench of the land.

These qualifications can be discerned in the human qualities of a nominee which are pertinent to confirmation because, in Frankfurter's words, a Justice is more than "the impersonal vehicle of revealed truth."

Judge Learned Hand once discussed the appropriate qualifications of great jurists. He said in part:

> They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaption; which will disrupt it if rigidly confined.

In assessing past nominees to the Supreme Court, I have sought in measuring the "total man" to judge the candidate's awareness of and sensitivity to "changing social tensions."

In this regard, it is, and must be, appropriate that we consider a nominee's actions and attitudes with respect to civil rights. I believe that a nominee's affirmation of the progress we have made in assuring equal treatment and opportunities for all Americans is a prerequisite for confirmation, I have applied this yardstick in the past; I have used it in respect to the nomination now before us and I shall hold true to it as long as I am a Member of the U.S. Senate.

For I believe that the Nation's highest tribunal has renewed the promise of liberty and equality, and that it can never renege on this sacred promise.

Mr. President, during the proceedings on past Supreme Court nominees, I have said I could vote to confirm a conservative, a southerner, and a strict constructionist. I voted with confidence to confirm the nominatin of Lewis F. Powell, Jr., to be Associate Justice of the Supreme Court.

But I regret that on the basis of his record I do not have that confidence in William H. Rehnquist and I am compelled to vote against his confirmation.

Since I announced my decision last Thursday to oppose Mr. Rehnquist's nomination, additional information as to Mr. Rehnquist's disposition to human rights has surfaced.

In its December 13 issue, Newsweek reported that while a clerk to Justice Robert Jackson in 1952, the nominee wrote a memorandum declaring that the "separate but equal" doctrine laid down by the Court in Plessy against Ferguson in 1896, in Mr. Rehnquist's words, "was right and should be reaffirmed."

This memo further stated:

> Regardless of the Justices' individual views on the merits of segregation . . . it quite clearly is not one of those extreme cases which commands intervention from one of any conviction. . . . To those who argue that "personal" rights are more sacrosanct than "property" rights the short answer is that the Constitution makes no such distinction. To the arguments made by Marshall—Thurgood, not John—that a majority may not deprive a minority of its constitutional rights, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are.

Heaven help us, Mr. President, if this is the answer.

Mr. Rehnquist was 28 years old when he wrote that memo and when he predicted that the Court's efforts to protect minorities would "fade in time, too, as embodying only the sentiments of a transient minority of nine men." Two years later Justice Jackson joined in the unanimous decision in Brown against Board of Education, which declared segregated schools to be inherently equal. The Court's efforts to protect minority rights did not "fade in time." Neither did William Rehnquist's resistance to efforts to protect these rights.

As I did in the case of Judge Carswell, I searched for evidence which might indicate a change and growth in Mr. Rehnquist's attitudes. I looked for indications that the nominee had grown away from the position he stated in his 1952 memo. But I did not, I could not, find such evidence.

On the contrary, my thorough analysis of Mr. Rehnquist's record reveals a continued and disturbing pattern of insensitivity to human rights. The record is devoid of any assurance that, if confirmed, he would not seek to undo the slow, steady progress we have made. Rather, the evidence suggests that, if confirmed, he might actively press to move the Court away from its commitment to equal protection and opportunity.

Since his 1952 memo, I find, time and again, a consistent pattern in Mr. Rehnquist's personal activities, writings, and opinions throughout the 1960's when he practiced law in Phoenix. What is clear from a review of available information is that, while our Nation forged ahead into new dimensions of equal opportunity and treatment for its people, Mr. Rehnquist clung tenaciously to a narrow view of the rights of man.

The years of 1964, 1966, and 1967 were years of hope for the long-disillusioned minorities. Congress began to move, as the Supreme Court had earlier, to insure that human rights were upheld. Yet, in each of these years, Mr. Rehnquist vigorously opposed progress in human rights.

On June 15, 1964, as a "lawyer without a client," William Rehnquist appeared before the city council of the city of Phoenix to argue against adoption of an ordinance guaranteeing equal rights of access to public accommodations.

There was nothing ambiguous about his speech. It was an eloquent, but, in my judgment, totally misguided, defense of the proposition that property rights rank higher than human rights. Let me repeat his words:

Here you are talking about a man's private property and you are saying, in effect, that people shall have access to the man's property whether he wants it or not.

Fortunately, his testimony did not convince the city council which unanimously passed the ordinance the following day. Undeterred, Mr. Rehnquist reiterated his views in a letter to the editor, published in the Arizona Republic, June 24, 1964. Within weeks the Congress of the United States passed the historic Civil Rights Act of 1964 with its broad public accommodations provisions.

Mr. Rehnquist now claims a change of mind on this issue. In his testimony before the Judiciary Committee last month, he said:

I think the ordinance really worked very well in Phoenix. It was readily accepted, and I think I have come to realize since, more than I did at the time, the strong concern that minorities have for the recognition of these rights. I would not feel that same way today about it as I did then.

Mr. President, it is incredible to me that any man did not know how strongly minorities felt about their rights. Minorities feel just as strongly about their rights, if not more strongly about their rights, than majorities feel about their rights. That is what is happening all over the world today. People are claiming and crying and fighting for their rights. Minorities who have been oppressed for centuries are fighting for their rights. How can an intelligent man—and Mr. Rehnquist is an intelligent man—not have known in the 1960's that minorities felt so strongly about their rights? Then in 1971, when he came before the Senate Committee on the Judiciary to be confirmed for the Supreme Court of the United States, our highest tribunal, he said that now he understands how strongly minorities feel about their rights.

Mr. BAYH. Will the Senator yield?

Mr. BROOKE. He does not say that he was wrong in 1967. He does not say that at all. He just says the Phoenix, Ariz., ordinance worked well—as though he were surprised that it would work well—and that, therefore, since it did work well, and because he now understands in 1971 how strongly minorities feel about their rights, he has changed his mind and perhaps today he would not say what he said in 1967.

Yes, I shall be very pleased to yield

Mr. BAYH. I just want to reemphasize—and the Senator has done so on his own volition—the fact that although the proponents of Mr. Rehnquist said, well, now, he really does not believe that; it may have been bad to write that memorandum back in 1952 in reference to the case of Brown against Board of Education; it may have been bad not to have wanted black people in the drugstores of Phoenix in 1964—at a time when this city was alive, when hundreds of thousands of people became aware of that great 1964 Civil Rights Act—it may have been bad in 1967 for him to have taken issue with the superintendent of schools in his efforts to desegregate the school system of Phoenix, but this is a new Mr. Rehnquist in 1971. They say he really does not believe in this any more.

As the Senator from Massachusetts has pointed out, he has not said that he was wrong in 1964; he has not said that the philosophy presented in Brown against Board of Education is a good philosophy; he has fallen back on the argument that we did not get quite as many bloody noses out of the public accomodations ordinance as he had anticipated.

I wonder if the Senator from Massachusetts shares concern, as does the Senator from Indiana, that it is too late to remake Brown against Board of Education. That is the law of the land, and to try to look with hindsight at what a man who has now made certain statements relative to Brown against Board of Education some feel now is not important. But we have to look at his philosophy, and the thought processes that he used, and the assessment of various values of the Constitution that he used, to determine how he would judge should another Brown against Board of Education—a similarly dramatic landmark case—come before the Court.

Does the Senator from Massachusetts have concern about the sensitivity and the humanitarian nature of a nominee who looked so coldly and callously at blacks with regard to personal rights as that expressed by the nominee, given another case like this, as there are bound to be several?

Mr. BROOKE. Mr. President, I certainly am very much concerned about Mr. Rehnquist's insensitivity in this area. I am very much concerned at the thought of confirming the nomination of a man for the Supreme Court of the United States who, after making the statement he did in 1967, comes before the Senate Judiciary Committee in 1971 and asks the members to vote favorably upon his nomination and report his nomination to the full Senate, yet even then does not feel strongly enough about basic human rights to say categorically, without any equivocation whatsoever, that he now thinks differently. I searched the record. I read it thoroughly. I find no such language contained herein. I cannot interpret what I have read in the record to mean that he has changed his view, no matter how much I may stretch that record or that language. I cannot find it anywhere in the record. Let me just read the words again:

I think the ordinance really worked very well in Phoenix. It was readily accepted, and I think I have come to realize since, more than I did at the time, the strong concern that minorities have for the recognition of these rights. I would not feel that same way today about it as I did then.

Nowhere there in those words I have just read do I find a rejection of the philosophy of his statement in 1967—nowhere.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. BROOKE. I yield.

Mr. BAYH. The Senator from Indiana sat through every word of that testimony, and it is not there. The interpretation for which the Senator from Massachusetts searched, I also searched for. I asked questions trying to get this type of disavowal. It is not there. I think we have an alarming consistency between the language and the rhetoric throughout his career and the reasoning in his Brown against Board of Education memorandum to Justice Jackson.

Mr. Rehnquist then said the Constitution—I will paraphrase it very badly, because he stated it very articulately, but in essence he said—the Constitution does not give preference to personal rights over property rights. There is great consistency between that language in 1952 and the language in the letter to the editor about the Phoenix public accommodations ordinance, and, indeed, the integrated versus segregated society language in the 1967 letter. So it at least shows the same belief that he had in 1964, 1966, and 1967 as he had in 1952.

I thank my colleague for yielding.

Mr. BROOKE. To go on, Mr. President, Mr. Rehnquist's "change of mind"—in quotes—came slowly, even though it was welcome. It came slowly.

In 1966 he opposed two important provisions of a model State Antidiscrimination Act. One would have permitted an employer with the approval of a State agency, to voluntarily hire new employees to fill vacancies in such a way as to reduce or eliminate racial, religious, or sex imbalance in its work force. The other provision also opposed by Mr. Rehnquist was designed to prohibit "blockbusting" tactics by which some realtors profited from racial fears.

Mr. Rehnquist moved to delete this provision because of what he considered to be "constitutional and policy" questions. Once again his opposition was overruled.

One year later, and only 4 years ago, Mr. Rehnquist voluntarily entered the debate on de facto segregation within the Phoenix Public School System with a letter to the editor published in the Arizona Republic of September 9, 1967. Mr. Rehnquist's letter responded to a series of articles in the Republic outlining the "integration program" for Phoenix High Schools proposed by the Superintendent of Schools, Dr. Howard Seymour. Mr. Rehnquist was as vehement on this issue as he had been before: he opposed any mechanism which would compromise the traditional neighborhood school concept. He wrote:

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

In that letter, Mr. Rehnquist upholds the point of view expressed in his 1952 memorandum. In 15 years, and notwithstanding the Supreme Court's unanimous decision in Brown against Board of Education, it is apparent that William Rehnquist has remained unmoved and unchanged.

Particularly, I reject Mr. Rehnquist's assertion that—

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

I am convinced that we are a free society seeking full freedom of opportunity, which shall lead us to integration. Thus, I believe we are dedicated to an integrated society.

The United States of which I dream can only be achieved in unity. In my opinion, we cannot have a division of the races. I have always opposed black separatists and white separatists. I have also opposed those who advocate a laissez-faire course and treat as equal the consequences of integration and segregation. Segregation is a lingering evil of the past; integration is an abiding goal of the future. They cannot be equally weighed. Yet only 4 years ago, Mr. Rehnquist so weighed them.

In hearings before the Judiciary Committee, Mr. Rehnquist still had not recanted his view though he has had ample opportunity to do so. Rather he has sought to explain away his statement in the narrow context of busing, though nowhere in his letter is there any mention of busing. His original statement was broadly, not narrowly, based. It dealt with far more than the Phoenix School System; it was Mr. Rehnquist's statement of his strong belief that this was the proper course for the Nation.

Mr. President, to summarize there is a persistently disturbing pattern in Mr. Rehnquist's record in the 1960's. The Nation was moving forward; Mr. Rehnquist was looking back. In 1964, the nominee opposed a Phoenix public accommodations ordinance while Congress was in the process of passing the Civil Rights Act of 1964. In 1966, the nominee sought to delete equal employment and anti-"blockbusting" provisions from a Model State Civil Rights Act, as President Johnson began to enforce title VI of the Civil Rights Act of 1964 to eliminate de jure segregation in Southern school districts. In 1967, Mr. Rehnquist wrote that "we are no more committed to an 'integregated' society than we are to a 'segregated' society," as Justice Thurgood Marshall was appointed to the Supreme Court.

From this pattern, I reluctantly conclude that there is little evidence to support the contention that William Rehnquist has had an appreciation for and a sensitivity to the needs and rights of individuals. On the contrary, his record gives every indication that he remains unappreciative of and insensitive to changing social tensions. His own words, presumably written after careful thought and study reveal a persistent unwillingness to permit the law to be used for the purpose of promoting equal justice under the law for all Americans.

Mr. President, disturbing as Mr. Rehnquist's record was during the 1960's, I wanted to find evidence of growth or change.

In pursuit of evidence to this effect, I encountered an obstacle to complete inquiry—the nominee's position as Assistant Attorney General, Office of Legal Counsel. From the day he assumed this position, it is almost impossible to separate William Rehnquist, the man, from William Rehnquist, the President's advocate. Whatever the merits of the nominee's invoking the lawyer-client privilege on a number of issues, the result was to make sparse his public record and to preclude full assessment of his growth and change since 1967.

In the interval between his 1967 letter to the editor and his nomination on October 21, 1971, I find only one statement by Mr. Rehnquist concerning civil rights that could be construed as personal and not made on behalf of the Justice Department. In a letter to the editor of the Washington Post rebutting an editorial critical of Judge Harrold Carswell, Mr. Rehnquist wrote:

> My criticism of your editorial, however, goes beyond these misimpressions. The *Post* is apparently dedicated to the notion that a Supreme Court nominee's subscription to a rather detailed catechism of civil rights decisions is the equivalent of subscription to the Nicene Creed for the early Christians—adherence to every word is a prerequisite to confirmation in the one case, just as it was to salvation in the other.

The contemptuous tone of Mr. Rehnquist's letter is almost as disturbing as its content. He abruptly dismisses those who have championed civil rights and two decades of judicial progress. The letter offers additional evidence that Mr. Rehnquist had not moved away from the apparent insensitivity to human needs and human rights he expressed in 1952 and evidenced throughout the 1960's.

Mr. Rehnquist apparently has never been reconciled to the failure of his prophecy that the Court's efforts to protect the rights of minorities would "fade in time." Eighteen years passed and the Court's efforts did not fade, but instead grew brighter and a Nation moved ahead. "Personal" rights were held sacrosanct by nine men who embodied a permanent sense of equal justice for all Americans.

We cannot, or should not, now undo the progress this country has made. Those who look to the Supreme Court for fairness, for justice, for equality, must not be disappointed. The American people must continue to be confident that the Naton's Highest Court will fulfill its promise. I believe that the confirmation of William Rehnquist would strain this confidence.

Mr. President, as I said at the time I announced my opposition to two previous nominees to the Supreme Court, it is a painful experience for me to seek to deny any man the opportunity to achieve the highest honor his profession has to offer. Nor do I lightly seek to deny the President of the United States, and the leader of my party, the opportunity to name a man of his choice to our Highest Court.

But, Mr. President, I feel it is my responsibility as it is the responsibility of every one of us in the U.S. Senate, to insure that our Nation must go forward and never backward. One of the most important questions before us is: Will William Rehnquist, on the basis of his record as a member of the Court insure equal justice under law? I ask each of my colleagues to carefully consider the total man whose nomination is before us. I ask that they consider his attitude and actions in the context of the mid and late 1960's. I ask that they consider if on this record, they can support William Rehnquist with the confidence that, under the law, every American will be treated fairly, justly, and impartially and have an equal opportunity to live, learn, and earn.

Mr. President, I speak in the belief that all the people of the United States must have confidence in their system of government. We are charged with sustaining that confidence. Thus we must also ask: Will the confirmation of William H. Rehnquist serve to bolster the confidence of the people in our system of laws?

Mindful of the four words inscribed on the Court, I have concluded that Mr. Rehnquist is not the right man at this crucial period in our history to reassure the people that the Court will hold true to its sacred dictum of "equal justice under law."

I respectfully ask my colleagues to review my reasons.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. BROOKE. I yield.

Mr. BAYH. Having sat through the bulk of the Senator's remarks and having discussed the merits and the responsibilities that each of us has as an individual, I must say that I am deeply impressed by the Senator from Massachusetts. I think both of us waged a common struggle in our own mind as to what we should do with respect to this nomination. Both of us have reached the same conclusion. I must say that I have not heard that conclusion and the reasons for substantiating such a conclusion more eloquently expressed on this floor than has been done by the distinguished Senator from Massachusetts, and I am deeply moved.

Mr. BROOKE. I thank the distinguished Senator from Indiana for his very generous comments relative to my remarks on the Rehnquist nomination. I know how deeply the Senator feels about the need to have only the best men and women serve on the Supreme Court of the United States. I know how zealously he has guarded the rights of the people of the United States in the selection of Supreme Court nominees.

I feel, as does he, that the Senate has a grave responsibility in the authority vested in it to advise and consent as to Supreme Court nominees. I know the job he has done on the Judiciary Committee in trying, in all fairness to the nominee and in keeping with the high responsibility of the Senate, to investigate, to inquire, to ask and to search for all evidence he could find, favorable as well as unfavorable—because, certainly, my colleague wants to find favorable evidence, as we all do.

I know how painful it has been for him. I certainly would have hoped that in filing the vacancies on the Court, our President—because he is the President of the Senators from Indiana as well as my President—could have sent us two names that we could have proudly endorsed and whose nominations we could have confirmed. One of his nominees, obviously, was a man that at least 89 out of 90 of those who had the opportunity to vote for confirmation believed was an outstanding appointment to the Court. Now we have the second name, which gives us very serious concern.

So, Mr. President, I am very gratified that the Senator from Indiana has been able to hear some of the remarks I have made concerning this nomination. I am sure that much will be said on the floor of the Senate before the time for actual vote on this confirmation. I have never been able to predict—nor have I ever attempted to predict—what the Senate would do on any vote. I do not know now, and I do not now predict. But I do believe that we perform no greater service than the one we perform in giving full and careful consideration to appointees for the Supreme Court of the United States.

Mr. Rehnquist is a relatively young man. I believe he is some 47 years of age. If God is kind to him, based upon life expectancies, Mr. Rehnquist could live for many years to come. I hope and pray that he does. If my colleagues should see fit to confirm his nomination and he should sit on the Supreme Court of the United States, he could be on that Court during our lifetimes, during the lifetimes of our children, and into the lifetimes of our children's children. Mr. Rehnquist has already demonstrated not only that he is an intelligent man but that he is an aggressive and an active man. I think it would be fair to conclude that Mr. Rehnquist could be classified as an activist. An activist, in my opinion, is one who does things, gets things done, who leads and has people follow him.

I am sure that, rather than sitting on the Court and writing opinions, Mr. Rehnquist would be an influence on any court on which he sat. I believe I am being fair in this assessment of Mr. Rehnquist, based upon the evidence. That evidence is that when he went before the council in Phoenix, Ariz., he was not a member of, to our knowledge, or an officer of, to our knowledge, any particular group, but he was acting on his own initiative. The evidence as to his aggressiveness is the fact that even after he failed to convince the council, he continued moving in that general direction because he had such strong views.

There is nothing wrong with that, of course. It is good to have men with strong views, men who are activists. The Nation would be stifled and stymied without them. I merely point this out because I believe that if Mr. Rehnquist were to be confirmed and sit on the Supreme Court, and if his views have not changed from the 1950's and the 1960's, as I have discussed in specifics this afternoon, then he could be an influence, in my opinion, for wrong on the Supreme Court of the United States, which could conceivably take the Nation back rather than continuing its forward progress.

Thus, Mr. President, I will conclude by saying that I have great faith in the intelligence, the integrity, and the insight of my colleagues in the Senate.

Mr. HART. Mr. President, will the distinguished Senator from Massachusetts yield briefly?

Mr. BROOKE. I am very much pleased to yield to my distinguished colleague from Michigan.

Mr. HART. Mr. President, unfortunately for me I was not able to be in the Chamber to hear all the remarks of the distinguished Senator from Massachusetts but I did have the opportunity to hear several of the point that he made.

One in particular which I believe will be helpful for us, and may add to the wisdom which will be reflected in the rollcall on this nomination, is the suggestion that we attempt to understand as fully as we can the sensitivity of minority groups in America when we are talking about a man for the Supreme Court.

As we look around at ourselves in the Senate, it is evident that this is a body of men elected by the people. We are pretty white. We are pretty male, and we are pretty old. That, I take it, is a reflection of the popular will. We also do not have to worry personally about reducing qualifications for food stamps around here—and neither does the Chief Executive. He can be described in the same way. He is popularly elected.

I believe that describes, with the oversimplification of a shorthand label, and with fair accuracy, two of the three coequal branches of Government.

It helps us understand why those who are poor, those whose educational opportunities have been limited, those who are in minorities of one or another category, correctly understand that it is the third branch of Government, the Supreme Court—which is not the reflection of a momentary majority—to which they must look for help and understanding.

Better than any Member of the Senate, the distinguished Senator from Massachusetts (Mr. BROOKE) can remind us of that.

Sometimes it is suggested that those of us who raise the question about this nominee—and have raised it about others—that he has not demonstrated a devotion to the great principles of civil rights, are flyspecking or looking for an alibi to vote against them. But that is the exact description that President Nixon used when he accepted his party's nomination in Miami: that the kind of judge we should look for is someone who has demonstrated devotion to those great principles of civil rights.

What we are hoping our colleagues will agree, when the record is on the desk of each Senator, and in the views filed by the four of us is first, that there is no such demonstration of devotion at any period in the life of this nominee and, second—which I think is the more important point for us to attempt to develop—that there are significant actions in the career of the nominee which do reflect a lack of sensitivity and a lack of appreciation of those values which the minorities in this country hope we will identify before we put a man on the Supreme Court.

The remarks of the distinguished Senator from Massachusetts are helpful in many ways; I rise only to thank him for making this particular point.

I hope that I have not given offense in suggesting that it may be completely understandable, but nonetheless unfortunate, that unless one has to scratch for food, unless he has to ask to be excused for being different from the majority, he is not going to get the point that some of us are trying to make around here; namely, that the Supreme Court is the one branch of Government where we hope the will of the moment, the cry of the pack, the popularity or the unpopularity of a person or program, will not be the dominant influence but rather that the Court will be influenced solely by the constitutional safeguards which the Founding Fathers built, in order to protect against the whim of the moment, no matter how overwhelming the majority may be at a given time. That is why the President was right, absolutely right, when he said that in the men and women who interpret our laws we should look for qualities that demonstrate a devotion to the great principles of civil rights. He said that, and I echo him; however, I find nothing in the record of the nominee that would support the conclusion that there is in his career any demonstration of such devotion.

I thank the Senator from Massachusetts.

Mr. BROOKE. Mr. President, the distinguished Senator from Michigan has, as always, made a fine, rich contribution to the colloquy. He speaks of his own personal dedication and devotion to the principles which he has enunciated. I know that he has given very serious thought to all of the Supreme Court nominees whose names have been presented to the Senate for confirmation in the many years he has served in the Senate.

Like the Senator from Michigan, I have been somewhat annoyed when people or the press would indicate that we are looking for ways to deny confirmation. I can very truthfully say that in the 5 years I have been serving in the Senate, I have never known any Member of the Senate to look for ways to vote against confirmation. It has been quite the reverse. All the Members of the Senate have looked always for ways to support confirmation.

I would go so far as to say—and I think I am correct—that there is a presumption in favor of confirmation, a presumption of innocence, if you will, and that the burden has always been the other way, that one had to get evidence to prove that a man was not Supreme Court quality or material.

That does not do away with our responsibility to look at the record in depth—the total record—before we cast a vote.

Here we are creating a third coequal branch of the Government. The President appoints and we confirm. It is quite different from Cabinet appointees.

I may have differed with Mr. Butz' qualifications and some of the things he said or stood for in voting for his nomination as a member of the President's Cabinet. But he is the President's man. He serves at the will of the President. The President named him and the President can discharge him. However, the Supreme Court, the judiciary, does not and should not serve at the will of the President. The members of the Supreme Court will be there long after the President has served his term. It is a very serious responsibility and one that cannot be taken lightly.

In the main we have to go to the Justice Department, the investigative branch of the executive department, to get information pertaining to potential appointees to the Court.

We depend upon the Justice Department very heavily for information concerning Presidential nominees to the Court. We have limited staff facilities for independent investigations and inquiries into the background, qualifications, and qualities of nominees. We can also look to an enlightened press, and look to citizens of the United States who might have independent knowledge of a nominee.

Sometimes it takes time. In most instances it takes time before we can get all of the information pertaining to a particular nominee for the Supreme Court. And thus it is rather disturbing when some think that by looking into the record, by really doing our job, we are either delaying or searching for adverse information about any particular nominee for the Court. I think we should take all the time we need.

I am opposed to filibustering. I have never participated in filibusters and I never shall. I have signed cloture motions. I have always voted for cloture when in my own mind I have made a determination that ample time had been given for debate on a particular issue. In the Rehnquist case I will do the same. When ample time has been given and the matter has been debated fully and the qualifications of this particular nominee have been discussed, I will then personally sign a cloture motion and will vote for cloture.

That does not mean by any means that I believe we should not have full debate and full discussion on his qualifications for perhaps the highest position in our National Government.

Mr. President, I know that we had all hoped that our session would have been concluded by now. It has been a long session. Many debates, many bills, many issues and many decisions have been made. The leadership is attempting to bring this session to a conclusion. And it is unfortunate that in the waning days of the session we are confronted with a nomination that gives many of us concern and perhaps even alarm. However, that is a fact.

So we are compelled to stay in session and debate the nomination and continue our other work until such time as the Senate works its own will on the nomination. As I said previously, I do not know when that will be.

I have heard many liken Mr. Rehnquist's case to that of other distinguished jurists in the past who had belonged to organizations or made statements, and have said that if we who are now opposing the nomination of William Rehnquist had been in the Senate, we would have been most disturbed and perhaps would have voted against them.

I am reminded of Mr. Justice Hugo Black of the great State of Alabama, who perhaps was cited more often than any other for this proposition. But if one were to examine the record of Hugo Black one would find, contrary to the beliefs of many, that Mr. Justice Black had shown evidence of change, great evidence of change, prior to his appointment and confirmation to the Supreme Court of the United States.

Oh, that I could have found such change in the record of William Rehnquist. As I said, I searched for that change. Instead of change, I found more evidence that there was no change, and this disheartened me. It disheartened me because I would have liked to have voted for his confirmation. It disheartened me because President Nixon had nominated him. It disheartened me because when I met him, he was very candid and very honest and very forthright. He told me of things in his record which had not come out in the press, certainly not in the hearings, because our meeting was prior to the hearings.

Some weeks before these facts were public information, he gave me names of people to whom I could talk in Phoenix, Ariz. I called those people. I asked him about some people to whom I could talk here in Washington, D.C., and in the Justice Department. He gave me those names, and I called those people. As I said, his candor, his forthrightness were qualities that I admire in him, as in any man. Candor is a prerequisite, in my opinion, for service on the Supreme Court, and it was taken in serious consideration last Thursday when I finally arrived at my own personal decision as to this nomination.

When I called Mr. Rehnquist on Thursday afternoon, I said to him, in essence:

> Mr. Rehnquist, I have tried very hard to find evidence which would warrant voting affirmatively for your nomination.

I went on to tell him exactly what my procedure had been and the course that I had followed, and why I could not vote affirmatively for him.

I do not think I am much different, Mr. President, in this respect from my colleagues. I think each of them in his own way goes through certain procedures before arriving at such a crucial decision. I think, Mr. President, that the Nation should be pleased that 100 Members of this body charged with this responsibility—a rather awesome responsibility, I might add—take that responsibility so seriously and give these nominations every consideration. This is the only way—yes, the only way—that we can be assured that we will have the best possible Supreme Court.

Perhaps, Mr. President, with some very few exceptions, I think one will find that this system has worked magnificently. Every American citizen should be proud; every American citizen should be secure and confident in the knowledge that we have a Supreme Court with the powers that are vested in it, and with the procedure that we have for selecting that Court.

Mr. President, I come to the conclusion of my remarks this afternoon with regret that I had to make them, but with confidence that I have done everything possible that I could have done in arriving at this conclusion. As I said, I hope that my colleagues will listen to my reasons, as I have listened to and read theirs.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Michigan is recognized.

Mr. BYRD of West Virginia. Mr. President, will the Senator yield, without losing his right to the floor?

Mr. HART. I yield.

ORDER FOR RECOGNITION OF SENATOR MONTOYA TOMORROW

Mr. BYRD of West Virginia. Mr. President, as in legislative session, I ask unanimous consent that following the remarks of the two leaders under the standing order tomorrow, the Senator from New Mexico (Mr. MONTOYA) be recognized for not to exceed 15 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD of West Virginia. I thank the Senator for yielding.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

Mr. HART. Mr. President, in the individual views of the Judiciary Committee report, I have expressed my opposition to the nomination of William H. Rehnquist. Today, if I may, I wish to highlight four aspects which I think should be kept in sharp focus as each of us deliberates and resolves how we shall exercise our constitutional responsibility of advising and consenting to or withholding our consent to the nomination.

First, there is the question of a nominee's philosophy. Just what does that elusive phrase mean? Second, there is the problem of the nominee's effort to obscure his own personal views from the Senate, perhaps to a degree unprecedented. Third, there is the nominee's record in the area of civil rights—and on this point, a few moments ago, in reaction by way of responding to a speech by the Senator from Massachusetts (Mr. BROOKE) I touched upon that issue. Fourth and finally, there is his approach to the balancing of individual liberties against the pressure of government re-

straint, or, in short his record on civil liberties.

From reading some news stories and listening to speeches, one might casually conclude that the nominee is being pilloried merely because he is not in lockstep with the political philosophy of those who oppose him. But I think observers would be compelled to agree that many of those opposed to Mr. Rehnquist did not oppose Mr. Powell, did not oppose Mr. Burger, and did not oppose Mr. Blackmun, even though we disagreed with their specific views on some of the issues which will undoubtedly come before the Court.

It has been suggested that, upon analyzing the record, each Senator can come to only one of two conclusions.

This is the theme that underlies many of the newspaper and media commentaries: either that Mr. Rehnquist's views and actions identify him as a right-wing extremist or that they show him only to be a zealous advocate for reasonable positions on controversial issues. I think that is a crude distortion of the position expressed in the individual views that we filed in the report from the Committee on the Judiciary. But there is a third conclusion which each Senator may draw from this record. It is the conclusion to which I have come. It is the conclusion that Mr. Rehnquist has indicated indifference, perhaps a precise enough word, to racial discrimination, and shown an unwillingness to seek its legal redress.

Whatever the reasonableness of any one position he has endorsed in the area of restricting individual liberties, his record is consistently on the side of enhanced governmental power, and gives short shrift to the values underlying the Bill of Rights.

I think that is what this debate should be all about, and I express the hope that my colleagues will study the record with that frame of reference in mind, as the measure to be applied to the nominee.

I make no charge of extremism, but I have concluded that he neither appreciates fully nor approaches openmindedly the fundamental values of human equality and individual liberty promised all Americans by our Constitution.

It is 1971, and I submit that no person with that background—of whatever political philosophy or judicial philosophy—ought to be confirmed by the Senate to sit on the Supreme Court.

In the recent debate about the propriety of inquiring into a nominee's philosophy, a great many different elements have been discussed under that term. The term "judicial philosophy" traditionally refers to a Justice's view of his role on the Court, particularly in constitutional adjudication—"judicial self-restraint," for example, or the so-called "strict construction" of constitutional provisions. These kinds of considerations are not necessarily identified with a Justice's disposition in the balancing of particular constitutional interests.

We have all been aware of how slippery these labels are at best, and how it is impossible actually, with a label or a brand, to encapsulate a great judicial mind. Take, for example, Mr. Justice Black: Here was a man who was the most insistent of his brethren on the Court upon following very literally the plain text of the first amendment and the Bill of Rights in general. Yet he was prepared at other times to effectuate their purpose in contexts where a literal reading alone would clearly not suffice to do so.

One looks at the records compiled by three eminent Justices, Holmes, Brandeis, and Frankfurter. They are three men often cited as in the tradition of so-called "judicial self-restraint," and yet they approached the traditional interpretation of the Bill of Rights with great vigor in landmark opinions which applied those safeguards more broadly than the Court had previously done.

Beyond "judicial philosophy," there is the nominee's attitudes toward the substantive provisions of the Constitution as they apply to the issues of the day, "The great issues of our day," as it is always put by the contemporaries. The history of the Senate's role makes clear the propriety of such considerations, and the nominee before us now, in his earlier writing, urged us to do precisely this, stating that it is our responsibility to identify the philosophy of anyone who is proposed for the Court.

We have been told more than once that Mr. Rehnquist will not let his personal views affect his approach to the Constitution—or as one of his supporters very recently put it, that he will "ignore his own philosophy in interpreting the Constitution." I think there has been some rhetorical fencing on this one, but we kid ourselves if we pretend that one can sort out Justices into those who do and those who do not interject their personal views into constitutional interpretation. The hard truth is that everybody does, and everybody must. It is inevitable. It is in the nature of man. Mr. Rehnquist repeatedly acknowledged at the hearing that all judges bring to the Constitution their own attitudes, biases, and values, the accidents of geography and history, and all the things that make us what we are at a given moment—not intentionally but inevitably, and particularly when the general phrases of the Bill of Rights or the 14th amendment must be applied to new problems. As Mr. Rehnquist wrote in the Harvard Law Review:

> If . . . a different interpretation of the phrases "due process of law" or "equal protection of the laws" (is desired) then men sympathetic to such desires must sit on the high court.

Then our responsibility would be to see where Mr. Rehnquist's sympathies lie.

II. COOPERATION WITH THE COMMITTEE

The Senate's deliberation has been marked by confusion about the Senate's duty to ascertain a nominee's views as best it can and the nominee's right to withhold that information from the Senate. Several very distinct elements have been lumped under the general notion of "privilege," particularly in efforts by Mr. Rehnquist's supporters to suggest that his evasion stands squarely on the precedent of recent nominations. I suggest that this is not correct.

First, in the case of several recent nominees who have been sitting judges or justices, the Senate has generally respected the demands of the principle of separation of powers. Clearly, a judge's opinions are a matter of public record. In those instances, the nominees made clear that they were not disavowing their prior opinions for whatever use a particular Senator wished to make of the fact that that was their opinion. There it stood. At the same time, they resisted—rightly, in my opinion—the efforts of Senators to cross-examine them as to a particular opinion they had written. For any Senator to call a sitting judge to task and force him to justify a past decision surely breaches the basic principle of separation of power and the independence of the judiciary. But that element, that consideration, is obviously inapplicable in the case of this nominee.

Second, every nominee is accorded reasonable latitude to decline giving his view of the proper result in a specific factual situation or the application of a specific principle to a particular set of facts. This avoids the danger that a nominee may be pinned down on particular cases likely to come before the Court to the point that he would be estopped from an openminded review should his nomination be confirmed.

I think that Mr. Rehnquist has invoked the second doctrine as much—perhaps more—than previous nominees, refusing on this ground to answer even general questions about his views on specific constitutional provisions. But he has gone way beyond this and also claimed "the attorney-client privilege" in what he concedes is an unprecedented fashion. It is in this third area that his refusal to cooperate is unprecedented and—I believe and suggest—unjustified. Leaving aside the serious question of whether a Government officer in his position can properly invoke the attorney-client privilege in this situation, Mr. Rehnquist, himself, has revealed that he does not take this excuse seriously, even in instances which arguably do fall within the traditional bounds of the attorney-client privilege. For example, in regard to the Justice Department's pending brief in the Supreme Court on domestic "security" wiretapping, he first suggested that since his role had involved confidential advice to the Attorney General under the attorney-client privilege, it would be inappropriate for him to share the nature of that advice with the Judiciary Committee. Then, on the following day, he readily divulged his criticism of the Department's approach in the lower courts and described his role in revising the brief to stress other legal grounds. Similarly, in regard to the "Pentagon papers," he indicated freely the character and nature of his confidential legal advice to the Justice Department.

His rationale for breaching this attorney-client confidentiality in these instances was that the Department had taken a public position. But that does not change the fact that he has been willing to detail his confidential advice. Certainly, the attorney-client privilege remains even though the client's ultimate position, once decided upon, is presented to the court.

Moreover, Mr. Rehnquist has gone beyond the attorney-client privilege not to

divulge confidential legal advice. He has declined to indicate whether his past public statements represent his own views or somebody else's—even without indicating whether they represent the confidential legal advice he at one time or another gave the Attorney General. It has been suggested that where he has spoken as an advocate, he cannot be asked to give his real position.

Surely, his defenders cannot have it both ways. They cannot suggest that it is unfair to take as his position the alarming statements he has made while in his present capacity—to tell us, in effect, "If you only knew his own views, you would not be concerned"—and at the same time suggest that we cannot get his real views because he has acted as an advocate. Where does this leave the Senate in its efforts to carry out its constitutional obligation? I suggest that we must take the record as we find it, and if the nominee unreasonably refuses either to explain or to disavow the disturbing positions he has taken, he does so at his peril. On the basis of the best evidence offered to the Senate, we must determine what views, values, and attitudes he will take to the Court when he interprets and applies the great provisions of our Constitution; or, to return to his Harvard Law Review comment, what sympathies will he take to the Court? What sympathies, what attitudes, does he take with respect to civil rights?

III. CIVIL RIGHTS

Reviewing that record, those of us who opposed the nomination in the committee reached the following conclusion:

Unrelieved by actions showing an affirmative commitment to racial justice, Mr. Rehnquist's record is one of persistent indifference to the evils of discrimination and an almost hostile unwillingness to accept the use of law to overcome racial injustice in America. President Nixon himself has called for judges to interpret our laws who are men "dedicated to the great principles of civil rights." The nominee's subsequent record, both in Arizona and Washington, is devoid of any significant reflection of such dedication.

Mr. President, I am sure that we are past the point of having to explain at great length why this is no longer a time when a man or woman can be placed on our Supreme Court whose unrebutted record is one of indifference to discrimination, of insensitivity to the consequences of discrimination, and resistance to removing its stains.

The memorandum accompanying the individual views on this nomination details the objection to Mr. Rehnquist on this count. In reading it, however, I urge that one point should be kept firmly in mind. The problem with Mr. Rehnquist's record is not—as some would suggest—a matter of requiring every nominee to have been an activist on behalf of civil rights. We do not ask a nominee, "How many times were you arrested on the picket line? How many times did you join freedom riders? How many times did you expose yourself to physical danger by insisting that somebody be able to exercise his right to vote?" I do not even ask him how many speeches he made in attempting to reach the conscience of America.

Depending upon the circumstances of one's prior activities, it may not always be easy to demonstrate tangible fidelity to the basic principles of human equality.

Despite the President's promise of judges dedicated to civil rights, close scrutiny of a nominee's record for a demonstrated commitment might seem unfair to one whose past gave no cause for concern. But that is hardly the case before us. Here we have a man who repeatedly has been a self-propelled opponent of advances in civil rights—and not because he was pleading a client's case but on his own, gratuitously, if you will, Mr. President.

I respectfully urge my colleagues to read the record and the memorandum; consider the nature and tone of this opposition, written in the mid-1960's by a man not holding office or subject to political pressures, but a man speaking quietly and freely his own thoughts. What does it tell us about his sensitivity to racial injustice and his appreciation of the effort to achieve human equality? It is only against this record that we have understandably sought some evidence offsetting these incidents.

Now let me turn to the specifics involved. Some suggest that Mr. Rehnquist was merely opposed to forced busing when he criticized the modest integration efforts sought for the Phoenix schools in 1967.

I ask unanimous consent that the excerpt of the memorandum dealing with civil rights be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER (Mr. CHILES). Without objection, it is so ordered.

(See exhibit 1.)

Mr. HART. Mr. President, essentially, the argument put forth to explain Mr. Rehnquist's action is threefold:

First, that the open enrollment approach, the heart of the proposals, was already in effect in Phoenix and, therefore, not in controversy when he voiced his opposition;

Second, that the proposals for voluntary exchanges and community relations were completely unobjectionable to Mr. Rehnquist; and

Third, that the only thing which so "disturbed" Mr. Rehnquist was the superintendent's suggestion that he "did not dismiss the possibility of busing."

In fact, the open enrollment in Phoenix at that time was limited to only a few schools. One of the superintendent's main proposals was to make it citywide. In part, it was in connection with this proposal that the superintendent was considering "busing" in the sense of providing subsidized transportation for those students who elected voluntarily to transfer out of their normal attendance zones. The news articles at the time make clear that Phoenix had been subsidizing transportation for students who remained within their normal attendance zones, but that students who chose to enroll outside them received no help; the superintendent had concluded that this was a financial deterrent to a successful "freedom of choice" plan.

In addition, the superintendent has proposed promoting voluntary exchanges of students among schools in various ways, including the location of special enrichment programs or vocational courses at particular schools. Obviously, this might involve transportation of students who had elected to avail themselves of such programs. But the evidence is overwhelming—and was at the time—that Superintendent Seymour was not proposing, and indeed was opposed to, mandatory busing of students through their assignment to nonneighborhood schools. Mr. Rehnquist's strong letter makes no mention of busing or forced transportation of students. Rather, one need only reread it to be struck by his hostility to the whole range of modest voluntary effort to promote integration in the Phoenix schools. And this, only 4 years ago, because of his firm conviction that:

We are no more dedicated to an "integrated" society than we are to a "segregated" one.

Mr. BAYH. Mr. President, will the Senator from Michigan yield?

Mr. HART. I yield.

Mr. BAYH. In listening to the compelling logic of the Senator from Michigan, the Senator from Indiana's mind flashed back to the hearings in which Mr. Rehnquist was before us articulately expressing his views. The thought that flashed through my mind was, as I think was generally agreed, that this was a man who was more than adequately endowed, with great capacity to articulate his beliefs skillfully, even to the point of not articulating his beliefs, and one whose forthrightness impressed us.

As I recall it, the Senator from Indiana asked a question about the 1967 letter and then asked the question about his opposition to the program of the superintendent of schools. Now the Senator from Michigan has brought up this same topic. So let me read the testimony in order to stimulate the memory of the Senator from Michigan, although I think from what he has said in his speech just now, he is already able to remember it quite well.

Senator BAYH. May I ask you just to explain in a little further detail a specific quotation from a letter that might be more pertinent to the general question?

The superintendent of schools apparently had said that we are and must be concerned with achieving an integrated society. And you responded and said:

"I think many would take issue with his statement on the merits and would feel that we are no more dedicated to an integrated society than we are to a segregated society, that we are, instead, dedicated to a free society in which each man is equal before the law, but that each man is accorded a maximum amount of freedom of choice in his individual activities."

Is that still your view now?

Mr. REHNQUIST. In the context of busing to achieve integration in a situation where it is not a dual school system; I think it is.

Earlier, I said:

Senator BAYH. What is your feeling about transporting people either long or short distances to maintain an all-white or an all-black school?

Mr. REHNQUIST. Well, I think that transporting long distances is undesirable for whatever purpose.

At every instance, it seems that when asked about this opposition to integration of the educational system, Mr. Rehnquist falls back on the generally

accepted feeling and the general emotional feeling today that long-distance busing is undesirable.

I wonder, now that the Senator from Michigan has brought up the matter of the forthrightness of the nominee, whether we have reason to be concerned about this if, when he is asked about the opposition to the school superintendent, he says it was based on his opposition to long-distance busing. Now, long-distance busing was an issue that he did not write about in his letter and which, from all of the accounts we have, was not at issue. I know that is a serious charge to make, but the issue of forced long-distance busing was not present. There is no mention of forced long-distance busing in the letter to the editor, written by the nominee. To suggest now that the only reason he took that position was that he was opposed to forced long-distance busing just seems not to be right, not to be fully candid, and not to be fully accurate.

I do not know whether the nominee realizes that, but that is the way it appears to the Senator from Indiana.

Mr. HART. Mr. President, the impression or the wonder voiced by the Senator from Indiana might even be more strongly couched if he remembered that later in those same hearings the nominee said that—

With respect to the 1967 letter which I wrote in the context of the Phoenix school system as it then existed, I think I still am of the view that busing or the transportation of students over long distances for the purposes of achieving a racial balance where you do not have an educational school system is not desirable.

That is how he phrased it.

Of course, it is not desirable. That was not the point.

Mr. BAYH. The Senator from Indiana is reminded that forced long-distance busing was not enough of an issue in Phoenix that it was even a subject addressed by Mr. Rehnquist in his letter. Is that not accurate?

Mr. HART. I think that is accurate. Let us put it this way. I think what we might wonder is whether the nominee is describing now, in 1971, his 1967 letter, as if it pertained to the current controversy over mandatory busing of students. And we ask whether a fair reading of the letter itself and the articles which describe the circumstances in Phoenix does not indicate that in 1967 Mr. Rehnquist actually was opposed to much more; that he was opposed to a very modest effort on a voluntary basis to reduce the division that threatens to destroy us as a people—the division between black and white.

Mr. BAYH. The Senator from Indiana has cause to wonder why, if that was the thrust of the integration program—which rather obviously it was, and there is no question about it—and if, indeed, the nominee took issue with that modest voluntary program, why, when asked to explain further his opposition, he resorted to being against what has become generally accepted as a flag word and an emotional phrase, "long distance busing."

That hardly is the type of candor that prior to this moment I had associated with the nominee.

I appreciate the Senator's yielding.

Mr. HART. I think it might be well—and I am grateful for the comments of the Senator from Indiana—to remember, too, that a newspaper in Phoenix on August 31 of that year 1967, reported the comments of the superintendent, Dr. Seymour, and makes the position of the superintendent very clear. The newspaper said:

But he [Dr. Seymour] said he opposes gerrymandering district boundaries or "busing" pupils from one part of town to another as means toward "true integration."

"There is nothing more artificial in my judgment that to load a group of pupils from one district and disgorge them at another without making it possible for full, active participation in learning, socializing, sports and activities, and without integrating the adults along with busing pupils."

That was the statement in the paper.

Mr. BAYH. I am glad the Senator brought this into the RECORD at this time, because I recall the discussion in hearings, in which it was rather obvious that the school superintendent, too, was against forced long-distance busing—the sort of artificial busing intended just to guarantee hypothetically 8.55 percent of black or brown children in every classroom. The superintendent apparently believed that there are some times or instances in which busing might be utilitarian in nature under certain circumstances. This might particularly have been true in Phoenix. As I understand it, the program there was strictly a voluntary, freedom-of-choice program, the least offensive type of busing. But the superintendent publicly said he was against the kind of thing that Mr. Rehnquist now says was the reason which precipitated the letter. This again causes me to wonder whether his real reasons had to be more basic, had to be more all-encompassing, had to suggest that there was something innately wrong at that moment in moving toward full, complete quality integrated education.

I appreciate the Senator from Michigan's tolerance in permitting me to interrupt.

Mr. HART. It was a welcome comment, and I do not regard it as an interruption. I think that viewed in the light of these circumstances it is fair to suggest, as I suggest now, that just 4 years ago the nominee, to use his words, found distressing some rather modest efforts by, I think, responsible school officials to promote equality of educational opportunity. That is what I think it suggests. Without any comment on the accuracy of the nominee's responses to the question, what the letter reflects against the circumstances of the plan proposed is an unwillingness to accept even the modest effort to reverse the trend toward what the Kerner Commission warned us we were becoming: a nation of two people, the black and white.

Then there as the second insistence which makes mandatory, I suggest, Mr. President, that we find some affirmative demonstration of concern, of awareness, and of sensitivity before we consent to this nomination. This one occurred in 1964. That is not quite as recent as 1967, but it is not ancient history, and it is not a period when the nominee was in grammar school. In 1964 the nominee opposed a public accommodation ordinance. Let us get that one into perspective.

Mr. BAYH. Will the Senator yield briefly? My arithmetic may not be perfect, but, as I recall, quite to the contrary to being in grammar school. In 1964 the nominee was 40 years of age or over. So at that stage one's judgment, hopefully, would be relatively mature.

Mr. HART. It is a chronological age at which society compels responsibility for one's conduct. Let us put it that way. It is a mature age chronologically.

The majority report of this nomination, on the theory that the best defense may be as strong an offense as one can mount, refers to the nominee's acknowledgment that the Federal Government's constitutional power to pass a nationwide accommodations law is now settled. The inference of that remark and comment is that there was uncertainty about this constitutional question, which was debated at great length in this Chamber that same year, 1964, which was the basis of the concern for Mr. Rehnquist and his opposition to the Phoenix ordinance. But he was addressing himself to a local ordinance, one to which the Federal power did not go at all.

Mr. Rehnquist's 1964 opposition to a public accommodations ordinance also must be kept in perspective. The majority report refers to his acknowledgment that the Federal Government's constitutional power to pass a nationwide accommodations law is now settled. The inference is that it was uncertainty about this question, debated at great length in the Chamber in 1964, which then underlay Mr. Rehnquist's concern. But he was addressing a local ordinance, one to which the question of Federal power did not apply. There has been little doubt seriously raised about the constitutionality of a town forbidding discrimination in public accommodations under its police power to promote the public welfare.

In any event, when he appeared in opposition to the ordinance he did not raise that argument. His opposition was a matter of personal preference—and I think this is a fair shorthand description of it—of preferring property rights over human dignity.

To be sure, he told us during the hearings on the nomination that in 1971 he no longer begrudges such a law.

As I recall it, he also suggested why he thought as he did in 1964. He said:

The law has worked pretty well. The law has worked well enough. I think I have come to realize since, more than I did at the time, the strong concern that minorities have for the recognition of these rights.

What rights is he talking about? What rights were sought to be protected by the Phoenix ordinance? The right to be treated decently at the hands of someone who invites the public in to sell something. It was not Mrs. Murphy's four-bedroom roominghouse, or less; it was a drugstore. He tells us:

I did not realize the strong concern minorities have for the recognition of these rights.

I remember in the hearings some witnesses reminded us what June 1964 was like in this country.

Mr. President, I had really thought that in June 1964, everyone—certainly everyone who had reached a majority—was aware that the whole Nation had focused its attention on the denial of the right to be treated as an individual, when a person went into get coffee or aspirin tablets, and not to be judged while 50 feet away, based on the color of his skin. I thought everyone was aware of that and was aware why Dr. Martin Luther King had become a national figure in June 1964. But clearly I was wrong. Some understood less clearly than others, and apparently the nominee was such a person.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. HART. I yield.

Mr. BAYH. The Senator from Indiana had the opportunity earlier in the day to be in the Chamber, and I think the Senator from Michigan was also here during parts of the speech of our distinguished colleague from Massachusetts (Mr. Brooke). The Senator from Michigan has been one of those Members of this body who has exhibited the greatest degree of compassion and understanding for the problems of those who may be of a different color, of a different background than the majority of our citizens, and has been one of the real leaders to bring equality into law, a real activist in this body. The Senator from Indiana has been happy to follow his leadership in this area since coming to the Senate. I must say I was impressed by our colleague for I am a young man with a white face who has never been placed in the position of being on the other side, of being denied or being discriminated against. I could not help but be impressed with the expression of our colleague from Massachusetts because he had been there.

I wonder what kind of signal it is that goes out from this body, or, indeed, that goes out from the White House when the man who is now just one short step away from the highest Court of the land is one who in the mid-1960's, by his own admission, did not realize how important it was to the black people and the brown people of this country—American citizens—to have access to drugstores and other places of public accommodation. Is that not the kind of thinking that we have to give significant credence to? Is that not the kind of symbolic gesture that says to those who are "different" that we talk about equality and opportunity but really we are not dedicated to it because we put on the highest Court of the land a man who, by his own admission, has not evidenced the degree of sensitivity that would give us to believe that he understood.

Is that a matter of legitimate concern to this body? Should we not consider in addition to what the nominee said, what this nomination symbolizes to others who are looking at the system to see whether there is anything in it, any place, for them?

Mr. HART. It is a legitimate concern and perhaps it is even more serious when we think of what the nominee did not say. He does not say even now, in 1971, that he himself is deeply concerned about the offense that is involved in the denial of access to public accommodations. He has yet to say he understands this is an injustice. He has yet to speak out.

He does say, in effect, "Now I understand some are outraged;" but he continues to be silent with regard to whether he himself feels that way.

This, too, I think, is relevant and appropriate for our evaluation of the nominee's measure of devotion to the great principles of civil rights, to use the words of the President who submitted his name.

Mr. BAYH. Mr. President, will the Senator yield further?

Mr. HART. I yield.

Mr. BAYH. As he points out, we have a real void here. The nominee was given the opportunity to come forth and tell the Senate and the entire country something reassuring now that he is about to assume the mantle of Supreme Court Justice. But instead he talks about having a better understanding of the importance of recognition of these rights to minorities. And he talks about the surprising, in his view, ease of implementing this legislation. This would lead one to believe, as I said earlier, that his conviction about the protection of individual rights depends on the amount of opposition.

Mr. HART. Before the Senator goes on with respect to that point, I think in fairness to the nominee we should make clear that subsequent to the answer that the Senator from Indiana and I have been analyzing before the committee, he did say that even if the ordinance had been less readily accepted, he would no longer oppose it. He suggests that the pragmatic argument that he was about to belabor was perhaps a weaker one than should be advanced in his defense. But it still leaves the conclusion inescapable for the record that the real reason for the change in heart of the nominee, according to him, is the realization sometime within the last 7 years of the strong concern the minorities have for recognition of those rights. But as I say, that still does not go to the point, not of his feeeling that such discrimination is an injustice, but only that he now realizes that others may regard it as an injustice. In my book, that is not enough.

Mr. BAYH. And a rather belated realization at that.

Mr. HART. Yes; and I suggest that that marks one as not qualified. That stamps one as a person to whose nomination we ought not to consent.

Now, perhaps responding to the President's job description of a Supreme Court nominee as someone who should be devoted to the great principles of civil rights, the proponents of the nominee have strained to find that kind of evidence. They pointed to a speech. That was a speech he made in his present position as Assistant Attorney General. It was a speech in which the nominee criticized militants because progress, as the nominee put it, has been made in civil rights.

Further, one of the proponents of the nominee now suggests that the vote cast by the nominee as a Commissioner on Uniform Laws in favor of a model antidiscrimination law revealed his changed view on public accommodations. The action of the Commissioners occurred in 1966, and his proponents suggest that this shows that just 2 years after his opposition in Phoenix to the public accommodations law, he was then in favor of free access to public accommodations.

Let us get that one a little more in perspective. First, this argument was never raised until we had the committee report out of the Judiciary Committee. Several times during the hearings in the Judiciary Committee the nominee was asked for any evidence of his support of civil rights which might offset the incident in 1964 that I have just described. We followed it by including a set of written questions which, through the chairman of the Committee on the Judiciary, we directed to the nominee. We included in those written questions this inquiry:

> What can you see, to what can you refer us, that might offset your opposition in 1964, or, put another way, would serve to demonstrate your devotion to civil rights, as the President phrased it?

At no time, either in the hearings of the committee or in response to our written questions, did Mr. Rehnquist refer to his actions as a Commissioner on Uniform Laws. I think if Mr. Rehnquist thought that was evidence of a change of heart in 1966, rather than in 1971, he would have mentioned it.

In fact, there was no serious controversy over this provision in the proposed law when the Commissioners were debating it. It was approved as a part of the final bill, but only after Mr. Rehnquist and others had succeeded in downgrading the proposed Uniform Act into a Model Act. As the memorandum filed as a part of the Individual Views in the Judiciary Committee report points out, that had the effect of releasing the Commissioners of any obligation to work for the passage of the act in their own States.

That brings us to the real significance of Mr. Rehnquist's participation in the model antidiscrimination act.

His supporters have, if I can phrase it this way, been forced to fall back upon his legal opinion provided the Attorney General upholding the Philadelphia plan as an indication of his support for civil rights. Let us look at that one a minute. The Philadelphia plan requires covered employers to redress racial inequities in employment. Yet Mr. Rehnquist, as a Commissioner on Uniform Laws, vigorously opposed the provision of the Uniform Act which merely permitted employers on their own initiative to take voluntary steps to redress the effects of past discrimination. It is difficult to believe that he and others personally endorsed the mandatory provision of the Philadelphia plan with much conviction if he was so strongly opposed to the much weaker provisions in the proposed Uniform Act.

Mr. BAYH. Mr. President, as soon as the Senator is through with that particular thought, I would like to explore it a bit further with him.

Mr. HART. I conclude this point only by suggesting that his opposition to the

provision in the model law against racial blockbusting that was proposed as a feature of the model bill when the Commission on Uniform Laws was in session speaks for itself. Anyone remotely familiar with the viciousness of this practice knows of why—it is a practice I have never heard anyone suggest had a single redeeming value—but the nominee opposed its inclusion as a Commissioner on Uniform Laws in their proposal.

Mr. BAYH. This trend of thought and this part of the Senator's speech, I must say, is a matter of more than passing concern to the Senator from Indiana, because I think this gives us a better understanding of the degree to which the nominee feels there is a legitimate reason for legislative intervention to promote racial justice. If indeed the nominee does not believe there is legitimate reason to legislate to outlaw this blockbusting business, which, as I have said repeatedly, is a most insidious tactic, responsible for more tensions, more animosity, and more hatred between black and white in the same community than anything else I know of, then I wonder, just in what area does the nominee believe there is legitimate reason for legislative activity? I am forced to ask this question because as shown by the transcript of the proceedings of the Commissioners, as the Senator from Michigan will recall, the nominee said that he felt there was both a constitutional question and a serious policy question which caused him to oppose the antiblockbusting provision of the Uniform Antidiscrimination Act.

It is the judgment of the Senator from Indiana that no one has a first-amendment right that guarantees him the business opportunity of going out and playing on the fears and frustrations that result from blockbusting.

Also, the distinguished Senator from Michigan pointed out the degree to which Mr. Rehnquist is alleged to have had a dominant role to play in the Philadelphia plan. When he was asked what evidence he had of a commitment to civil rights, he pointed out that he did participate in drafting the opinion of the Attorney General upholding the plan.

I think it is important for the record to be clear here. We were told by the Senator from Nebraska, with whom I sought to explore the question further yesterday but he did not want me to pursue the line of questioning at that time, that the nominee played a major role in developing the Nixon administration's Philadelphia plan to end racial discrimination in the building trades unions. But when we look at the facts of the situation, we were told earlier, during the hearings, as I recall, that he participated in drafting the opinion of the Attorney General which upheld the plan.

I think we have to look at the situation which confronted him and which confronted the Attorney General. The Secretary of Labor and the Labor Department had come down with a proposal to deal with the discriminatory practices that had existed theretofore in the building trades, and as the plan had been ruled that that plan was unlawful by, I believe, the Comptroller General.

Mr. HART. Yes, by the Comptroller General.

Mr. BAYH. The Comptroller General had said that this was unlawful. So then, of course, the President and the Department of Labor turned to their lawyer, the Attorney General, and said, "Help bail us out of this situation." And thereupon enters Mr. Rehnquist as the Chief Legal Counsel of the Department of Justice, to try to help the Attorney General bail the Department of Labor out of a very difficult situation.

To use this as evidence of a major commitment to human rights is stretching the point significantly, and I appreciate the fact that the Senator brought this up. I would also point out that Mr. Albert Jenner, whose letter has been read into the RECORD several times as evidence of Mr. Rehnquist's contribution to that model act, also is the one who points out that Mr. Rehnquist was the leader of the movement to lessen the effectiveness of that act. Instead of this antidiscrimination measure being a uniform act, which would impose on each Commissioner the obligation to work for its enactment in his home State, it was made a model act, which is a lesser degree of a proposal, and did not bind each delegate to any concerted effort to get it made the law of his State.

Mr. HART. Mr. President, I agree with the thought developed by the Senator from Indiana, and welcome his comments. As far as the nominee's opinion on the Philadelphia plan and its legality is concerned, it would have been noteworthy if the Justice Department, after the President had already authorized the Labor Department's order for the Philadelphia plan, had then said that the order was illegal.

I think it would be well, Mr. President, to note his supporters' emphases on the fact that the nominee did vote favorably on the final passage of the model antidiscrimination act following the Commission's consideration. Those of us in this Chamber know that such a vote is, shall we say, not the best evidence of a man's position if he first has strongly tried to knock out a section in the act, and has failed in that effort. I think fairness requires that that additional explanation be made.

It may be suggested in some of these instances, the nominee's position on a civil rights issue did not involve constitutional questions. That is perfectly correct. But even to the extent this is true, the important point, as noted earlier, is that his underlying attitude toward the injustice of discrimination—its significance or insignificance in his personal scale of values—inevitably will have a strong impact on his reading, if you will, and on his ability to apply the broad promises of the 14th amendment to civil rights problems which are of constitutional magnitude.

In summary, Mr. Rehnquist's repeated initiatives to oppose protection of minority rights is really unrebutted by any substantial expression of concern or sensitivity—let alone affirmative action on his part.

In my book, Mr. President, that alone persuades me that I should not advise or consent to the nomination.

I am reminded that it has been suggested that all the nominee has subscribed to is the unexceptional view that the Constitution is color blind. The short answer to that is this: at least since 1954, we have accepted the proposition that when the elimination of racial discrimination is the issue, the Constitution is not color blind. It requires us to take note of such discrimination and to fix it, to eliminate it.

IV. CIVIL LIBERTIES

In addition to his record on civil rights, and equally disturbing, is the nominee's consistent tendency to discount the Bill of Rights and the interests it preserves, whenever those interests are tested against the pressures for efficient government, order, and authority.

In the protection of individual liberty—as in the promotion of human equality—the Supreme Court has played a unique role throughout our history. Prof. Alan Dershowitz of Harvard Law School put it well in a recent analysis.

> (A) compelling case can be made for a Senator voting against an otherwise qualified nominee with a record demonstrating callousness about—or opposition to—civil rights or civil liberties.
>
> The Executive and Legislative branches are adequate protectors of order, security and efficiency. But there must be a coequal branch which is committed to the far more subtle—and far less popular—values of justice, liberty and equality.

It is not surprising that our popularly elected branches have not always been the most vigilant guardians of individual freedom in the face of the ever present pressures to accomplish the goals of the moment.

I made comment about this in an exchange earlier today with the able Senator from Massachusetts (Mr. BROOKE). To anyone who understands the nature of our process in this country, it is indeed the Court which is the one of the three coequal branches of Government to which the poor and the weak must count for the protection of their sometimes less popular, but nonetheless constitutionally guaranteed rights.

The expressions of concern about the nominee's approach to the Bill of Rights involve far more than his views on swinging the pendulum away from the rights of the accused in criminal procedure. I hope any Senator who thinks the record merely involves disagreement about protecting society from criminal violence will take another look at this record.

It is clear that many today are impatient with the provision of full legal rights to the accused criminal offender. I think they are shortsighted; they forget that the peril to each of us lies in the precedent of eroding the rights of any of us. Unfortunately, they can be persuaded by leaders whose responsibility I question that the great guarantees of liberty imbedded in our Constitution are just technicalities, technical "legalisms," which should be brushed aside if they hinder the prosecution.

A more realistic appraisal of the Bill of Rights was stated by President Nixon in another context when he wrote to the House of Representatives the following reminder:

A basic principle of constitutional law is that there are no trivial or less important provisions of the Constitution. There are no constitutional corners that may safely be cut in the service of a good cause. The Constitution is indivisible. It must be read as a whole. No provision of it, none of the great guarantees of the Bill of Rights is secure if we are willing to say that any provision can be dealt with lightly in order to achieve one or another immediate end.

The President's statement is excellent. But Mr. Rehnquist's record on the Bill of Rights is precisely one of dealing lightly with those provisions in the service of another end—a willingness to "shortcut" the basic purposes of the Bill of Rights, when they might hamper efficient government.

It is not so much Mr. Rehnquist's support of any particular proposal in the area of criminal justice which is as disturbing as his general approach to analyzing the interests that are in competition in the case of the right to bail, preventive detention, arrest without probably cause, and so forth.

But beyond the field of criminal procedure, the nominee's expansive approach to executive power and his restrictive reading of the Bill of Rights affect his approach to other kinds of issues—issues whose direct impact on all citizens should be more readily apparent to them than is the case in the field of criminal procedure.

Every American knows that he has an immediate stake in preservation of their own privacy, in his right to dissent vigorously from his government's policies, and his right to have free access to opinions and information about those policies. Yet these interests, too, are endangered by the appointment of a Justice who has displayed either indifference or willingness to compromise away some of these liberties.

The danger is presented by the inclinations of an Executive to stifle dissent, to undermine organized opposition to official policy, to free itself of congressional oversight or judicial "interference."

Often the effort is made in the name of orderly government or efficient administration. The able senior Senator from North Carolina, on earlier occasions, has used the words that I intend now to use to remind us of a very basic truth. It is language which the Senator from North Carolina attributes to Daniel Webster:

Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

Mr. Rehnquist's speeches pay ample lipservice to these rights. That is exactly what one would expect of someone with his intellectual capabilities and experience. But the occasional phrases which can be lifted out of those speeches to show his "balanced approach" are belled by his analysis of the private interests involved.

The two best examples of this approach to balancing individual rights and governmental interests are wiretapping of domestic "subversives" and government surveillance of political activities. We are talking about today's news, not something that may develop in the future.

WIRETAPPING

Repeatedly the nominee's defenders have pointed to his acceptance of the 1968 Safe Streets Act provision for controlled wiretapping. But that is no more a defense of his record than is the fact that a majority of the Senate approved wiretapping under the 1968 bill. That is simply not the issue here precisely because that 1968 statute did not deal with the present administration's assertion of broad power to wiretap, without prior court approval, in the case of domestic dissidents whom the Attorney General regards as a "subversive" threat to national security. Let us also be clear about the position Mr. Rehnquist successfully advised the Justice Department to adopt on wiretapping in "domestic" national security cases. He tells us that he convinced the Attorney General not to argue solely on the basis of inherent executive power outside the restrictions of the fourth amendment, but rather to argue that the fourth amendment does apply and must be satisfied. That is hardly the end of the matter. The Government's position is that prior judicial authorization is still not necessary under the fourth amendment if the wiretapping is an otherwise reasonable search. And the nominee's speeches claim that there should be no prior judicial approval because the Attorney General can adequately determine whether a search is reasonable and justified. To argue that the Attorney General, frequently a close political adviser to the President, is the kind of neutral buffer between the citizen and his Government envisaged by the framers of the fourth amendment, is to suggest a very superficial appreciation of that historical safeguard. Indeed, the provisions of the 1968 act only underline this concern, because Congress clearly thought that prior court approval was critical and specified its implementation in detail.

Moreover, the memorandum notes that Mr. Rehnquist's cavalier approach to the fourth amendment does not stop here:

Mr. Rehnquist for his part seems to be willing to go even further than merely supporting wire taps without prior court order in this easily abused area. He took the position at Brown University, as reported in the Providence Journal of March 11, 1971, that the Justice Department 'must protect against . . . subversive domestic elements, yet often does not have the evidence of imminent criminal activity necessary for wire tap authorization. In other words, Mr. Rehnquist argued that *because* the Executive does not have enough evidence to get a warrant against 'elements' it deems in its sole discretion 'subversive,' it should not have to get one. This 'analysis' turns the Fourth Amendment precisely on its head. If it were ever accepted, it would reverse the whole course of Fourth Amendment law in this country.

SURVEILLANCE

Mr. Rehnquist's now famous statement that we should rely on the self-restraint of the executive branch, and occasional oversight hearings by Congress, to protect the individual from intrusive surveillance is discussed in detail in the memorandum. Two points stand out from the rebuttal offered by his supporters in the majority report.

First, they point to Mr. Rehnquist's testimony at the confirmation hearing. He said then that his earlier reference to self-restraint assumed the existence of the present safeguards in the 1968 Wiretap Act and in the first and fourth amendments. In that context, the nominee suggested, he was merely indicating opposition to additional machinery for judicial control of potential abuses, because such judicial scrutiny might hamper the investigators.

But the provisions governing wiretapping in the 1968 act are not applicable to other kinds of surveillance. Mr. Rehnquist knows that. In any event, much of the political surveillance which has alarmed Americans in recent years is precisely in the area which the administration and Mr. Rehnquist claim is exempt from the provisions in the 1968 act—the alleged threat of domestic "subversion."

He also knows that the safeguards in the first and fourth amendments are not self-executing. If the judiciary is not permitted to implement them by restraining executive action, then we are indeed thrust back upon the executive's own self-restraint.

Second, Mr. Rehnquist's lengthy testimony before the Senate Subcommittee on Constitutional Rights gave short shrift to the possibility that such surveillance might have a chilling effect on the exercise of first amendment freedoms. The majority report quotes Mr. Rehnquists's expression of distaste for some of the obvious excesses of surveillance revealed at the Senate hearings. It fails to mention the all-important distinction which Mr. Rehnquist himself drew between policies he personally thought unwise or unjustified, and those which he felt raised a question of constitutional dimensions. He made clear that the potential abuse of surveillance was not, in his view, a serious constitutional problem.

Under pointed questioning at the confirmation hearing, he did acknowledge that many persons may be deterred from vigorously exercising their first amendment rights, even if others are willing to risk their future careers or other dangers of a "Government file." But his consideration of this central purpose behind the first amendment hardly reflected a deep appreciation of the fundamental interests involved.

CONCLUSION

It is not necessary to argue that the nominee's position on any one issue in the area of criminal procedure or privacy is "extremist" or beyond the pale. That is not the point. In each of these areas, Mr. President, there is an unbroken pattern of undervaluing the constitutionally protected interests of personal liberty in marked contrast to the wide scope he would afford executive power.

For this reason, my colleagues and I have joined in our separate views in expressing very grave doubts about Mr. Rehnquist's likely approach to these urgent issues of protecting the individual

which will come before the Court in the next several decades.

For this reason, too, in addition to his record on civil rights, I have concluded that I should withhold my consent from this nomination.

Mr. President, I express hope once again in the confidence that my colleagues will read our memorandum and will read it within the framework of the points I have discussed today in this discussion.

I am one of 100 Senators who hopes that our judgment on this nomination is correct.

I would be the first to acknowledge that there are no crystal balls which permit us to know the answer to the question of how anyone will perform once he goes on the Court. I acknowledge, as all of us must, that some men have gone on the Court with predictions that their decisions would reflect a constant, consistent and particularly philosophy and, in many cases, their performance has been consistent with those predictions; but in some cases they have moved ever gradually in a different direction.

But our responsibility, Mr. President, as I understand it, is to attempt, to the extent that the record of a nominee permits a judgment to be made, to determine whether a particular nominee will take to the Court a sensitivity and an awareness of the really great values of the Bill of Rights and the 14th amendment.

If we find in the record of the nominee, nothing that reflects this appreciation, but instead a steady pattern inconsistent with such awareness—indeed, on occasions, an affirmative opposition to those values—we ought not to consent to the nomination.

Mr. President, I yield the floor.

EXHIBIT 1

CIVIL RIGHTS

The Supreme Court has played a crucial and proper role in the last 20 years in securing the rights guaranteed in the Constitution for all citizens, particularly our racial minorities. For many of those to whom America has made unfulfilled promises, the Supreme Court has often been the one responsive institution which can be counted on to dispense equal justice under law. President Nixon himself, in accepting his party's nomination in 1968 recognized this when he said:

"Let those who have the responsibility for enforcing our laws and our judges who have the responsibility to interpret them be dedicated to the general principles of civil rights."

Mr. Rehnquist's record, far from demonstrating such a commitment to civil rights, displays a consistent hostility toward efforts to secure rights for the victims of discrimination.

There are three specific episodes in the last seven years which show that Mr. Rehnquist is unwilling to allow law to be used to promote racial equality in America. There are his volunteered opposition in 1964 to a Phoenix public accommodations ordinance; his opposition in 1966 to two key provisions of a Model State Anti-Discrimination Act; and his public statement in 1967, offered in opposition to modest proposals toward integration, that "we are no more dedicated to an integrated society than to a segregated society." And these incidents are not offset in any way by an affirmative demonstration of commitment to equal rights.

A. THE 1964 PUBLIC ACCOMMODATIONS ORDINANCE

In June of 1964 the Phoenix City Council was considering a public accommodations ordinance which declared that—

"It is . . . contrary to the policy of the City and unlawful to discriminate in places of public accommodation against any person because of race, color, creed, national origin, or ancestry."

The ordinance applied only to "public places" offering entertainment, food or lodging, and specifically excluded "any place which is in its nature distinctly private." In testimony before the City Council, Mr. Rehnquist called this ordinance so "far reaching" that it should be submitted to the people for a vote rather than being passed by the Council. He also said:

"I am a lawyer without a client tonight. I am speaking only for myself. I would like to speak in opposition to the proposed ordinance because I believe that the values that it sacrifices are greater than the values which it gives. . . . There have been zoning ordinances and that sort of thing but I venture to say that there has never been this sort of an assault on the institution where you are told, not what you can build on your property, but who can come on your property. This, to me, is a matter for the most serious consideration and, to me, would lead to the conclusion that the ordinance ought to be rejected."

The ordinance was passed unanimously by the City Council the next day. Mr. Rehnquist, still without a client save himself, then wrote a letter to the editor of the *Arizona Republic* calling passage of the ordinance "a mistake." Incredibly, the letter first equated the indignity suffered by a victim of discrimination barred from a lunch counter with the "indignity" suffered by the segregationist forced to serve a meal, and then concluded:

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

The freedom to which he referred was the freedom of the property owner to do with his property as he wished. As Mr. Rehnquist recognized in the letter, this freedom has been impinged upon by a great many laws, such as zoning laws, and health and safety regulations. While Mr. Rehnquist thought that imposition on property rights was acceptable for purposes of zoning, he thought an impingement on property rights designed to assure equal access regardless of race to places which hold themselves out to the public was unjustified. In other words, in 1964 the nominee, as he agreed at the hearings, "felt that personal property rights were more important than individual freedoms, the individual freedom of the black to go up to a lunch counter."

It is important to understand the time at which this ordinance was being considered. The fight to end discrimination in public accommodations was in full swing across the nation. The encounters at Selma and Birmingham were recent history. The Congress was in the midst of considering the broadest and most significant piece of civil rights legislation it had ever passed, and that legislation included a meaningful public accommodations section. By the time Mr. Rehnquist spoke in Phoenix, the House had passed the bill, and the Senate had invoked cloture on it. Even more important, the most substantial objections to the federal act came from those who doubted the federal government's constitutional power to enact public accommodations legislation. This was not an argument the nominee used. He fought the measure solely on its merits.

When questioned at the hearings about his opposition to the ordinance, Mr. Rehnquist said he has changed his mind. Asked why, he replied:

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

Subsequently, Mr. Rehnquist, perhaps recognizing that a pragmatic argument is weak where principle in involved, stated that even if the ordinance had been less readily accepted he would no longer oppose it. Thus the real reason for Mr. Rehnquist's change of heart is, according to him, his realization within the past 7 years of the "strong concern that minorities have for the recognition of these rights." Significantly, it is still not a matter of the nominee's feeling that such discrimination is an injustice, but only that he now realizes that *others* may so view it.

While it is encouraging in some ways that Mr. Rehnquist says that he has come to realize the depth of concern among members of minority groups to be treated as individual human beings by all persons, it is very distressing to imagine a person on the Supreme Court who just seven years ago, when he was 40 years old, was as unaware of the depth of this feeling as Mr. Rehnquist was by his own admission. The insensitivity which Mr. Rehnquist's own statement reveals is hardly offset by an announcement at confirmation hearings that he would no longer oppose public accommodations measures—particularly when other actions by the nominee after 1964 are taken into account.

THE 1966 MODEL STATE ANTIDISCRIMINATION ACT

The second example of Mr. Rehnquist's opposition to the use of law in the promotion of racial equality came in 1966, when as an Arizona representative to the National Conference of Commissioners on Uniform State Laws he participated in deliberations on a proposed Model State Anti-Discrimination Act. The Act forbade discrimination in certain aspects of employment, public accommodations, education, and real property transactions, and it created a State Commission on Human Rights to enforce its provisions. The Act was finally approved by the States 37–2 (Alabama and Mississippi dissenting), with Arizona and Mr. Rehnquist voting in favor of ft. But this came only after the Act was relegated to the status of a "Model" instead of a "Uniform" act, thereby relieving the Commissioners of the personal duty to seek passage of the Act in their home states. See Handbook of the National Conference of Commissioners on Uniform State Laws 406 (1966). And it came after Mr. Rehnquist attempted unsuccessfully to delete two key provisions of the Act.

The first was a proposal which was, in the words of the Commissioners' Comments, "designed to permit the adoption [by an employer] of voluntary plans to reduce or eliminate" racial, religious, or sex imbalance in its workforce. No compulsory hiring to achieve racial balance was involved; the Act merely permitted voluntary efforts. These plans were to be subject to the approval of the Commission on Human Rights, and they could apply only to the hiring of new employees or the filling of vacancies. According to the debates, four states already had enacted similar laws: Indiana, Massachusetts, Illinois, and California. Mr. Rehnquist opposed this provision, and, in effect, moved to delete it. Another Commissioner called this motion "a direct attack upon the power granted in the statute to eliminate racial imbalance." The issue then came to a vote and Mr. Rehnquist's motion was defeated. The provision now appears as Section 310 of the Model Act, which reads as follows:

"SECTION 310. [Imbalance Plans.] It is not a discriminatory practice for a person subject to this chapter to adopt and carry out a plan to fill vacancies or hire new employees so as to eliminate or reduce imbalance with respect to race, color, religion, sex, or na-

tional origin if the plan has been filed with the Commission under regulations of the Commission and the Commission has not disapproved the plan."

This opposition in 1966 reveals Mr. Rehnquist's unwillingness to allow law to be used in constructive ways to undo 200 years of discrimination in America. Audit also reveals that the nominee's much heralded responsibility for the Opinion of the Attorney General upholding the lawfulness of the "Philadelphia Plan"—which required that specified numbers of minority employees be hired to redress the effects of earlier discrimination—cannot be given much weight, for the nominee's personal philosophy and policy preference are to the contrary. Indeed, the inconsistency is shown even more clearly by the fact that the Philadelphia Plan is mandatory on all those covered, while the provisions Mr. Rehnquist sought to delete from the Model Act were merely permissive.

The second proposal that Mr. Rehnquist opposed was one designed to prohibit vicious "blockbusting" tactics by which realtors sometimes play on racial fears for their own profit. As the Reporter-Draftsman of the Act, Professor Norman Dorsen of New York University, said during the deliberations, a number of cities and at least one state (Ohio) had anti-blockbusting provisions by 1966. Mr. Rehnquist moved to delete this section. He said:

"It seems to me we have a constitutional question and a serious policy question, and in view of the combination of these two factors, plus the fact that it doesn't strike me this is a vital part of your bill at all, I think this would be a good thing to leave out."

Mr. Robert Braucher, then Chairman of the Special Committee on the Model Anti-Discrimination Act and a Professor at Harvard Law School, and now a Justice on the Supreme Judicial Court of Massachusetts, replied with an eloquent defense of the anti-blocking provision:

"However, I would like to speak for just a moment to the merits of this. The practices that are dealt with in this provision are practices that have no merit whatever. They are vicious, evil, nasty, and bad. These are people who go around—and this is not a hypothetical situation; this is something that has happened in every big city in the United States—and run up a scare campaign to try to depress the value of real estate. They will if possible, buy one house, and then they will throw garbage out on the street; they will put up "For Sale" signs; they will perhaps hire twenty badly clad and decrepit-looking Negroes to occupy a single-family house, and so forth, and then they go around to the neighbors and say: Wouldn't you like to sell before the bottom drops out of your market?

"And the notion that type of conduct should be entitled to some kind of protection under the bans of free speech is a thing which doesn't appeal to me a tiny bit."

A vote was then taken on Mr. Rehnquist's motion to delete the section, and the motion failed. The section now appears as Section 606 of the Model Act, which reads as follows:

"SECTION 606. [Blockbusting.] It is a discriminatory practice for a person, for the purpose of inducing a real estate transaction from which he may benefit financially

"(1) to represent that a change has occurred or will or may occur in the composition with respect to race, color, religion, or national origin of the owners or occupants in the block, neighborhood, or area in which the real property is located, or

"(2) to represent that this change will or may result in the lowering of property values, an increase in criminal or antisocial behavior or a decline in the quality of schools in the block, neighborhood, or area in which the real property is located."

Some have argued that Mr. Rehnquist's vote in favor of the final Model Act which contained public accommodations provisions shows the nominee's change of heart from his 1946 position opposing a Phoenix public accommodations ordinance. But that is a vastly oversimplified view. In the first place, the Commissioners were dealing with model legislation, not a law about to be put into effect, so the situations are not comparable. And even more important, the nominee himself was twice asked to explain his change of heart, which was first announced at the confirmation hearings. Neither time did he mention his vote as a Commissioner in 1966. This means either that in the nominee's mind the vote approving the final draft was not significant in showing a change of heart or that he chose not to bring it up because of his opposition to the imbalance and anti-blockbusting provisions. Giving the nominee the benefit of the doubt, one concludes that in his own mind the 1966 vote was not important. There is then no reason it should be important to the Senate. In any event, the final vote is far less significant than Mr. Rehnquist's earlier opposition to the two sections of the act discussed above.

THE 1967 LETTER

The third incident was a letter to the editor Mr. Rehnquist wrote in September 1967 in response to a series of articles and a school official's proposals to deal with de facto segregation in Phoenix. The letter can be understood only in the context in which it was written.

Mr. Harold R. Cousland wrote a series of six articles for the *Arizona Republic* in late August 1967 concerning de facto segregation in Phoenix and what might be done to combat it. Mr. Cousland discussed the problem of racial segregation in the Phoenix schools, the reasons that segregation is self-perpetuating, the contention that minority group children are better off in integrated schools, compensatory education plans, and alternative proposals for integration: open enrollment, voluntary busing, school pairing, educational parks. Forced busing of students was not one of the proposals.

Just as Mr. Cousland's series was completed, the Superintendent of the Phoenix Union High School District, Dr. Howard Seymour, proposed a number of steps designed to combat de facto segregation in Phoenix. As reported in the Arizona Republic of September 1, 1967, at p. 19, these steps were:

Appointment of a policy adviser skilled in interpersonal relations and urban problems;

Organization of a citywide advisory committee representing minority groups;

Formation of a Human Relations Council at each high school;

Promotion of voluntary exchanges of pupils among racially imbalanced schools in various ways, including the location of special enrichment programs and extra-curricular activities;

In the long run, a series of seminars on the nature of prejudice;

Curriculum changes designed to accent the contributions of various ethnic groups and individuals;

Without setting a ratio of minority teachers at each school, the assignment of staff in a way which redressed the existing imbalance.

Mr. Rehnquist found the combination of Mr. Cousland's articles and Dr. Seymour's program "distressing" enough to write the following letter to the Arizona Republic:

"'DE FACTO' SCHOOLS SEEN SERVING WELL

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

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

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

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

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

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

Mr. Rehnquist was given several opportunities at the hearings to explain this letter. His reply always took the same line:

"I would still have the same reservations I expressed in 1967 to the accomplishment of this same result by transporting people long distances, from points where they live, in order to achieve this sort of racial balance, and what I would regard as rather an artificial way."

And later in the hearings:

"With respect to the 1967 letter which I wrote in the context of the Phoenix School system as it then existed, I think I still am of the view that busing or transportation over long distances of students for the purpose of achieving a racial balance where you do not have a dual school system is not desirable."

And again in answers to supplemental questions, Mr. Rehnquist explained that a statement by Dr. Seymour that he would "not dismiss busing of students as a partial solution" lay at the heart of this letter.

Thus, Mr. Rehnquist has tried to cloak his 1967 letter in the current controversy over mandatory busing of students. But a fair reading of the letter itself and the articles on which it is based demonstrates that Mr. Rehnquist was opposed to much more. The letter itself does not even mention busing, or, indeed, transportation of students in any form. And it is apparent from the most cursory glance at the proposals Dr. Seymour made that—as Mr. Rehnquist admitted in answers to supplemental questions—virtually all of the proposals are "entirely consistent" with the neighborhood school concept Mr. Rehnquist wrote about. Yet the letter specifically suggested that "the voters of Phoenix will do well to take a long second look at the *sort of proposals* urged by Messrs. Cousland and Seymour." (emphasis added)

Moreover, the newspaper story from the *Arizona Republic* of September 1, 1967, out

of which Mr. Rehnquist takes Dr. Seymour's statement that he would "not dismiss busing of students" when read in full shows that Dr. Seymour had an extremely moderate view of the problem:

"He [Dr. Seymour] said he would not dismiss busing of students as a partial solution, but he discounted busing or the altering of district lines as complete approaches to the problem.

"'It is much more preferable for us to demonstrate a willingness to broaden the spectrum of school populations through such actions as voluntary transfers, a local peace corps of students and teachers, . . . and other devices intended to life the aspirations of those who live and learn without them.

"'The research evidence tentatively supports the premise that minority pupils achieve more in an atmosphere of high motivation,' he said."

And the *Phoenix Gazette* of August 31, 1967, reporting the same speech by Dr. Seymour makes the Superintendent's position equally clear:

"But he [Dr. Seymour] said he opposes gerrymandering district boundaries or 'busing' pupils from one part of town to another as means toward 'true integration.'

"'There is nothing more artificial in my judgment than to load a group of pupils from one district and disgorge them at another without making it possible for full, active participation in learning, socializing, sports and activities, and without integrating the adults along with busing pupils,' he continued."

Thus, far from being an advocate of forced busing, Dr. Seymour favored other ways of integrating the schools, such as encouraging voluntary transfers under a program already in effect. Viewed in this light, one sees rather clearly that just four years ago Mr. Rehnquist found "distressing" some rather minimal efforts of school officials to promote equality of educational opportunity. One also sees that his answers to the Committee's questions on this matter were more glib than candid.

The truly alarming aspect of this 1967 letter, however, is Mr. Rehnquist's statement, 13 years after *Brown* v. *Board of Education* that "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society." As explained above, this statement cannot simply be written off by the nominee as made in the context of long-distance busing. It must stand on its own as representing his view of our society's obligation to its citizens. And Mr. Rehnquist has never disassociated himself from this statement. Yet at least since the Supreme Court declared that "separate is inherently unequal," this Nation has not been neutral as between integration and segregation; it stands squarely in favor of the former. And if Mr. Rehnquist does not agree, he is outside the mainstream of American thought and should not be confirmed.

The statement is especially disturbing when put into context. The newspaper story which contains the quote by Dr. Seymour with which Mr. Rehnquist took issue reads:

"Commenting on teaching minority members, [Dr. Seymour] said the district should make no attempt to establish ratios of one type of teacher to the pupils they serve.

"'Since we are and must be concerned with achieving an integrated society,'" he said, "the Phoenix Union High School system recognizes an obligation to staff schools with personnel to help relieve cultural imbalance within the community. Pupils need to be exposed to the fine talents representative of all races.'"

Thus there is yet another part of a consistent pattern, complementing Mr. Rehnquist's opposition to the employment "imbalance" section of the Model State Anti-Discrimination Act, and to the public accommodations ordinance, of the nominee's hostility to programs which recognize 200 years of discrimination in America and take steps to rectify the tremendous burdens which that discrimination has imposed.

THE ABSENCE OF AFFIRMATIVE COMMITMENT TO EQUAL RIGHTS

Significantly, the disturbing inferences which flow from the incidents just described are not rebutted in any way by other, affirmative actions Mr. Rehnquist has taken to promote racial justice. Indeed, the absence of a demonstrated commitment to equal rights in the nominee's record is alone strong grounds for questioning his nomination.

Mr. Rehnquist was twice asked at the hearings to describe what in his record demonstrated a commitment to equal rights for all. His entire answer was as follows:

"It is difficult to answer that question, Senator. I have participated in the political process in Arizona. I have represented indigent defendants in the Federal and State courts in Arizona. I have been a member of the County Legal Aid Society Board at a time when it was very difficult to get this sort of funding that they are getting today. I have represented indigents in civil rights actions. I realize that that is not, perhaps, a very impressive list. It is all that comes to mind now.

* * * * *

"I think that there are some paragraphs in my Houston Law Day speech which recognize the great importance of recognition of minority rights, that the progress is not as fast as we would like and that more remains to be done. I am trying to think of some other public statement that may contain similar—well, you know, I am just coming back, not back to isolated passages in public statements."

This was subsequently expanded and clarified by Mr. Rehnquist in response to additional questions by certain members of the Committee. Mr. Rehnquist added that he had been an Associate Member of the American Bar Association Special Committee on the Defense of Indigent Persons Accused of Crime in 1963; that he had testified on behalf of the Administration in favor of ratification of the Genocide Treaty and in support of the Equal Rights Amendment; and that he had participated in the preparation of the Opinion of the Attorney General upholding the legality of the "Philadelphia Plan." Mr. Rehnquist also explained in somewhat greater detail the sorts of civil rights actions in which he represented indigents.

This record, compiled over the course of an 18 year career, reveals little more than the routine activities which may be expected of any private lawyer who becomes a high-ranking government official. It cannot be called a demonstrated commitment to fundamental human rights.

Representation of indigents, for example, is considered one of the duties of every member of the bar, and in criminal cases is usually done at the request of the court. The civil rights actions Mr. Rehnquist described in his response to written questions could more accurately be called civil cases than civil rights cases in the usual meaning of that term. And in response to additional questions, Mr. Rehnquist admitted that his membership on the Maricopa County Legal Aid Society Board had been *ex officio*, by virtue of his position as an officer of the County Bar Association.

Nor is any particular commitment shown by his record in the Department of Justice since 1969. His testimony in support of the Equal Rights Amendment was less than wholehearted. And any reliance which might otherwise be placed on his authorship of the Opinion of the Attorney General upholding the lawfulness of the Philadelphia Plan is undermined by his opposition to a far less reaching proposal in the Model State Anti-Discrimination Act in 1966, discussed above. Further, once put in chronological sequence, the significance of that Opinion is somewhat suspect. In June of 1969 the Labor Department, with Administration approval, promulgated the orders for minority hiring commonly referred to as the Philadelphia Plan. In August the Comptroller General held the Plan illegal. In September, Mr. Rehnquist's office prepared the Opinion of the Attorney General which, unsurprisingly, upheld the Labor Department's—and the Administration's—well publicized proposal.

In sum, Mr. Rehnquist's record fails to demonstrate any strong affirmative commitment to civil rights, to equal justice for all citizens, let alone a level of commitment which would rebut the strong evidence of insensitivity to such rights.

ALLEGED HARASSMENT OF VOTERS

There have been a number of charges and denials concerning Mr. Rehnquist's role in voter challenges by Republicans during various elections in the early 1960's in Phoenix. One serious charge was that made in sworn affidavits by Mr. Jordan Harris and Mr. Robert Tate alleging that Mr. Rehnquist harassed and intimidated a voter and engaged in a scuffle with Mr. Harris at the Bethune precinct in 1964. Messrs. Tate and Harris charge that Mr. Rehnquist made an improper attempt to administer personally a literacy test to a would-be voter. Mr. Harris says he approached Mr. Rehnquist, to whom he had been introduced, and "argued with him about the harassment of voters." A struggle ensued, in which Mr. Tate came to Mr. Harris' aid. A policeman, it is said, entered and took Mr. Rehnquist into an office, from which he soon left. Mr. Tate identified Mr. Rehnquist "from pictures I have seen lately in the papers . . . he did not, at that time, however, wear glasses."

These affidavits are corroborated by two additional ones sworn within the past few days. These came from the Rev. and Mrs. Snelson McGriff, who say that Mr. Rehnquist—or "his twin brother"—was at Bethune precinct in 1964. Rev. McGriff says that the challenger, Mr. Rehnquist, wore glasses while inside the voting place, but took them off when he came outside, before the scuffle took place. *See* the *National Observer*, Nov. 28, 1971, p. 4, col. 1.

Mr. Rehnquist has submitted a sworn affidavit which says that the affidavits of Messrs. Tate and Harris "insofar as they pertain to me . . . are false." He has denied having been at the Bethune precinct in 1964, and he denied that he ever personally "harassed or intimidated voters."

The conflict in the evidence before the Committee is not resolved simply by reference to Judge Charles Hardy's letter, as the Majority would have us believe. Judge Hardy only confirms what was already documented by contemporaneous news accounts and by an FBI report: that there was voter harassment and a fight at Bethune in 1962, and that Mr. Rehnquist was not involved in it. But Judge Hardy's letter does not by any stretch of the imagination stand for the proposition that no scuffle occurred at Bethune in 1964. Thus Mr. Rehnquist's statements and Judge Hardy's letter do not "completely refute the charges" made by Messrs. Tate and Harris. Indeed, Judge Hardy's letter which states that the "events in question" occurred in 1962, could not have been intended as a refutation of their charges since it is dated before their affidavits were made and released.

Nor does the fact that the Federal Civil Rights Act of 1964, in effect at the time, prohibited oral literacy challenges "undercut the credibility of these allegations" as the Majority Report claims. That fact means only that the challenges, if there were any, violated federal law. And at least in some parts of Arizona, a Justice Department investigation has revealed that "challenges . . . based on . . . ability to read the Constitution in English" were made in 1964. *See Apache*

County v. *United States*, 256 F. Supp. 903, 909 (D.D.C. 1966) (3-judge court).

Instead, it appears that the Committee lacks either the motivation or machinery to conduct the type of fact-finding which is needed to uncover which side of this dispute is mistaken. Therefore, each Senator will have to decide for himself what weight—if any—to give either the charges or the blanket denial.

Whatever the actual facts are about the 1964 incident at Bethune, that dispute should not be permitted to obscure the larger question of the extent of Mr. Rehnquist's responsibility for the Republican efforts to intimidate and harass minority voters in Maricopa County from 1958 to 1964. Judge Hardy, whose letter is so heavily relied upon by the Majority, described those tactics as follows:

"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 next preceding the election and that he was unable to read the Constitution of the United States in the English language. In each precinct the Republican challenger had the names of persons who were listed as registered voters in that precinct but who apparently had not resided there for at least thirty days before the election. In precincts where there were large numbers of black or Mexican people, Republican challengers also challenged on the basis of the inability to read the Constitution of the United States in the English language. In some precincts *every* black or Mexican person 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 waiting to vote and asking for their names. There is no doubt in my mind that these tactics of harassment, intimidation and indiscriminate challenging were highly improper and violative of the spirit of free elections."

In response to a written question from several members of the Committee, Mr. Rehnquist stated that he felt "that there was no connection between my role [in 1962] and the circumstances related by Judge Hardy." He also stated that the practices Judge Hardy described "did not come to my attention until quite late in the day of the election in 1962" and that is why he took no steps to curb practices such as indiscriminate use of literacy challenges, which he believes improper. But this disavowal of involvement in the 1962 practices must be placed alongside the facts, established by Mr. Rehnquist's own answers, that in 1960, 1962 and 1964 the nominee played an important role for the Republican Party in Phoenix in voter challenges.

In 1960, Mr. Rehnquist was designated by the County Republican Chairman as co-chairman of the Ballot Security Program; he supervised and assisted in the preparation of envelopes mailed to Democrats—largely in black and Mexican-American districts—which were the foundation of residency challenges; he recruited lawyers to serve on a Lawyers' Committee; he advised challengers on the law; and he supervised in assembling returns of the mailings for challenging purposes.

In 1962, Mr. Rehnquist was designated Chairman of the Lawyers' Committee of the County Republican Party, and he again taught challengers the procedures they were to use. And, as in 1960, he served as a troubleshooter—going to precincts at which disputes had arisen, in order to help resolve them.

Finally, in 1964 Mr. Rehnquist was Chairman of the Ballot Security Program, selected by the County Republican Chairman. As such, he had overall responsibility for mailing out envelopes, recruiting challengers and recruiting members of the Lawyers' Committee, and for speaking, or seeing that someone spoke, at a training session of challengers. In 1964, as well, Mr. Rehnquist was general counsel to the County Republican Committee.

Thus while Mr. Rehnquist has sought to disassociate himself from the tactics employed by the Republicans in 1962 and other years, it cannot be overlooked that he held a high and responsible position in the Republican party's election day apparatus from at least 1960 to 1964, a period that saw very substantial harassment and intimidation of voters in minority group precincts.

CONCLUSION

A review of the nominee's entire record on civil rights reveals a persistent unwillingness on his part to allow law to be used to overcome racial injustice. There are two significant implications of this which argue strongly against confirmation. First, Mr. Rehnquist's views are such that one must fear the interpretation he may give to the great promise of the Fourteenth Amendment: equal protection of the laws. Indeed, one must also fear the limits he would impose on a legislature's efforts to redress 200 years of racial injustice. Second, there is the question of the very appearance of fairness and impartiality. At a time when many Americans, young and old alike, doubt the responsiveness of our system of government, we cannot afford to put on the Supreme Court a man consistently insensitive to the role that law must play in achieving a fair and just society.

QUORUM CALL

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum. I hope this will be the final quorum call of the day.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

LEGISLATIVE SESSION

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the Senate return to legislative business.

The PRESIDING OFFICER. Without objection, it is so ordered, and the Senate will resume consideration of legislative business.

ORDER FOR ADJOURNMENT TO 9 A.M.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until 9 o'clock tomorrow morning.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR RECOGNITION OF SENATOR PROXMIRE AND VACATING ORDER FOR RECOGNITION OF SENATOR MONTOYA TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that, following the remarks of the two leaders on tomorrow, the distinguished Senator from Wisconsin (Mr. PROXMIRE) be recognized for not to exceed 15 minutes and that the previous order recognizing the Senator from New Mexico (Mr. MONTOYA) be vacated.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR THE TRANSACTION OF ROUTINE MORNING BUSINESS TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that following the remarks of the distinguished Senator from Wisconsin (Mr. PROXMIRE) on tomorrow, there be a period for the transaction of routine morning business for not to exceed 15 minutes with statements therein limited to 3 minutes, at the conclusion of which the Senate will proceed to the consideration of Calendar No. 537, S. 2676, a bill to provide for the prevention of sickle cell anemia.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR RESUMPTION OF CONSIDERATION OF THE NOMINATION OF WILLIAM H. REHNQUIST ON TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that upon the disposition of S. 2676 on tomorrow, the Senate return to executive session and the resumption of the consideration of the nomination of William H. Rehnquist to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. BYRD of West Virginia. Mr. President, the program for tomorrow is as follows:

The Senate will convene at 9 a.m. After the two leaders have been recognized under the standing order, the senior Senator from Wisconsin (Mr. PROXMIRE) will be recognized for not to exceed 15 minutes, following which there will be a period for the transaction of routine morning business, with statements therein limited to 3 minutes. At the conclusion of routine morning business, the Senate will take up S. 2676, a bill to provide for the prevention of sickle cell anemia. The bill will be debated under a time limitation of not to exceed 30 minutes, and there will be a rollcall vote on final passage. The rollcall vote should occur at about 10 o'clock a.m.

Following the rollcall vote on S. 2676, the Senate will return to executive session to resume consideration of the nomination of William H. Rehnquist for the office of Associate Justice of the Supreme Court of the United States.

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First, experience has shown that where low-income housing is located, crime increases. The precise facts and figures are subject to debate since the people who supply them invariably have a political interest in one direction or another. But the basic situation is well understood. The poor and disadvantaged classes have always provided the greatest number of criminals, especially in a country where poverty is considered to be either a moral or statutory crime. So large numbers of poor people grouped together in public housing projects produce higher crime rates. When you add to this already unhealthy picture the fact that increasing percentages of housing project tenants are not working poor but welfare poor—people who are among the most hopeless and desperate in the city—the situation grows worse. The city claims that about 16 per cent of public housing tenants are on welfare. Congressman Edward I. Koch of Manhattan thinks 30 per cent is closer to the truth.

"The residents of Forest Hills are expressing two very real and rational fears," says Koch, who has joined Congressman Rosenthal in opposing the present design of the 108th Street project. "The fear of crime is a very real one, and second, it's absolutely rational to believe property values will decline in the area of a high-rise housing project. Fear moves in and people move out."

A woman who picketed the Forest Hills project site this week illustrated this statement with personal experiences. "The city put up a housing project near where I used to live in Brooklyn," she said. "It was the kind of neighborhood where you could leave your door open when you went to the store. Then the kids from the project found out about this gold mine and you could see them going through the back yards in the middle of the day, trying doors to see which ones were open. People began to lock up, buy gates for the windows, but who wants to live that way? Then came the burglaries and muggings and people began to move out. I came to Forest Hills. Where am I going to go next?"

Early in his first term John Lindsay recognized that building low-income housing projects in slum and ghetto areas maintained poor people in an environment harmful to their chances for social progress. Distributing the housing projects into middle-class neighborhoods was the way to stop this piling of poverty on top of poverty. But no one seemed to grasp a simple fact of social engineering. Unless the middle-class neighborhoods *remain* middle class after the housing projects are completed, no progress is made. Instant slums are created in formerly attractive areas. The poor are shifted from one ghetto to another, and *their lives don't get any better.*

There is no curative magic in middle-class neighborhoods like Forest Hills. The people who live there aren't better off because the area is nicer. They're better off because they made the area nicer. Unless new residents contribute the same kinds of middle-class disciplines and values to the neighborhood, it will become something else. This is where John Lindsay and the social theorists who work for him went wrong. Their new housing projects, with few exceptions, put too many poor families together in one place. The poor had more of an effect on the middle-class neighborhoods than the neighborhoods had on them. The neighborhoods became poor.

What Rosenthal Koch, and most of the Forest Hills residents who oppose the present project would like to see is a different approach to low-income housing, an approach that takes into consideration the fact that while integrating races isn't much of a trick in New York City any more, integrating people of different economic levels and value systems is practically impossible. But, in reasonable numbers, it can be done. Instead of cooking up a housing project that will concentrate 536 low-income families in high-rise towers that Rosenthal has called "concrete ghettos," why didn't the planners limit the low-income allotment to 100 families or so? Instead of those towers, why weren't the new buildings kept in close profile with the surrounding ones? And why was a middle-class community like Forest Hills expected to take such a huge dose of concentrated poverty without a single sweetener from the city to compensate?

"We've never had a thing from the city," says Joseph Walderman, vice-president of the Forest Hills Residents Association. "Not one damn thing."

If the Lindsay administration had settled for a smaller number of low-income families in the Forest Hills project, if it had come up with a more compatible design, if it had mixed in some middle-income housing and added a much needed community recreation center, there would have been no large-scale protest by residents of the area. The poor families would have been absorbed into the middle-class neighborhood because their numbers were not large enough to threaten it. Everyone would have benefited. But with the present plan, everyone is in danger. The residents may lose their neighborhood, and the poor may find themselves in another slum.

"Lindsay didn't worry about us," says Walderman, a quiet articulate man, "because he thought he could get away with ramming this thing down our throats. We're middle-class liberals. We're not supposed to fight back. Our picket line must have come as quite a shock to him."

Press coverage and editorial opinion on the Forest Hills affair have hit hard on the theme that the protesters are either bigots or misinformed, or both. This is inevitable, perhaps, because the middle class doesn't make good news copy. They aren't like the lower-class Italian home-owners of Corona, full of colorful little ethnic details, who needed a voice to protest their homes being razed to make room for a new school. The middle class speaks for itself. It believes in the bourgeois values of home, religion, hard work, and tries to do the right thing. It's middle America, and all that term implies. It's dull, ordinary, predictable, and supposedly reactionary in racial matters. This, say the Forest Hills residents who want the housing project, is the real reason why the vast majority of their neighbors oppose it.

This type of slander is effective in an emotional issue like racial integration, but it doesn't check out. Ed Koch attended a dinner recently where Carl Stokes, a black man and former mayor of Cleveland, addressed a number of fellow black politicians. "If you think it's only whites who don't want low-income housing projects in their neighborhoods," Koch remembers Stokes saying, "baby you're wrong!" Stokes then told how his administration had built projects in middle-class black neighborhoods in Cleveland. A black woman and friend of the mayor whose home was near one of these projects said to Stokes: "Carl, I never thought you would do that to me." And she never spoke to him again.

In a middle-class Puerto Rican neighborhood of the Bronx, homeowners are now expressing opposition to two new residence houses for wards of the court planned for their area. The middle class Puerto Ricans are worried that muggings and drug use will increase and their property values will drop. And how many court wards would move into the neighborhood? Just 24. Count 'em. Twenty-four.

The real issue in Forest Hills and in every middle-class neighborhood in America lies in the answer to this question asked last summer by Eleanor Holmes Norton: "Will whites flee as blacks and Puerto Ricans of the same economic status and life-style move in?" In Forest Hills the answer has been no. Middle-class blacks move into a building and although there is nervousness and uncertainty, whites do not leave. People who share similar values and abilities can overcome racial differences. With an influx of low-income families, however, that value sharing is minimal and strained.

If the city administration means to keep New York from deteriorating any more than it already has, there will have to be an end to shoving large numbers of low-income families into middle-class neighborhoods. Disrupting the middle class will not help the poor. It will only deprive them of a better neighborhood to which they can advance when they, like many of the people of Forest Hills today, have lifted themselves out of poverty.

EXECUTIVE SESSION

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate go into executive session to consider nominations on the Executive Calendar under "New Reports."

There being no objection, the Senate proceeded to the consideration of executive business.

The PRESIDING OFFICER. The nominations under "New Reports" will be stated.

AMBASSADORS

The second assistant legislative clerk proceeded to read sundry nominations of ambassadors.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the nominations be considered en bloc.

The PRESIDING OFFICER. Without objection, the nominations are considered and confirmed en bloc.

INTERNATIONAL CIVIL AVIATION ORGANIZATION

The second assistant legislative clerk read the nomination of Mrs. Betty Crites Dillon, of Indiana, to be the representative of the United States of America on the Council of the International Civil Aviation Organization.

The PRESIDING OFFICER. Without objection, the nomination is considered and confirmed.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the President be notified of the confirmation of the nominations.

The PRESIDING OFFICER. Without objection, it is so ordered.

THE SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

THE REHNQUIST NOMINATION SHOULD BE CONFIRMED

Mr. PROXMIRE. Mr. President, I will vote for the confirmation of William Rehnquist as Associate Justice of the Supreme Court.

I will do so first because Mr. Rehnquist obviously has strong intellectual qualifications. The Court demands a high grade of intellectual ability. Mr. Rehnquist has it. His distinguished academic record, his demonstrated competence as

a practicing lawyer, and his acknowledged ability as an Assistant Attorney General handling complex and difficult legal and public policy problems all demonstrate this.

Although the Rehnquist nomination has become controversial, although he has been opposed by many competent critics, I have yet to hear anyone dispute his intellectual capacity.

This level of ability is rare. It is needed on the Supreme Court. It is a strong point in Mr. Rehnquist's favor.

Second, Mr. Rehnquist has given every indication that he is a man of stable temperament. In the intensive study that has been conducted of the Rehnquist background, there has been no evidence that any critic has developed that Mr. Rehnquist would decide questions on the basis of unreasoning emotion or impulse. And his demeanor in the ordeal of confirmation under questioning was impressive. Mr. Rehnquist seems to be a man of judicious temperament.

Mr. Rehnquist has been a lifetime student of the law. He served former Associate Supreme Court Justice Jackson as his clerk, and served with distinction.

Frankly, I have had more pressure in opposition to Mr. Rehnquist than I have had on any Presidential nomination for the Supreme Court in the 14 years I have served in the Senate. That opposition has come from friends of mine for whom I have the greatest respect and whose judgment I trust.

My friends and my staff are almost unanimous on this nomination. They almost without exception oppose it.

And they oppose it for the same reason. They argue the Rehnquist appointment is likely to cast the Court for years to come in a conservative posture. They contend that Rehnquist's intellectual ability and the force of his personality constitute not a national asset but a serious threat to civil rights and civil liberties.

They argue the great advances of freedom made by the Court in recent years will be jeopardized and even reversed.

Mr. President, I reject that judgment. The crystal ball of Senators and even Presidents is very cloudy, indeed, in predicting the future conduct of newly appointed Supreme Court Justices. Holmes and Frankfurter are two of many whose impact on the American law have been quite different than most observers expected at the time of their appointment.

After carefully reading the record, after hearing the criticisms of so many who object to this appointment, I have become convinced that the case simply has not been made that Mr. Rehnquist does not understand or support the Bill of Rights or the other safeguards of liberty in the Constitution.

And, Mr. President, in all honesty I share the conviction expressed by President Nixon that we need a better balance between the forces of law enforcement on the one hand and law violation on the other. That does not mean any less concern for the liberties we should treasure and advance. Those liberties are at the very heart of what makes this country unique and great.

It does mean that the appointment to the Court of a wise and able man who has demonstrated his thorough understanding of the threat that crime and disregard for the law represents—and I believe Mr. Rehnquist is such a man—can be fully consistent with maintaining the Bill of Rights in its full significance.

Finally, Mr. President, I opposed the nominations of both Judge Haynesworth and Mr. Carswell. In one case the conflict of interest was clear and conspicuous. In the other the Supreme Court nominee simply did not have the ability required for this immensely important position.

In this case Mr. Rehnquist does not and has not had any conflict of interest in his conduct in office, and he obviously has great ability.

Under these circumstances, I have resolved what doubt I have—and I do still have some—on the side of the President of the United States and his nominee. If the Senate should establish the precedent of refusing to confirm able and honest nominees on the grounds that we disagree with their political views, we will have a Court that will consist of political weather vanes reflecting whatever political view the Senate happens to hold at any time. We do not need another U.S. Senate interpreting the law. We need a Court of the ablest legal scholars we can find. Mr. Rehnquist should fit well in such a Court.

For all these reasons I will vote for the confirmation of William Rehnquist.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. PROXMIRE. I am happy to yield to the Senator from Indiana.

Mr. BAYH. I must say that I find myself deeply distressed by the position taken by my friend, the Senator from Wisconsin. He is a man of great logic, and he has been a real fighter for some of the important issues that have been before the Senate.

The Senator suggested he could find nothing in the record to indicate that the nominee did not possess the dedication to human rights that he should have. Has the Senator had the opportunity to read the hearing record and the minority views?

Mr. PROXMIRE. I have read the record and the minority report and I was impressed by the arguments against Mr. Rehnquist. As I said, my staff took a poll and they unanimously felt he should be rejected on the basis of the record and on the basis of the argument made in the minority views.

However, I was not convinced. For one thing, I think that he has changed his views. He took a different position than I took on civil rights matters 8 or 10 years ago. In my view that does not mean that Mr. Rehnquist now has little or no regard for civil liberties and civil rights. I think what he said in the confirmation proceedings indicated he has had a change of heart. This Senator has changed his views with respect to certain matters during the years; I think the Senator from Indiana has; and I think all of us do that. This man changed, developed, and grew, and I thing on civil rights, by and large, people throughout our country have learned and changed.

Mr. BAYH. I hope the Senator from Wisconsin will bear with me for a moment or two. We have had polls in my office, too, on some critical issues. More than once there has been a 7-to-1 vote but the "one" has been the one who came to the Chamber to vote. That is the way it has to be, and I understand. That is each Senator's responsibility

I have heard a great deal about the nominee's change of mind. But, with all respect to the Senator, I say there is nothing in the record to indicate that is so.

Mr. Rehnquist said he sees no constitutional issue raised by surveillance, the right to privacy. Is that a matter of concern to the Senator from Wisconsin?

We have a nominee who, not in 1964, 1966, or 1967, but 3 or 4 weeks ago when testifying before the Committee on the Judiciary, said he saw no constitutional difficulties presented by surveillance. What about the right to privacy?

Mr. PROXMIRE. That is a generalized conclusion; the Senator would have to be more specific in respect to the nominee's attitude. The Senator is talking about wiretapping, and so forth.

Almost all of the evidence I could see against Mr. Rehnquist is based on his activities when he was in the Justice Department. I think it is very unfair to visit upon an employee of the Justice Department the policies of that particular department. If the Senator from Indiana or the Senator from Wisconsin were working in the Justice Department, either we would do what we were told to do by the Attorney General and the President, or resign. We would either resign or do it the best we could, and that is what he did.

Mr. BAYH. A close reading of the record will show that he said:

If I did not agree with these policies I would have resigned.

Mr. PROXMIRE. Of course, the Senator is talking about whether he agreed overall with general policies of the President. It does not mean he has to agree with every single aspect. There were occasions when he might have argued against policies; but on the basis of having been heard, the Attorney General made up his mind and Mr. Rehnquist carried out the orders.

At any rate, I do not think the Senator makes a case against the nominee for the Supreme Court on the basis of what happened in the Justice Department while he was an employee there.

Mr. BAYH. Does the Senator from Wisconsin have any examples of these efforts?

Mr. PROXMIRE. The Senator from Indiana knows better than I, because he serves as a member of the Committee on the Judiciary and he was there when the committee attempted, as I understand it, to find out what went on between the nominee and the Justice Department in their conferences on their policies, and that the Justice Department refused to divulge that information. They may have been right or they may not have been right. At any rate we do not know and we do not have a clear record on whether or not the nominee did disagree with his

superiors. The fact that the Justice Department has followed a policy or policies in the last few years and that Mr. Rehnquist carried out some of them is not a basis for rejecting this man, who has a very high intellectual capacity and who has demonstrated his ability.

Mr. BAYH. I ask these questions not to be argumentative but to explore the facts as they appear to one Senator. Of course, we all make different judgments and we give different importance to the same facts. But I think we need to understand that Mr. Rehnquist was not some lower echelon lackey who was ordered into battle to carry out commands of the generals. Indeed, he was one of the top policymakers. He did not just carry out policy: he helped to make it.

I know of no efforts he made to show us that his own views were different from Department policy. We did not ask him to prejudge cases. We tried to get his personal views. In statement after statement he went so far as to say he did not think it would be a constitutional question if the Government wanted to follow, or to put a tail on, the Senator from North Carolina (Mr. ERVIN).

When we were discussing the limits of our right to privacy, he never once denied that the President had the inherent right to bug our telephones in both foreign and domestic security cases without any kind of supervision at all. This was the real William Rehnquist. It was not just Justice Department's view.

This is what caused me to consider that his approach to the Bill of Rights was callous at best. This belief was reinforced by the nominee himself, who said, "If I did not believe in these policies, I would have left." He did not espouse these views because the administration might fire him. He was comfortable; he was a part of formulating that program.

Mr. PROXMIRE. I am sorry. Will the Senator repeat the last observation?

Mr. BAYH. I was suggesting that he was a part of formulating these programs. For instance, the preventive detention bill—I do not know how the Senator voted on that bill, but this was one of William Rehnquist's babies.

Mr. PROXMIRE. I voted for it.

Mr. BAYH. Then, the Senator does not share the concern I have about this particular matter.

Is the Senator from Wisconsin familiar with the 1952 memorandum that then law clerk Rehnquist wrote to Justice Jackson relative to Brown against Board of Education in which he urged that Plessy against Ferguson be reaffirmed?

Mr. PROXMIRE. Yes. I think that was bad—a mistake. I do not think this Senator would have done it. But that was written when the man was in his 20's and then a clerk of a Supreme Court Justice. I think, certainly, Mr. Rehnquist's views have changed since then. I think the views of the Senate have changed since then, and the views of the country have changed since then. To go back to that period and say because he took this position, which in my view was a wrong position, that now, in 1971, he is disqualified, I think is not fair.

Mr. BAYH. I would like to concur with the statement that the Senator from Wisconsin has just made. After all, Mr. Rehnquist was only 28 years of age which is hardly wet behind the ears. That is exactly the age which Judge Carswell was when he made his now-infamous statement about white supremacy which led to his nomination being turned down by the Senate. The fact that Mr. Rehnquist said that in 1952 does not mean he could not have changed his mind. Unfortunately, I do not think he has had any change of heart. In 1964 he was opposing the Phoenix City Council ordinance to require the integration of public places of business, using very much the same argument which he made in his memorandum to Mr. Justice Jackson. At that time he was 40 years of age. Does it concern the Senator from Wisconsin that at age 40 he still had the same concern for property rights in place of individual rights?

Mr. PROXMIRE. The Senator will recall that when the bill was before the Senate in 1964 we voted to provide against discrimination in places of public accommodations. The Senator from Indiana and the Senator from Wisconsin held strong views on that and were enthusiastically in favor of that. But it was a change in the policy of this country. There were many thoughtful people at that time who opposed it. So it was a change in national policy. Simply because at that time Mr. Rehnquist represented the settled view does not seem to me to disqualify him now for the Supreme Court.

I think that is a very important view now, but it is, nevertheless, a policy view. It is a view that was held at one time by the late Senator from Illinois, Mr. Dirksen, and many other Senators, but in the course of debate he, like others, changed his mind at the time of the adoption of the civil rights bill. He was opposed to the civil rights bill to begin with. He fought it as the principal opponent. But he recognized it was an idea whose time had come, and his position changed. It is probable that Mr. Rehnquist's view has changed, as he said it has.

Mr. BAYH. Mr. Rehnquist has never said that he was wrong when he wrote that memorandum. He has talked about a nine-judge majority and stare decisis and the weight to be given to precedent. But let us remember we are talking about a man who is going on that Court and who will be a part of that nine-man voting block. That is why I think it would be a mistake to put on the Court a man who in 1952 was in favor of sustaining Plessy against Ferguson. I do not say this because of the ultimate conclusion he reached, but because he urged Justice Jackson to vote against Brown against Board of Education on the ground that the Court would be making an error in supporting the rights of this minority. It seems to me it is a mistake to put a man on the Court who does not feel that the Court not only has the right but the responsibility to protect individual rights. That is the reason for the Bill of Rights. That is the purpose of the Court. He talked about Jehovah's Witnesses. He talked about the rights of businessmen. He talked about various other minorities that had to be protected. He talked about slaveholders. He just did not believe the Court should move into those areas. This concerns me because if we confirm him, he will not be a law clerk or an official down at the Justice Department who can be removed if the country does not like his voting. He will be on the highest Court and every public pronouncement of William Rehnquist would indicate that he does not realize the importance of the rights of minorities.

Sure, of itself it means little or nothing that in 1952 he was against Brown against Board of Education. However, in 1964 he was against letting black people into the drugstores of Phoenix. As a private citizen he became excited enough over a very mild integration plan to take public issue with the school superintendent. That was in 1967. In 1966, as a uniform laws commissioner he did everything he could to stop an antiblockbusting provision, which was favored by the rest of the commissioners. He tried to strike that out of the uniform code. He tried to strike out a section which would have permitted—not required but permitted—employers to compensate for past discriminatory hiring practices. When he was defeated in that fight, he successfully led the effort to change it from a uniform act to a model act.

If there is sufficient reason to believe that Mr. Rehnquist now is sensitive to the rights of minorities, I wish the Senator from Wisconsin would point it out to me, because I do not find it in the record.

Mr. PROXMIRE. I have taken the position I have taken on this nomination, I will say to the Senator from Indiana, because I feel that while the views of Mr. Rehnquist are different from the views I hold very strongly, and as I have said in my statement, while I have some hesitation about it, I think we are wrong if we impose a political test and that is exactly what the Senator from Indiana proposes. I do not think we should appoint people to the Supreme Court based on whether we agree with any political position they have taken. It should be on the basis of their ability, integrity, honesty, and whether or not there is a conflict of interest involved. I think on all those scores this man is outstanding.

After all, he was No. 1 in his class at Stanford Law School. He is a man of great ability and great intellect. We need men like that on the Supreme Court. The argument that he has taken a quite different view, and a view that does disturb the Senator from Wisconsin, on civil rights is not a sufficient basis why he should not go on the Court.

Mr. BAYH. What is the proper scope of the Senate's inquiry, in the view of the Senator from Wisconsin? I ask the question because I have great respect for the Senator from Wisconsin and because the people look upon this body not only as a whole but at individual champions. And they look at the Senator from Wisconsin as one who courageously led the fight against the SST because it was wrong, and they will want to know how he views this nomination. I think that

his vote would be taken as a compliment and they would regard the vote of the Senator from Wisconsin with more than normal weight.

Are there limits beyond which we should not permit a man to go on that Court?

Mr. PROXMIRE. Of course there are. As the Senator knows, I voted against Carswell. I voted against Haynsworth. I probably voted against more nominees of President Kennedy, President Johnson, President Eisenhower, and President Nixon than almost anybody who has been here while I have been in the Senate. I have never taken the view that we should automatically rubberstamp any nominee of the President. But I think when the President makes a nomination to the Supreme Court of a man who is qualified intellectually, who has a good, solid legal background, a man who is open, who is honest, a man whose conduct in that respect has not been questioned, I am going to support him.

I think there was a strong effort made to discredit Mr. Rehnquist on specific grounds, but I did not see any instance in which this was substantiated. I did not see any instance in which it was shown that Mr. Rehnquist was dishonest or where he had acted improperly, or without regard to the law. Under those circumstances, it seems to me that we should give the President of the United States and the nominee the benefit of the doubt.

Mr. BAYH. I guess I should have been more definitive in my question. There are no grounds, apparently, in the policy area that the Senator from Wisconsin feels are sufficient to oppose the nomination.

Mr. PROXMIRE. Policy area? I am not sure I know what the Senator means. Political grounds. There are some——

Mr. BAYH. Being against Brown against Board of Education is not sufficient in the mind of the Senator from Wisconsin?

Mr. PROXMIRE. Well, the fact that he was against it some time ago, no. I would say no. I would say that is not sufficient. Obviously, if it were, I would not be for Mr. Rehnquist.

Mr. BAYH. I asked him about the letter to the editor that he wrote and the issue he had with the superintendent of schools in Phoenix in the very mild integration effort, a freedom of choice plan, really, which has now been outdated by light years. I asked him why he opposed that, and he said he was against long-distance busing. The superintendent himself was against long-distance busing. There is just no evidence, I may say to the Senator from Wisconsin, to substantiate the claim that William Rehnquist would look differently, if he were on that Court today, on the rights of black people than he did back in 1952 when he urged Justice Jackson to vote against Brown against Board of Education.

I shall not pursue this further. The Senator from Wisconsin has been very kind. It is very distressing to me, as I say, that he has taken this position, but each Senator has the right to his own viewpoint, and I know that he feels deeply in his conscience that he is right. I accept that judgment.

Mr. PROXMIRE. I thank the Senator. Mr. President, I yield the floor.

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. BAYH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BAYH. Mr. President, I should like to follow my colloquy with the Senator from Wisconsin with a few additional observations.

On the past two occasions when the Senate has refused to advise and consent to Supreme Court nominations, we have had a variety of reasons expressed by various Senators as to why they reached the conclusion to vote "No" against the President's nomination.

The Haynsworth nomination, I think the record will show, presented a unique combination of concern over the nominee's views on civil rights, perhaps also his concern over certain social issues closely related to the labor-management area, and concerns about the judge sitting on cases in which he had a financial interest—the ethical question. Because of these matters, 55 Members of the Senate stood up and said, "With all respect, Mr. President, no. Send us another nominee." And the President did.

Then followed another heated battle over the Carswell nomination. The Carswell nomination was not a replay of the Haynsworth nomination. Even stronger concerns were expressed about Judge Carswell's position in the area of civil rights and human rights. This was rather well documented by a statement he had made when he first ran for the legislature, when he was 28 years of age, in which he said that he yielded to no man in his belief in white supremacy.

I find it ironic now to see the similarity that was expressed in the argument of the Senator from Wisconsin, wherein he said that if he felt that William Rehnquist still was opposed to Brown against Board of Education, he would vote against him as a nominee to the Supreme Court.

Some argued strongly in support of Judge Carswell that if they believed he still felt that the cause of white supremacy was valid, they would vote against him for the Supreme Court. But they contended that Judge Carswell had changed his mind.

Now the proponents of William Rehnquist suggest—not that he was right in urging Justice Jackson to vote against Brown against Board of Education and to sustain Plessy against Ferguson—that Mr. Rehnquist has changed his mind.

Just as the Senate, when confronted with the evidence about Judge Carswell, apparently came to the conclusion that he had not changed his mind, I think the evidence is equally clear that William Rehnquist has not changed his mind on the great social issue presented in Brown against Board of Education. I wish it were not the case, because I cannot contest the intellectual capacity of the man. But it seems to me that a man who is wrong on the great philosophical issues that confront this country should not be given the Good Housekeeping seal of approval by the U.S. Senate just because he happens to be magna cum laude. In fact, it would seem to me that a man who possesses this intellectual capacity should have to meet a higher test of understanding of the humane questions of the day.

In 1952, when magna cum laude Rehnquist was advising one of the most distinguished Justices on the Supreme Court, he was totally unaware of the problems, the perplexities, the sensitivities, and the frustrations of the millions of black Americans. To me that indicates that on the outside the grade may be letter "A" but on the inside, in the heart, where it really counts, he fails the course. Such an analysis also comports with his repeated statements that he changed his mind about the open accommodations ordinance, not because he came to realize that all citizens are entitled to the same rights, but because he now knew how much the minorities cared about such rights.

Of course it is possible for a 28-year-old to mature. I think this is a valid hypothesis. Hopefully, it is possible for a 43-year-old to mature and get greater wisdom. But, interestingly enough, if one follows the maturing and, the development of the thought processes of William Rehnquist from the 1952 memorandum to 1967, when he took issue with the Phoenix superintendent of schools on the very same issue, there is no maturing.

If between age 28 and age 40 the position of William Rehnquist on the important area of quality education, of letting minority students have access to our public institutions of education, did not change, why are we to assume that suddenly there was a renaissance beyond age 40?

I think that that is not a valid assumption. Certainly Mr. Rehnquist was a leading member of the bar. He had very set thoughts, a very significantly developed philosophy and intellect. To suggest that there has suddenly been a renaissance between 1967 and 1971 is to look for something that does not exist, and to hope and pray for something that never will be.

I think it is important to look at some of the excerpts from that editorial in 1967 to see what Mr. William Rehnquist thought then about letting the minority children of Phoenix have access to their school system. I begin by setting the issue in perspective. On yesterday we talked extensively about the philosophy expressed in the 1952 memo. Yesterday I quoted, and I quote again today for the sake of continuity, from that memorandum which Mr. Rehnquist wrote to Justice Jackson:

> One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

He further stated:

To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction.

Therein was the philosophy of William Rehnquist in 1952. I suggest that his philosophy did not change much between then and 1967, because in the issue that was involved in Phoenix, Ariz., we were not talking about a quota system. We were not talking about forced long-range busing. As I suggested to my friend, the Senator from Michigan, yesterday, we have pounded our breasts and talked about the intellectual capacity and the honesty of the nominee. Yet he had the audacity to come before the Committee on the Judiciary and try to explain away his opposition to the school plan in Phoenix on the basis that he was opposed to long-distance busing. Long-distance busing was not even involved. The superintendent of schools himself was against forced long-distance busing, and if William Rehnquist says that is the reason he wrote that letter, he is not being honest with the Senate.

Mr. Rehnquist said in his letter, and I will quote excerpts from it—but I ask unanimous consent that the entire letter to the editor written by Mr. Rehnquist back in 1967 be printed in the RECORD at this time.

There being no objection, the letter to the editor was ordered to be printed in the RECORD, as follows:

"DE FACTO" SCHOOLS SEEN SERVING WELL

(By William H. Rehnquist)

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

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

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

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

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

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

Mr. BAYH. Mr. President, just to excerpt part of that letter so that the Senate may look specifically at what concerns the Senator from Indiana, in referring to the superintendent of schools, Mr. Seymour, Mr. Rehnquist said as follows:

Mr. Seymour declares that we "are and must be concerned with achieving an integrated society." Once more, it would seem more appropriate for any such broad declaration to come from policy-making bodies who are directly responsible to the electorate rather than from an appointed administrator.

Of course, it is rather obvious, if I might interject here, that Mr. Rehnquist is opposed to such phllosophy espoused and promulgated by policymaking bodies. He is opposed to this kind of thing because of the position he took when he was a uniform State law commissioner when an antidiscrimination act was in the process of being promulgated.

Mr. Rehnquist led the effort to degrade that proposal from a uniform act and make it a model act so that he would not be committed to having to go back to Arizona and say, "All right, ladies and gentlemen of the State legislature, we are going to implement this antidiscrimination act."

He continues:

But I think many would take issue with his statement on the merits, . . . I think many would take issue with the statement on the merits, and would feel that we are no more dedicated to an "integrated" society than we are to a "segregated" society.

Mr. President, he said we are no more dedicated to an integrated society than we are to a segregated society. Then he proceeds very deftly by saying that:

We are instead dedicated to a free society in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.

To be sure, we are dedicated to a free society. To be sure, we want each man to be equal before the law. How much freedom before the law does a black child have who cannot get into the Phoenix school system? How much freedom does a member of a minority group have if he cannot shop where he chooses?

How much freedom does a black family have that cannot find a house in which to live? How much freedom does a black person have who is sick, and who is denied access to the drug stores of Phoenix? How can anyone make a statement like that in light of 200 years of discrimination? Although this is a very well phrased intellectual argument, it completely falls apart on the facts and shows a kind of inhumane quality, and a lack of the sensitivity that any Justice of the Supreme Court must have if he is to deal with equal justice before the law for all of our citizens.

Mr. KENNEDY. Mr. President, the American people are the freest people in the world. When we count our blessings we can count many of them in constitutional terms:

Freedom of speech, of assembly, of religion;

Freedom of the press;

Due process of law before life, liberty, or property can be taken away;

Equal protection of the law without regard to wealth, race, religion, or ethnic origin;

Freedom from unreasonable searches and seizures, from forced self-incrimination, from excessive bail, from cruel and unusual punishment;

Right to counsel and to habeas corpus;

A government of limited powers, constrained by tripartite checks and balances;

An independent judiciary to enforce and vindicate all of these rights.

We take those blessings so much for granted that sometimes we forget that they have real content and make real differences in our lives. But that content does not merely happen. It does not protect itself. It does not exist as an absolute in stable equilibrium.

Though our liberty has persisted for nearly two centuries, preserving it has been a major national challenge. In my own lifetime, at least once each decade the American people have had to prove their love for liberty by defending it against direct challenges, and they have always proved equal to the task.

In the 1940's freedom was challenged by a madman who thought the final solution to the world's problems was to separate and eradicate races and religions he considered inferior, and by another dictator who sought to persuade his people to trade their liberty for an authoritarian government which could make the trains run on time. America mobilized in the name of freedom, and we invested a generation and a treasure and half a decade in preserving liberty for ourselves and for our friends.

In the 1950's, the threat came stealthily from within, and we did not adequately respond until it was almost too late. One man poisoned the environment of liberty with inuendo and insinuations and invective. Yet, in the nick of time, the courage and conscience and concern of the American people for their birthright of freedom were again aroused, and provided a strong antidote to the McCarthyite venom.

In the mid 1960's, a small band of men succeeded in capturing one of the major political parties. But when they tried to sell the American people on the idea that "extremism" was the path to liberty, the people came to the polls by the millions to bury that philosophy—they thought—once and for all.

The first 2 years of this decade have not been happy ones in the history of liberty. We have seen the first prior restraints on our press in history. We have seen soldiers shoot down our children during an antiwar assembly, and we have waited in vain for the convening of a Federal grand jury to fix responsibility. We have seen secret electronic surveillance of dissident domestic groups by fiat

of the Executive. We have seen—and the courts have found—indiscriminate mass arrests, protracted illegal detentions, fraudulent manufacture of evidence, cruel and inhuman punishment, and pursuit of baseless prosecutions as harassment, all in the name of making the buses run on time one morning in Washington. We have seen misuse of investigative agents to intimidate critics of Government on the outside, and blatant pressure to eliminate critics within Government. We have seen civil rights take a back seat to regional politics, and civil liberties take a back seat to the politics of fear.

Oh, yes. We are still the freest people in the world, but if the trend of the 1970's continues as it has begun, then sooner or later we will find ourselves locked in another struggle to maintain liberty. I would rather that it be sooner than later. I would rather not wait to shore up the constitutional foundations of our freedoms until they have been so chipped away and eroded that they are in danger of collapsing. I would rather we, right here in the Senate, take a stand now to preserve our heritage as free men and women. I would rather we draw a line boldly at the boundaries of our democracy and say: This far, Mr. President, and no further.

There will, of course, be other opportunities. There may be other Supreme Court vacancies for this President and the Senate to fill. And there will be the contest in the fall of 1972 in which liberty may be an issue. But the asymmetry of the risk is too great. If we assent to the present nomination, we are saying to Nixon and Mitchell and Kleindienst and Mardian and Rehnquist, "Go ahead, whittle away our Constitution, constrict our liberty, curtail our freedom. We will not only refrain from stopping you, we will reward you by placing you and your ilk in the temple of liberty."

And so the whittling will increase, and the constraints will multiply, and the curtailment will accelerate—all in the pursuit of the highest motives—until one day we may all wake up and find that we have ratified by our silence the embezzlement of our most precious entitlements. By then it may be too late to find a battlefield, let alone win the battle. An exaggerated nightmare? Perhaps, although people in Greece, Northern Ireland, Canada, Chile, East Pakistan, and South Korea probably thought so, too, until one day recently they woke up to find basic rights suspended—for their own good, of course. But why should we take that risk at all? Why should not we repeat, symbolically and pragmatically, the words carved in stone at the Justice Department: "Eternal vigilance is the price of liberty," and effect that vigilance by making sure that the camel of authoritarianism gets his nose no further into the tent of freedom than it is already.

The symbolism is clear. William Rehnquist, as Mr. Nixon himself put it, has been the President's lawyer's lawyer during this whole period of retrogression in human rights and human liberties. Never in the course of American history have so few taken so much from so many, and William Rehnquist was there every step of the way.

When the Attorney General needed someone to validate the legal theory in the Pentagon Papers case, Mr. Rehnquist was happy to oblige, even though he knew that the legal sufficiency of the case depended on the factual situation, and even though he knew he did not know all the facts. And when someone was needed to call the Washington Post and ask it please not to publish the news, Bill Rehnquist was ready and willing.

When someone was needed to defend George Harrold Carswell's pitiful record in civil rights cases, there was Bill Rehnquist attesting to the fact that the Carswell decisions—though they looked racist, and sounded racist and smelled racist—were really only the product of a "consistently applied constitutional conservatism." And there was Bill Rehnquist, ready with a new "reasonableness" label for the tapping and bugging of domestic dissidents when the old "inherent power" label became too much even for the Justice Department to stomach, and there he was designing the "reasonableness" argument without bothering to find out which, or how many, or why, citizens were being electronically spied on in the absence of court orders or probable cause, without knowing, for example, that there are three to nine times as many days of non-court-ordered Federal electronic spying as there are days of court-ordered surveillance.

And it was Bill Rehnquist who sat in to tell the May Day planners what kind of special legal arrangements would have to be made to invoke extraordinary powers, who was silent when such powers were invoked without legal authority, but who nevertheless spoke up promptly in defense of the May Day procedures, again without bothering to ascertain the facts. And after Senator ERVIN had demonstrated clearly and brilliantly that executive branch self-restraint had utterly failed as a limit on military spying on civilians, there was Bill Rehnquist telling Senator ERVIN that executive "self-restraint" was the answer to abusive investigative practices. And there was Bill Rehnquist putting the legal gloss on the administration's efforts to gag dissident Federal employees, and justifying the ex cathedra Presidential expansion of the powers of the Subversive Activities Control Board.

Be careful, we are cautioned. Maybe some of those positions were required of him in his role as advocate. But in most of these instances he was no mere mouthpiece. He was actually or potentially the brains, or the intelligent filter.

Look at the Carswell situation, for example. When I questioned Mr. Rehnquist about his defense of Carswell's civil rights record, he stressed that he did so as an advocate, implying that perhaps his personal views were different from his public views, an implication corroborated by other hints he has given. And yet if Mr. Rehnquist in fact felt personally that Carswell was a racist, then his job was not to persuade the Senate of the contrary, but to persuade the Attorney General to withdraw the nomination. For surely to a dedicated and bright lawyer like William Rehnquist, the appointment of a mediocre racist to the Supreme Court would be a watershed issue of the highest order.

Walter Hickel knew what to do in situations like that. So did the late James Allen. So did Leon Panetta and Terry Lenzner. And in the Justice Department itself the Solicitor General has shown the way by refusing to put his name on important departmental briefs with which he disagreed. So if the nominee really disapproved of the official line on these issues of major national significance, there were ways for him to express that fact, but never once did he avail himself of them.

The defeat—or at least the mustering of a serious showing of opposition to—this nominee is important for far more than its symbolism. The post he aspires to is a seat on the Supreme Court of the United States. There his prejudices and predilections, his sensitivities and sensibilities, his sympathies and secret hopes, will all become the stuff of which justice is made. Perhaps no official of Government has as much unreviewable discretion as a Justice. The simple decision to accept or reject a case for Supreme Court review, a decision which can be one of life or death, is one which each Justice makes arbitrarily, without explanation, without recourse, based on his own sense of priorities.

Sitting as a Circuit Justice on emergency matters, one member of the Court can wield immense power with almost unlimited discretion. And beyond that, on the largest issues of the day, a Justice, especially one who believes as the nominee does that every right must be balanced against other values, must apply his own system of weights and values when he is asked what "due" process, "reasonable" searches, "excessive" bail, "equal" protection, and other constitutional standards should mean in practice.

And he does not have that power and that responsibility just for the term of the man who appoints him. He has it for life. He is likely to be a member of the Court for at least the opening quarter of the third century of our Nation's independence. Thus during a time when we should be rededicating ourselves to liberty, during a time when individual imagination and initiative and spirits should be given another chance to soar, this man who seems to care so little for individual liberty, will be one of the referees between the individual and the state.

During a time when technology will give the Government the tools to intrude on every second of every day of every citizen's life, this man, who appears so congenial to Government intrusion, will be setting the bounds of Government power. During a time when every last vestige of racial discrimination and preference must be erased if our society is not to deteriorate into warring camps, this man, who has repeatedly proven his lack of sensitivity to the human drive for equality, will have his hand on the throttle—and his foot on the brake—of equal protection and equal opportunity.

In short, at the very time when we as a nation may have to decide whether the constitutional precepts which have served us so well for 200 years shall en-

dure for another hundred, this man, who thinks of the defenders of constitutional liberties as "softies," will have a large say in the decision.

Are we men or are we mice? Are we so in awe of the President that we will surrender our own freedom, and that of the people who sent us here, just to avoid offending the President? Do we have so little analytic capacity that we will allow him to pass off a compulsive authoritarian as a judicial conservative? Are we so naive, are we so relieved at the nonnomination of the "Nixon six" that we will let ourselves be taken in by the greatest "bait and switch" ploy in history? Are we so simple minded that we are willing to risk severe constitutional retrogression in hopes that some Peter Pan will fly us to a land without crime, without discord, without dissent?

What are we afraid of? When the President has the veto power over our activities, he does not hesitate to remind us of that fact, and as we saw again last week, we all too frequently yield to his warnings. In the case of Supreme Court appointments, we are trustees of liberty for the people.

We have the veto power, not to mention the constitutional obligation of advice to the President. We have proved the force of that power. But why is it that we do not insist that the President's selections reflect our concept of liberty as well as his own? That is what the framers of the Constitution expected us to do. That is what the Senate has done time and time again over the years. That is what the President does to us when our roles are reversed. And that is what the nominee himself has said we should do.

The suggestion has been made that there may be something "political," and therefore improper, about refusing to confirm William Rehnquist. Is it "political" to fear for liberty? Is it "political" to opt for the kind of racial harmony that will bring domestic tranquility among our people? Is it "political" to vote to preserve the courts as what John Mitchell himself called "the great bulwark against undue assumption of power by another branch," and the "alternative mode for relief of grievances at times when the more active branches seemed stalemated"? I think not. The oath I took on entering the Senate requires me to preserve and protect and defend the Constitution, and that is precisely what I am doing.

Some Senators are taken with the suggestion that the political consequences to progressive Democrats from the defeat of a third conservative nominee might be worse than the damage this nominee could do on the Court to liberal causes. The logic escapes me.

First of all, constitutional liberty is not a "liberal cause." When I learned about American government, the Constitution was supposed to be for all the people, and it was the conservatives who cared most strongly about maximum scope for individual initiative and endeavor and minimum restraint on the power of government.

Secondly, if it is the "political consequences" of a Rehnquist defeat that Senators are worried about, then it is they who are injecting politics into their decisionmaking to override their views on the merits.

Finally, it is important to remember who defeated the previously rejected nominees. Of the 55 Senators who voted against Haynsworth, 17 were Republicans, including the minority leader and minority whip, and of the 51 Senators who voted against Carswell, 13 were Republicans, and at least two more were what are generally described as Southern Democrats. So it was the whole Senate, not any particular political faction, which declined its consent in those cases.

Moreover, I do not think any of us have anything to be ashamed of or embarrassed about in terms of our overall record on Supreme Court nominations. Even if we assume that a President has or should have some ability within limits to give the Supreme Court a cast that reflects a sense of his own outlook, that test has more than been met.

We now have three Nixon appointees, the first two, if labels are necessary, must be called more than conservatives. They have proven themselves to be consistently responsive to the administration's legal positions, except in the field of civil rights, where the Executive position has been too retrogressive on occasion even for them to swallow. The Chief Justice and the Attorney General have been matching each other almost speech for speech on the issues of the day and they are in regular contact. Thus, even if the vacancies had ended there, the President would have had no legitimate complaint that he had not been allowed to leave his imprint on the Court.

Given the present distribution of Justices, we are certainly not required by any notion of fairness or balance or representation to accept uncritically a final nominee whose constitutional approach places him even beyond the extremity of that already broad spectrum:

A person who might well have been the only dissenter had he been a Justice instead of a law clerk when Brown against Board of Education came before the High Court.

A person who has so little concept of the importance and vitality of the Constitution that he thinks of decisions enforcing it as operating not to the benefit of the freedom and dignity of all of us, but rather to the benefit "of criminal defendants, or pornographers, and of demonstrators."

A person who would like to see us not only throw out the recent decisions assuring poor Americans the same quality of justice as rich Americans, but also revert to the 1903 concept that judges should not worry about whether evidence used in court was unconstitutionally obtained.

A person who supports the right to speedy trial—but only if the right to habeas corpus is diluted.

A person who thinks that "liberty" and "property" are interchangeable values, that "integration" and "segregation" are equivalent evils, that there is something wrong with invoking the notion of "insensitivity" as applied to public officials' views of civil liberties.

A person who thinks that the Nation may "now" be faced not with a challenge to reconcile order and liberty, but with a "choice between liberty and order."

A person who, believing that "disobedience cannot be tolerated, whether it be violent or nonviolent disobedience," suggests without limitation that "if force or the threat of force is required to enforce the law, we must not shirk from its employment."

A person who—just 7 years ago—expressed publicly his concern about the "indignity" thrust upon a shopkeeper required to serve black customers, while the Senate was invoking cloture on a bill to open public accommodations to all Americans.

A person who, as Joe Rauh pointed out so persuasively, saw only as "victories" for "Communists, former Communists, and others of like political philosophy," four Supreme Court decisions, two of which were written by, and two concurred in by, Justice Harlan, the same "conservative" Justice Mr. Rehnquist would like to replace, decisions which vigorously applied the first amendment and other constitutional basics to clear the witchhunt atmosphere of the 1950's.

It is true that William Rehnquist never said he was a white supremicist as Carswell did; it is true that he has never had the problems of financial conflicts that Judge Haynesworth had; it is true that no one has suggested that he would represent mediocrity on the Court, as one Senator suggested of a past reject. But are these the only criteria we know how to apply?

To me the relevant criteria are clear. First, as some of my colleagues are fond of saying, the Constitution is not a suicide pact. No matter how erudite and articulate a nominee may be, and Mr. Rehnquist is a most erudite and articulate gentleman, if we are persuaded that he does not place a high priority on rights and liberties that we consider central and vital to the American way of life, if he seems devoted to redistributing freedom away from citizens and to the Government, if his record indicates that he thinks constitutional protections are expendable at the will of the sovereign, then we have an obligation to our constituents, to our oaths, and to ourselves, to keep him as far from the Supreme Court as possible.

I would go beyond that to a second, higher, standard. I believe the Senate has the right at this point in our Nation's history to require an affirmative showing by each Supreme Court nominee of a commitment and dedication to civil rights and constitutional liberties. At a time when we are on the verge of dissolving racial barriers in our society for all time, we have a right to know that our Justices are enthusiastic about that prospect, that whenever this goal of society is appropriately involved in the balancing process, it will weigh at least as heavily as other social goals.

At a time when our freedoms of expression, assembly, and of press, and our protections from unreasonable searches, from denial of liberty without due process, and in general, from arbitrary gov-

ernment interference, are increasingly threatened by executive action, we must be sure that those joining the High Court fully support the constitutional responsibilities of the judiciary to constrain authoritarian interference with the privacy, beliefs, mobility, associations, or any of the other facets of liberty, that make American citizens the freest people on earth.

Perhaps this man as a Justice will turn out to be truly dedicated to constitutional freedom, contrary to all the evidence from his past. Perhaps he will prove himself fully committed to racial equality, in spite of his almost flawless record of obstruction. But the Supreme Court should not be his proving ground.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. KENNEDY. I yield.

Mr. BAYH. Mr. President, I must say the Senator from Massachusetts has delivered a very compelling dissertation on why the Senate should reject the nomination of William Rehnquist. If I might, I would like to ask a few questions to try to perhaps expand upon his perceptive points. Earlier in the dialog I had with the Senator from Wisconsin, he suggested that because William Rehnquist was intellectually competent and had not been proved dishonest, he thought the Senate really had very little reason to get involved in turning down a Presidential nominee on what he described as political grounds.

Could the Senator from Massachusetts expand on this question? Questions of mediocrity, conflicts of interest, and white supremacy statements were involved with respect to other nominees. But these particular types of shortcomings are not present in the nominee before us. Could the Senator explain a bit further the right, or the lack of it, or the obligation, or the lack of it, of the Senate to look deeper, to look into the bones of a man to see what he believes and thus to see in what direction the Court will be headed if he is sitting on it?

Mr. KENNEDY. I, of course, will be glad to elaborate on the comments I made here. I think the Senator from Indiana knows full well that the Senate established criteria of judgment in terms of the nominations of Carswell and Haynsworth and rejected both nominees, one on the basis of his clearly demonstrated racial views and the second largely because of conflicts of interests in terms of financial holdings.

It seems to me that, in setting criteria for our own evaluations and judgments on this nominee, we should put in terms of equal value the requirement of a firm commitment to the protections guaranteed under the Constitution in the areas of civil rights and civil liberties.

Particularly in terms of the two areas I have mentioned, as the Senator from Indiana understands so well, having sat through the extensive hearings that were held and being the real leader in terms of the study of this nominee, we have seen, in the nominee's background and experience, in the statements he has made as the President's lawyer's lawyer, and in his position in the Justice Department, and also prior to that, a uniform lack of commitment and concern for the basic human liberties and human rights as guaranteed by the Constitution.

I was suggesting that in terms of affirmative commitment, it is just as reasonable to establish it as a criterion of judgment for the Senate as was the case with respect to the conflicts of interest of Mr. Haynsworth and with respect to the questions of commitment to racial equality of Mr. Carswell.

It seems to me, particularly given the times in which we live and the questions with which this country is confronted, we should expect that each nominee show a sensitivity and a concern for human rights. We should see evidence that he will—in reaching the various balances when considering what equal protection is and what due process is, or what the balances are between the rights of a central government and the rights of indivldual liberties—have a clear commitment to give individual freedoms their due balance and weight. I think we have seen in this nominee that time and time again, when that balance has been considered, it has been inexplicibly light in terms of human rights and human liberties. So I think the nominee fails to meet that requirement.

As I mentioned, I would establish an additional requirement, and that is, for nominees to go on the Supreme Court they have to display a positive concern in terms of the rights and liberties of the citizens of our Nation. I think that is particularly important now, given the stress that our society is being subjected to, the fact that we are at a time in our history when, hopefully, within the next decade we can put the elements of discrimination behind us for all time, and at a time when we are seeing a constant infringement in the areas of civil liberties both because of the technological progress that has been made over a period of time and a general kind of disdain for the protections of the rights of privacy that we have certainly seen in terms of this administration. With the increasing burden we have to face in terms of meeting our constitutional responsibilities to our country, we must insure that the nominees themselves are going to have a sensitivity and an affirmative commitment in those areas.

I think all of us, in considering our vote on this question, are attempting to ascertain what the criteria ought to be for any nominee. Those of us who express reservations about this nomination realize full well that we may be accused of voting against him for political reasons, but I think we entered this with a very clear understanding that that whip could come back at another time in the course of history and could work, if that were the reason, to the disadvantage of those who might be more progressive. But politics is not the reason.

I think during the course of this debate one of the very important and useful results has been to help the Senate, and help the American people, understand better our responsibility in terms of advising and consenting and of scrutinizing a broad range of considerations which I think are required of us in terms of fulfilling our responsibility under the Constitution.

Mr. BAYH. The Senator struck a chord there that I think is important to reiterate. I suppose all of us, in judging what the impact of the nominee will be on the Court, are quick to consider what the impact of his vote on the Court will be on the significant policy questions that will be laid before him. The Senator from Massachusetts points out, in his characteristic fashion, the fact that at this time we are thinking about more than one vote on the Supreme Court of the United States.

We are indeed in the process of creating a symbol, sending out signals to large numbers of people who wonder, not just what the Supreme Court of the United States thinks about education, free speech, surveillance, and opening up our system and keeping it that way, but what the Senate itself says. They are looking at what an elective body thinks about those key issues, and I suppose it is fair to say that the Senator from Massachusetts is equally distressed about the message that will go forth from this body if a William Rehnquist and what he symbolizes to these large numbers of people is put on the Supreme Court.

Mr. KENNEDY. I certainly am. And I think that the Senator from Indiana, in the course of this debate, has touched upon one of the very serious kinds of crisis that I think we are facing in our country, and that is the whittling away of the liberties of our people, including, as I mentioned in the statement, the first prior restraint of the press of our Nation and the pursuit of a news broadcaster by the Federal Bureau of Investigation who had been highly critical of certain administration programs and positions.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. KENNEDY. I yield.

Mr. BAYH. What about those two key issues? Those are important issues, not just to Senators, but to some of our friends in the press who may be listening to this debate. In the judgment of the Senator from Massachusetts, from what we have been able to see in the record and what we have been able to read about what the nominee has said himself, what does the Senator from Massachusetts feel the nominee's position would be on the right of the Federal Government to say to a reporter, "We want to know your sources," or, as in the case that was just handed down by the Court, where an effort was made by the executive branch to muzzle the press, and it was turned down by the Court?

What does the Senator from Massachusetts feel the record shows about the inclinations of the nominee on these two issues?

Mr. KENNEDY. There does not really seem to be much question, since the nominee was instrumental in clearing the development of the Justice Department's position on the application for the prior restraint order. There does not seem to be any kind of question as to what his views would be in terms of more centralized authority and responsibility of the Federal Government. This is really quite clear, as it was in the development of the May Day procedures, which have been struck down by every kind of court review that has taken place with respect to

them—procedures which were defended by the nominee in his speech in North Carolina only a day and a half after their use.

I remember asking the nominee, whether, after he had read, as widely reported throughout the United States, of the young people and other citizens who were unjustly arrested in the indiscriminate mass roundups during the May Day demonstrations, whether he felt there was any added responsibility, on the part of a lawyer in his position, of seeking to insure that justice was provided, not only for the Justice Department but also for those who were affected by Justice Department actions, and whether he felt there was any affirmative responsibility on his part to find out for himself, to go down and take a look at the jails and talk to the people in them and try to find out whether there was any illegal action being taken by the authorities, and to do something about them.

He said, no, he did not feel the necessity for any such affirmative action. I asked him the same question with reference to the Kent State situation, whether, when he read about the young unarmed students who were slaughtered out at Kent State, and when he saw the report of the eminent national commissions that looked into the question—the Scranton Commission report or other kinds of reviews that have pointed out the need of convening a Federal grand jury—whether, when he was the President's lawyer's lawyer charged with an important part of the responsibility for assuring that there was going to be adequate justice for all people as well as the Justice Department, whether he, in such a situation, took the time to go down and talk with the Attorney General and present his own views with respect to the tragedy that took place at Kent State, and urge that there be adequate pursuit of this question by the Justice Department, he again said he felt no positive compulsion on this issue.

As I mentioned in my statement, on the whole question of spying on political rallies, and the whole series of hearings that were held by the Senator from North Carolina (Mr. ERVIN) on the question of surveillance, where once again, as a member of that committee, I heard time and time again talk about this kind of surveillance by agents of the Federal Government, he stated that he did not believe it served to provide any kind of chill to those who were speaking out about the many vital issues facing this country today.

So the Senator is correct; these are not just isolated instances. These are not isolated cases. This is a series of actions taken and supported by the nominee which reach at the very heart of the life and liberty of the people of this Nation.

I would say as well, as the Senator well remembers, at the time we were asking the nominee whether he felt that he could support all these actions, he said:

> Well, if they were objectionable, I would not come up and testify in support of the Justice Department's position.

So we have to assume, in the light of the fact that he came up in their support, that he really found very little to object about.

Mr. BAYH. If the Senator will yield——

Mr. KENNEDY. Just let me finish this thought. In spite of the fact that we have seen within this administration examples of individuals who felt sufficiently concerned or outraged by actions that were taken by the administration, in various fields including the rights of individuals in this country—Terry Lenzner, for example, who was forced out of the Legal Service Division of the OEO program; James Allen, from the educational program; Leon Panetta from the HEW civil rights office, and Secretary Hickel from the Interior Department—here were individuals who were sufficiently concerned, who objected strenuously enough to feel that they could not be a part of governmental actions and attitudes that offended their consciences.

But we do not have that kind of courageous conduct by this nominee, in spite of the fact that during the past 3 years, as the Senator from Indiana has pointed out and as I have tried to develop today, there has been the greatest kind of emphasis in terms of seeking to restrict the rights and liberties of the people of this country by governmental action that I think we have seen in at least the last 100 years.

Mr. BAYH. I am glad that the Senator has emphasized the nature of the nominee's employment, and the caliber of his position. It has been argued by some—in fact, it was argued this morning by the Senator from Wisconsin—that the nominee really could not be held accountable for the positions of the administration, because he was just following out orders. Is the Senator from Indiana correct in believing that, at one point in the hearings, the nominee responded that, if he did not like the positions, if he strongly disagreed with them, he would resign?

Mr. KENNEDY. As I recall, he indicated that, if he felt they were sufficiently objectionable, he would not have made them. I must say that is a position that can be understood, that even the lawyer's lawyer on various questions would separate himself from a view with which he strongly disagreed. So I think there is basis to conclude that he did not find that the positions were objectionable or that he would have taken a substantially different course of action on them.

As the Senator will recall, the distinguished Senator from Maryland (Mr. MATHIAS) and I tried to review with the nominee his concept of the elements of due process. We were not trying to probe or to say, "How would you act, given a certain factual situation?" We were trying to elicit from him at least some kind of statement as to how important he thought due process was, as to how strongly he weighed the concept of equal protection as an element to assure justice to the people of this country, about the various considerations in balancing the individual liberties of people versus the central authority.

We tried to elicit that from him, but we were unable to get any kind of development of these concepts, even though we were not trying to ask him how he was going to decide a case. We were trying to elicit from him some kind of response so that we could gather a feeling about his own concern for these vital instruments of the courts and of the law which have been so heavily relied upon to produce progress in terms of liberties. We could not get any kind of comment on that. Yet, at the time when Congress was attempting to reach and share, under the Constitution of the United States, in the area of foreign policy, he was freely willing to go to Pennsylvania to tell a political audience that he felt that the actions that were being considered by Congress to require the President to terminate and set a date for the end of the war in Vietnam were questionable constitutional actions. He was not tonguetied about that.

Once again, I think that shows the continuing thought process of the nominee that what the Central Government and what the executive branch and what the President of the United States wanted to do, he was willing to accept.

That is what troubles me, as I mentioned in the course of my remarks. And it surprises me that many of our friends from different parts of the country, who time and time again take the floor of the Senate and talk about how we do not want the Central Government, the national authority, infringing on the rights and liberties of small communities and towns and States of this Nation, are willing to go along with this. Every time the nominee had the alternative of choosing between the individual rights and liberties and the central authority, he came down on the central authority. Would the Senator from Indiana agree on that?

Mr. BAYH. Yes. I think we have a rather interesting inconsistency. The Senator from Massachusetts touched on this in his remarks.

On one hand, we have the nominee who relies on the almost infinite power of the Federal Government to become involved in those areas where they are confronting the rights of individuals. Take as examples prior restraint of the press, access to the sources of news reporters, the right of peaceful demonstration, the right of jury trial, preventive detention—the whole series of proposals that the nominee not only favors but also has been instrumental in developing for the administration. In these areas he feels that the Federal Government or the central source of Government, the executive branch, is omnipotent.

On the other hand, I find the strange inconsistency because he does not seem to feel Government has the same right—and duty to pursue it diligently—so far as protecting the rights of individuals in the whole civil rights area is concerned. It is all right for the Federal Government to say, "Thou shalt not publish," but it is not right for the governmental authorities to say, "You had better let black people into the drugstore."

Does not the Senator feel that there is a little inconsistency with that sort of thought process?

Mr. KENNEDY. I think the Senator has pointed up one of the real dilemmas.

I mentioned this morning that every time there was a question between the central authority or the National Government's power and that of the individual, the nominee came down on behalf of the central authority.

As the Senator from Indiana has pointed out, when there is a question between the rights of property and the rights of the individual, the nominee came down in terms of the rights of property rather than the rights of the individual.

I think all of us are very much aware of the dilemma and the crisis this Nation went through during the period of the 1960's, when many kinds of changes took place in this country. In many instances there were extraordinary acts of statesmanship and courage exhibited time and time again in the southern parts of this Nation, of individual leaders, of communities, of persons who realized the critical nature of that period and were prepared to put emotionalism aside and to go ahead to fulfill the guarantees of the Constitution of the United States. I am sure the Senator from Indiana has heard example after example, as I have.

Yet that was not the case when this nominee had a chance to speak out while these acts of courage were taking place in much more inflammatory situations than in Arizona. We have a nominee who was born in the North, received an education in the West—not that anyone feels that those parts of the country have any leg up in terms of sensitivity to concern about rights or liberties than any other part of the country; but certainly in the whole movement toward rights and liberties, these issues were in the South much closer to the surface, with much more discussion and debate, than in other parts of the Nation—and every one of his statements in terms of rights and liberties in this country came out—instead of enhancing or expanding them—in terms of opposition to them.

I think this must be a matter of considerable concern for all people, not only the Members of the Senate but also all Americans, when they are trying, as they are in many parts of this country, with extraordinary kinds of difficulties even in the northern communities—I know that in my own city of Boston there recently has been a report on the questions of education—when so many cities of the North and the South are really trying to take some steps to draw out the poison and really come to grips with the problems of discrimination in this country. But all the statements we have been able to find, or that we have had reported to us have been unsympathetic to civil rights—and I would ask the Senator whether he has come across any contrary evidence. The major statements were in the Phoenix letters, and testimony in the 1960's. Then there were his views on the Carswell civil rights decisions in the letter to the Washington Post, when Carswell's nomination was being considered. There was also the record in terms of the model code, on the questions of blockbusting and equal employment opportunity.

These seemed to be the four oustanding incidents, and on each occasion the nominee moved away from the expansion of rights and liberties.

I am asking the Senator, who has provided a great deal of study in this matter, whether he has come across anything that would rebut that; because, in fairness to the nominee, we want to insure that we fully consider any positions which have been assumed by the nominee, either in his official capacity in the Justice Department or prior, that show this kind of sensitivity, as Mr. Powell did in Virginia during the period of the fifties, in terms of opposing massive resistance, when, as I remember as a student in law school in Virginia during that period of time, the emotion involved and the climate of those times made such a position difficult; I wonder whether the nominee's record shows anything like the strong support and initiative in the development of a national legal services program which Mr. Powell showed when he was president of the American Bar Association. I am wondering whether the Senator from Indiana has been able to find any instances such as this which would at least show the kind of sensitivity, concern, and commitment that many of us feel is so essential in terms of a nominee for the Supreme Court?

Mr. BAYH. First of all, I concur with the assessment of the Senator from Massachusetts, that on each occasion when the nominee's position has been articulated, he has been found to be on the wrong side of the individual human question involved. I must say that I did not realize how much to the point the closing paragraph of Mr. Rehnquist's letter to the editor was over this public accommodations law, until I happened to glance down at it just now. Here is what Mr. Rehnquist says when he talks about individual rights and individual liberties:

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

The individual freedom Mr. Rehnquist is unwilling to sacrifice even a portion of is not freedom of speech, not freedom to dissent, not freedom to the right to a trial by jury, not freedom to go in and buy some medicine for your children, or to get a good education, or to live in a decent house, but the individual freedom that Mr. Rehnquist says we dare not sacrifice even a portion of is the right of a proprietor who holds a business place open for public use to say, "You cannot come in if your face is black."

It seems to me that that is hardly the kind of sensitivity, hardly the kind of scale of equity we should demand of one who sits in judgment on us all.

I have searched for the answer to the second question of the Senator from Massachusetts and have had a number of my staff members, as has the Senator from Massachusetts, and a number of volunteers throughout the country, looking and searching, and we have not found any contrary evidence—I have been hoping that some would be uncovered——

Mr. KENNEDY. The Senator has not been able to uncover any evidence in terms of the nominee since he was a law clerk as to his feeling on rights and liberties; is that not correct?

Mr. BAYH. We have not found any evidence that would prove the kind of humane position that the Senator from Massachusetts articulates so well. In fact, the Senator may not know it, but on the opening evening of this debate, after the Powell nomination had been accepted, the Senator from Nebraska was waxing in his normal and eloquent manner in support of the nominee——

Mr. KENNEDY. I remember that.

Mr. BAYH. And I asked him whether he could bring us one word in the debate, give us an article, give us any proposed legislation, give us any example, of the nominee's commitment to human rights. Not only has this not been forthcoming but the Senator from Nebraska refused to answer any further questions and has not proceeded to follow that line of thought. I do not know why it is that the proponents, if they really believe this man is a defender of individual liberties and civil rights, cannot come up with some documentation. It is rather strange.

I want to ask the Senator from Massachusetts:

It has been disclosed in the past 48 hours, debated on the floor of the Senate, and printed in the national press, that Mr. Rehnquist strongly urged Justice Jackson while the nominee was a Supreme Court law clerk, to vote against Brown against Board of Education, and suggested that the Court had no business getting involved in looking into the great social questions, and suggesting that the Court had no right to get involved in protecting minority rights in this way or they would find themselves part of a transient majority of nine.

That hit the press Monday. Is it not rather strange to the Senator from Massachusetts that there has not been one word forthcoming from any proponents of the nominee to try to explain away what I feel is a most unfortunate revelation—not unfortunate that it was revealed, but unfortunate that this seems to characterize and symbolize the position of the nominee in the whole area of educational opportunities?

Mr. KENNEDY. I would agree with the Senator from Indiana. Comments have been made about the time the Senate is taking to consider this nomination. I would certainly hope that those who believe that the nominee has this concern and commitment in terms of human rights and liberties would debate this and put forward a positive case for it. We have not seen that. The Senator from Indiana has been in the Chamber these past few days and I would ask him whether he has seen any evidence of it. The case against Mr. Rehnquist is being made clearly. It has yet to be rebutted. I do not see any of the proponents in the Chamber helping to reach answers to these questions.

Has the Senator, during the time he has been in this Chamber on this debate, heard any explanations about the background of that memorandum that was drafted by Mr. Rehnquist?

Mr. BAYH. None whatsoever, I say to my colleague. Each Senator, of course, has the right, indeed it is our individual responsibility to determine to what extent we become involved in debate. I do not believe that any of us want to drag any of our colleagues kicking and screaming into a debate. But here we are debating a controversial Supreme Court nomination, and there have been some

well-documented and well-substantiated charges made. The only effort made to lay the charges to rest was, "I will have the chance," my friend from Nebraska said, "before this debate is over, to answer these questions at length, but I do not want to answer them now." He suggested to me that he was going to have the opportunity to put in the RECORD substantiation of his belief—and I think he is sincere—that the nominee is not anti-civil rights or anti-individual liberties. But this information has not been forthcoming and before the debate had even warmed—in fact, before the first speech was made, the distinguished minority whip was suggesting that a filibuster was going on. Yesterday, less than 24 hours after the Powell nomination had been accepted—in fact, just about 20 hours after the Powell nomination had been accepted—the distinguished minority leader was up in the Press Gallery telling the members of the press that there was a full-blown filibuster going on. The distinguished Senator from Massachusetts (Mr. BROOKE) had not even had a chance to make his speech. The speech of the Senator from Massachusetts (Mr. BROOKE) was, I thought, a rather dramatic revelation and important to the consideration of our colleagues of this matter.

Then the distinguished Senator from Pennsylvania (Mr. SCOTT) was in the Press Gallery telling the press and the Nation that a filibuster was going on. So I must say, if the Senator from Nebraska has any suggestions to make to the Senator from Indiana as to how we can get those on the other side of this question to rise up and answer some of these questions and provide some of this information, I think the country has a right to know it and I am yearning for the answer to that question.

Mr. KENNEDY. Regarding the so-called filibuster, I think it is valuable to look back at an earlier nomination proceeding, as I pointed out at a Brandeis University dinner in New York a couple of weeks ago. In terms of the time factor, and because it is interesting as to who is labeling whom in terms of a filibuster, here is information about one of the most distinguished nominees and perhaps the greatest Justice who has served on the Supreme Court.

The nomination of Louis D. Brandeis to the Supreme Court on January 28, 1916, ignited one of the most bitter confirmation fights in the history of the Senate. Three sets of hearings were held over a period of 4 months. The record grew to some 1,500 pages in print. The issue became a matter of intense national focus, with the highest of political stakes at risk. When it was all over on June 1, Brandeis had been confirmed 47–22, on almost a straight party line vote.

It is helpful to look back at that experience to learn from it. The single overwhelming fact was that President Wilson had chosen one of the most talented and dedicated men in American history. He was the great crusading lawyer of his times, and then some. In the name of the public good, he had challenged the giant interests that ruled the Nation—the utilities, the railroads, the monopolies. And much too often he had won.

Thus his enemies were legion and powerful, and they left no stone unturned in attempting to persuade the Senate to reject him. But the constitutional mechanism of advice and consent worked well; the Senate reopened its hearings twice to check out all the allegations. The proponents and opponents had full opportunity to weigh the merits and express their views. And truth and justice were the victors.

But, of course, the key was selecting the right person, a man truly committed to fairness, to responsive institutions, and to the public welfare, a person of proven intellect and capacity, a man of whom President Wilson could write:

> He is a friend of all just men and a lover of the right; and he knows more than how to talk about the right—he knows how to set it forward in the face of enemies.

Twice they reopened the hearings to consider that nominee, when various allegations and charges were made and remade by those who wanted to frustrate that nominee.

I am reminded that the time that was taken was welcomed by those who were proponents of Louis Brandeis when the various charges and allegations were made concerning this nominee. It was the proponents who insisted that the record be opened again and that the nominee's record be examined thoroughly so that the allegations and charges could be fully responded to.

Yet here we have, with relation to a vital issue in this case, as the Senator has mentioned, the memorandum that was prepared to express support for the Plessy against Ferguson concept of separate but equal, at a time when the country and the Supreme Court were to embark upon a 9-to-0 decision in Brown against Board of Education and set the whole country on a new course, but we have no answer, no new hearing, no chance to examine the nominee's supporters on this question.

I have not seen the memorandum. Law clerks are charged with preparing various position papers. However, certainly we ought to be able to have some kind of response and have the matter put in some kind of context.

We have had so many examples in the past in the Senate with respect to various charges—and not charges nearly as far-reaching or as extensive in terms of implication as these—where the proponents of the nominee have insisted that the hearings be reopened.

Mr. BAYH. Mr. President, the Senator studied that matter and was aware of that subject. I am glad he brought those comments into the debate, because I think they are pertinent.

I wonder if the Senator could inform me whether there was any discussion about invoking cloture on a filibuster at the time when the hearings were reopened and the record was being made straight.

Mr. KENNEDY. It is my understanding that it was the proponents of the nominee who insisted that these charges and allegations be settled and resolved.

I did not see at that time charges made that there was undue delay in terms of the nominee. But there was a conscious effort made by the proponents to assure that the charges made—and they were a matter of extreme seriousness—were fully and adequately answered.

Mr. BAYH. Mr. President, will the Senator permit me to explore his thoughts relative to the activity and the efforts on the part of the nominee with reference to a Uniform State Law Commission? I would like to have the Senator's opinion on this matter because of the opinion of the Senator from Nebraska when I asked him to give us some support for his views on the nominee's record on civil rights. Does the Senator from Massachusetts recall when the Senator from Indiana asked the nominee to give us some evidence of what he had done affirmatively to get the test established so as to give us evidence of his commitment to human rights?

Does the Senator from Massachusetts recall at that time the fact that the nominee did not mention participating in this Model State Antidiscrimination Act effort?

The reason the Senator from Indiana brings it up is that if, indeed, that was considered in the mind of the nominee and those who support him as a manifestation of his previous pursuit of his commitment to human and civil rights, it would seem to me that in response from Indiana and others asked, that they would not have had to find it out by an investigation of the record itself.

Mr. KENNEDY. I agree with the Senator from Indiana. I do not recall offhand exactly what the nominee stated when the Senator from Indiana asked that question. Does the Senator remember?

Mr. BAYH. What I am trying to point out is, first of all, the nominee did not mention that, in his judgment, participation as a uniform State law commissioner, when it was considering an Antidiscrimination act, was sufficiently important that it should be stated as evidence of his dedication commitment to human rights. It was only when investigators disclosed that as a member of this uniform State law commission on two occasions had tried to eliminate provisions of it, or the entire act, that this matter became public. For the Senator from Nebraska to suggest that finally voting for this, after he had effectively led the effort to lessen its impact from that of a uniform act to that of a model act, I think is not good evidence of commitment to human rights.

I might just read to the Senator from Massachusetts the distinction, and why I feel it is important. First of all, as the Senator realizes, the nominee voted against, and tried to get stricken from the model act, that provision which would have outlawed blockbusting. It was an antiblockbusting provision. He also tried to strike from the model act a provision which would have enabled an employer voluntarily to compensate for hiring practices, for the fact that in the past he had discriminated against those of minority races, and, thus, had a very imbalanced work force.

In addition, when he was unsuccessful in these two efforts, as the Senator re-

calls, he led a successful effort to diminish the standard of the commission's work from that of a uniform act to that of a model act.

I read from the 1966 Handbook of the National Conference of Commissioners on Uniform State Laws here the definition of the distinction between a uniform act and a model act:

> Approval of an act as a uniform act should carry with it the obligation of the commissioners from each State to endeavor to procure its enactment by the legislatures of the States.

That was the thrust of the uniform act, and the nominee led the effort to keep it from being a uniform act so that he would not have to be responsible for going back to the Arizona State Legislature and implementing it. A model act, on the other hand—and I quote from the Handbook again—"shall be applied to any act which does not have a reasonable possibility of ultimate enactment in a substantial number of jurisdictions." So there was a rather obvious effort on the part of the nominee to demean the quality and the responsibility incumbent upon those who participated in the drafting of this act.

I wonder if the Senator from Massachusetts would care to comment relative to how valid the claim is that William Rehnquist's participation in this particular commission is evidence of his commitment to civil rights.

Mr. KENNEDY. I think the Senator from Indiana has made this point and has drawn these distinctions, which I think are extremely compelling. I share the conclusions and the deep concerns that the Senator from Indiana has drawn from this occasion, and as he developed during the course of consideration in committee just prior to the vote.

In reviewing the speeches made here, we have to reach these conclusions and decisions in terms of the rights of the people of this country and especially in terms of minority rights, whether it is the actions taken in Phoenix, the model code referred to, the letter to the Washington Post, or the memorandum prepared for the Supreme Court Justice.

If these actions could be explained as individual acts, that would be one thing, but taken as a series and pattern of actions, I think we are completely justified in concluding that the nominee does not have that firm commitment and dedication to the rights of the people of this country that is so essential for us to find in fulfilling our constitutional responsibilities.

If we take his actions in the Justice Department, whether it be in terms of wiretapping or surveillance—where he was challenged in considerable detail by the Senator from North Carolina (Mr. ERVIN)—or his justification for the program of handling the May Day demonstration, on the whole question of restraint, as separate matters they might be troublesome, but would not be a bar, but taking them together, in terms of the rights of the American people and the liberties of American citizens, in all fairness one has to conclude that this nominee has not shown the kind of sensitivity in terms of the liberties of the people that I think is so essential and which we are challenged to protect.

So I share these concerns with the Senator from Indiana. I think the Senator from Indiana has provided yeoman service in terms of illuminating these matters and examining them in detail. I would welcome, as I am sure the Senator from Indiana would, some kind of response in these areas which have been raised over the period since Monday night last, that we would have a positive response for the Senate, and what is more important, for the people of this country, in order that we may know exactly the kind of concern and commitment this nominee has for the rights of the citizenry of this Nation.

Mr. BAYH. Mr. President, I wish to say one word before the Senator terminates his remarks. I am grateful for the contribution he has made, not only in his speech and his colloquy here today, but also from the very beginning, from the very first instance when the nominee's name was brought before the committee. Throughout the hearings and committee debate the Senator from Massachusetts has suggested a penetrating analysis to find out the facts. He has expressed articulately his concern that the nominee does not meet the standard several of us feel should be met by a member of the Supreme Court.

It is unexplained to me, as it is to the Senator from Massachusetts, why, after the revelation of these facts, there has not been a single proponent of the nominee come forth and say, "I think the man should be on the Supreme Court even if he was against Brown against Board of Education, and here is why."

Hopefully, before the debate is over the country and the Senate will have that explanation from those who think William Rehnquist has the capacity to be a good Supreme Court nominee.

WILLIAM REHNQUIST AND CIVIL RIGHTS

Mr. GOLDWATER. Mr. President, as I came to the Senate floor from time to time yesterday to hear the arguments made by Senators who disagree with the nomination of William Rehnquist, I noticed one predominant theme being repeated over and over. The theme is the allegation that Mr. Rehnquist is not committed to the cause of civil rights, a failing which is said to be evident statements he has made as a private citizen.

It is interesting for me to observe, Mr. President, that none of his opponents question Mr. Rehnquist's integrity. Indeed, his critics earnestly announce their recognition of his high moral character and personal integrity. Yet at the same time they say this, they question the truthfulness of Mr. Rehnquist's personal disavowal of any reluctance to uphold the guarantee of the Constitution and of duly enacted statutes securing equal rights for all citizens. They nitpick his every utterance at the hearing, distort and take out of context his past statements on human rights, and even quote from certain of his writings without giving the complete sentences in which his words are set.

Mr. President, I believe the discussion on the part of Mr. Rehnquist's critics has exceeded the bounds of reasonable debate. I plan to take up two of these incidents today to demonstrate how far his opponents have gone in bending over backward to cast an unfavorable light on Mr. Rehnquist's record. I am going to discuss only two of these matters at the moment because, in truth, there were not many more points raised in the debate yesterday relative to the nominee than these.

One statement which is claimed to indicate an "indifference to the evils of discrimination" is Mr. Rehnquist's position taken in 1964 in opposition to the public accommodation ordinance proposed for the city of Phoenix. The fact that Mr. Rehnquist testified against the ordinance is mentioned time and again by the nominee's opponents, but the full grounds for his past doubts about the ordinance are never explained.

If my colleagues who are opposed to this nomination are sincerely searching for evidence which indicates an absence of hostility toward antidiscrimination efforts, they might have read the complete text of Mr. Rehnquist's comments at the Phoenix hearing in which he made it quite clear that a major reason for his position on the ordinance rests in the fact that when the members of the city council were running for office they took the position there would be no compulsory public accommodation ordinance.

Accordingly, he suggested that now that the members had been elected they should abide by their campaign position and instead of acting on the ordinance refer it for the vote of the people. Thus we see that Mr. Rehnquist appears to have been influenced in his stand by a feeling the city council was under a moral obligation to the people to present the issue to them as a whole for a decision.

Furthermore, Mr. Rehnquist indicated in his letter to the editor of the Arizona Republic on the same ordinance that minorities would have an important interest to be balanced if widespread discrimination against them had actually existed in Phoenix. He said:

> If in fact discrimination against minorities in Phoenix eating-places were well nigh universal, the queston would be posed as to whether the freedom of the property owner ought to be sacrficed in order to give these minorities a chance to have access to integrated eating places at all.

Thus, even in this statement which is being criticized so severely we can see that Mr. Rehnquist gave recognition to the need for the right of minorities to prevail where discrimination was prevalent. These and other comments in his statements at the time show that he was then only speaking about a situation where a small minority of public accommodations did refuse access to minority citizens. Mr. President, I am not trying to explain these comments away or to make it out as if Mr. Rehnquist had declared himself in support of the proposed city ordinance; but I do wish to illustrate that there were certain modifying elements which make his views in 1964 fall far short of outright indifference or hostility toward the use of law to overcome racial injustice, as charged by the minority views signed by four Senators.

Of course, Mr. President, we now have Mr. Rehnquist's statements to the committee declaring that he was wrong in the position he took in 1964. He emphasized to the committee that his personal experience in 1964 was with an environment in which the denial of minority rights in practice was infrequent. He now states that his realization of the depths of feeling of minorities would control his opinion that a public accommodations law is good and necessary, without regard to whether or not the discrimination being attacked is infrequent or whether or not the public in general accepts the law as well as it has been in Phoenix.

Mr. President, if Mr. Rehnquist's integrity is accepted as we are told it is by the minority, then the change in position by the nominee should be accepted at face value and this matter should be closed. Instead, the minority refuses to accept the honesty and sincerity of Mr. Rehnquist's current statements and claim that he does not really mean what he says he does. I believe, however, as does anyone who actually knows Mr. Rehnquist, that he does not have a racist bone in his body and that he is deeply committed to an attitude of respect and recognition of equal rights. I will have more to say on this at the end of my remarks.

Mr. President, a second issue raised by the critics of Mr. Rehnquist yesterday concerned his views on the 1967 school integration program proposed for Phoenix high schools. Mr. Rehnquist told the committee during its hearings that his earlier declaration as a private citizen was aimed at preserving the neighborhood school system. This is borne out by the record because Mr. Rehnquist had said, in his 1967 letter to the editor:

> The great Majority of our citizens are well satisfied with the traditional neighborhood school system.

Of course, as everyone knows, the great threat which is seen by the public as disruptive to neighborhood schools is the idea of forced busing.

This is the same letter in which Mr. Rehnquist stated that—

> Many would feel that we are no more dedicated to an "integrated" society than we are to a "segregated" society; that we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.

Now, we have heard a great deal of deploring about the first part of this sentence, but when it is taken in the context of the complete sentence we see that Mr. Rehnquist fully recognizes the equality of each man before the law.

This is certainly not a statement calculated to resist integration of the races. In his 1967 letter Mr. Rehnquist makes it clear he was talking about his interpretation of what additional steps the school superintendant had planned for the schools in order to achieve "an integrated society." His letter was sent in the context of an existing program, then in effect in Phoenix, which called for the step of freedom-of-choice desegregation, with students being permitted to pay their own bus fare to attend other high schools.

With this program of open enrollment to all races already in being in Phoenix, Mr. Rehnquist informed the committee it was his understanding that the only kind of additional busing which the local school superintendent could have had in mind was compulsory, long-distance busing. It should be remembered that the school official, upon questioning in 1967, refused to dismiss the forced busing of students as a possible technique. What is more, Mr. Rehnquist added in his 1971 statement to the committee that he personally was in full agreement with the open enrollment voluntary busing policy as a means of achieving integration.

Once again, Mr. President, the minority Senators simply refuse to give credence to his remarks. Notwithstanding his declaration explaining his mental processes in 1967 and notwithstanding his emphasis on the neighborhood school concept, Mr. Rehnquist's detractors choose to ignore his words and erect an extremely distorted view of his position. In effect, Mr. President, the critics of the nominee refuse to believe anything he has to say on the question of civil rights and human liberty.

However, Mr. Rehnquist's personal character is backed up on the record before the committee by person after person who has known him or worked with him. For example, Judge Walter Craig, a U.S. district judge in Arizona, testified:

> I have never known Bill Rehnquist to be racist, and I know him pretty well, Sir.

Judge Craig also stated:

> 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 with respect to the necessity to improve their lives and their society. I don't think that he would be in any way insensitive to the philosophy of civil rights or the Bill of Rights, or any other rights.

Then we have the impressive recommendation to the committee supporting Mr. Rehnquist by Jarril Kaplan, who has served as chairman of the Phoenix Human Relations Commission. Mr. Kaplan writes:

> In all my years of intergroup relations in this community, I never once heard reference to Mr. Rehnquist as bearing hostility toward minority persons . . . I do not profess to know everything Mr. Rehnquist has ever said or done. On the basis of what I do know, however, I believe that it is neither accurate nor fair to label him as a "racist," sophisticated or otherwise.

Dean Phil Neal, at present the dean of the University of Chicago Law School, related to the committee in writing of his observations on Mr. Rehnquist as a former student of his at Stanford Law School. He said:

> I am confident that he is a fair-minded and objective man. Any suggestions of racism or prejudice are completely inconsistent with my recollections of him.

In addition, I would like to offer for consideration the report of the American Bar Association on Mr. Rehnquist which discusses the comments received by the association from over 120 judges and lawyers and 10 law school deans in the seven States of the Ninth Judicial Circuit. Speaking of lawyers and judges who are devoted to expanding concepts of civil rights, the bar association report mentions that—

> A number of leading liberal and civil rights lawyers support the nomination because of his professional competence, intellectual ability, and character. As one of them summed it up, he had "total professional respect for Mr. Rehnquist." He had never known of any reproach to his character. He states he is "not a Bircher, not a racist, but a decent man and a good human being."

Finally, Mr. President, I believe it is important for us to observe what personal acquaintances of Mr. Rehnquist have to say about the manner in which he conducts his personal life. Mr. Joe Tameron, principal of Kenilworth Elementary School, wrote the Judiciary Committee that he knew Mr. Rehnquist had moved his family into the Phoenix Elementary School District because he "wanted his children to have experience and association with children from minority groups, as well as with the different socioecenomic groups."

Also, Mr. Paul Bliklen, a neighbor of Mr. Rehnquist, wrote the committee that during discussions with the Rehnquists he found that they were motivated to move to the downtown area of Phoenix bordering the inner city because they felt their children "would be better exposed to a cross section of America, racially, economically, and philosophically."

Mr. Bliklen added:

> We have worked with Nan and Bill Rehnquist over the years on many school projects and neighborhood undertakings. Working with us was always a cross-section of parents from mixed ethnic, racial, and economic backgrounds. In all of these contacts, never have I heard or seen Mr. Rehnquist act in a negative way towards a person or show preference because of his race, background, or economic disadvantage.

Here, Mr. President, is proof of the essence of a man's character and his true feelings about human dignity. Here is what is known about a man's reputation by those who intimately know him. Here is the day-to-day living philosophy of a man as that philosophy directly touches him and his own family. Here is an unblemished record of personal respect and association in his daily life for all members of society and for any group within it.

Does a man have to belong to the NAACP in order to demonstrate his willingness to support the cause of civil rights? Does a man have to prove his membership in the Americans for Democratic Action in order to show his sensitivity to the protection of individual liberties and equal rights? Or can we judge a man as being sensitive and committed to these rights on the basis of his known reputation and his personal treatment of and experience with other human beings? Mr. President, I believe the answer is self-evident and I believe it is equally obvious that Mr. Rehnquist is an honorable, fairminded member of society, who has a proven record of commitment in his life to the respect and support of human dignity and equal rights.

Mr. BROCK. Mr. President, if the confirmation of nominees to the Supreme

Court were not such serious business, I would find the activities of William Rehnquist's opponents over the last several weeks amusing indeed. Time and again, unfounded accusations have surfaced only to be refuted. In desperation, these opponents have fallen to the tactics they so piously deplored in other times. They have made so many false charges, so often unfairly characterized the nominee's position on issues, and so consistently taken Mr. Rehnquist's statements and conduct out of context that new charges now have a hollow ring. It is like the shepherd boy crying "Wolf" too often.

The point is that Mr. Rehnquist's opponents deplore the fact that he is not a judicial activist with a political philosophy attuned to their own. That is truly the issue. It should be candidly addressed as the sole issue.

The confirmation process is a solemn responsibility of the Senate. With it comes the prerequisite that individuals nominated to the Supreme Court be treated with the respect incumbent with the privilege of nomination and in turn that they act with the same responsibility and respect toward their inquisitors. Mr. Rehnquist has fulfilled this responsibility admirably. In addition to his outstanding credentials, Mr. Rehnquist has been most candid and open in expressing his views before the Judiciary Committee.

Throughout the long hours of questioning, he has maintained the consistency and poise that are a must for the position to which he has been nominated. One by one the counterfeit issues raised by his opponents have been discarded and indeed, his responses to these issues have revealed that he is a man of the highest standards of professional competence, integrity, and judicial temperament.

In conducting its thorough investigation and favorably reporting the nomination of William H. Rehnquist, the Senate Judiciary Committee has proved beyond a doubt that this man is eminently qualified to take his place on the Supreme Court. I look forward with enthusiasm to voting for this worthy man.

Mr. ALLOTT. Mr. President, with an admirable strength of argument Mr. Robert Bartley of the Wall Street Journal has exposed the flimsiness of the arguments currently being used to delay the absolutely certain confirmation of Supreme Court nominee William H. Rehnquist.

So that all Senators can profit from Mr. Bartley's reasoning, I ask unanimous consent that his story be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Wall Street Journal, Dec. 6, 1971]

REHNQUIST AND CRITICS: WHO'S EXTREME?

(By Robert L. Bartley)

WASHINGTON.—The most powerful impression to emerge from the microscopic public analysis of the life and works of Supreme Court nominee William H. Rehnquist is that his critics are pretty desperate. At one point the arguments proved too much even for the most critical Senators, and Sen. Edward Kennedy upbraided the witnesses for creating "an atmosphere which I think is rather poisonous."

Now the critical members on the Senate Judiciary Committee—Sens. Bayh, Hart, Kennedy and Tunney—have filed their minority report setting out the responsible case against the nomination. As Sen. Kennedy's remark suggests, it judiciously avoids the less substantial allegations that have appeared in the press in recent weeks. There is, for example, no suggestion that Mr. Rehnquist is guilty until proven innocent of membership in extremist organizations because his name appears on a list compiled by a little old lady and willed to someone else.

OUTSIDE THE MAINSTREAM

The minority report, rather, focuses mostly on Rehnquist's views on certain issues, and as such is an intriguing document. It volunteers that there is no question about Mr. Rehnquist's qualifications in terms of legal standing or personal integrity. On the widely debated question of whether the Senate should consider a nominee's judicial philosophy, it makes the case that indeed the Senate should.

The minority, of course, argues that on this third test Mr. Rehnquist flunks. It says he "has failed to show a demonstrated commitment to the fundamental human rights of the Bill of Rights, and to the guarantees of equality under the law." While not every detail of a nominee's philosophy ought to bear on his Senate confirmation, it suggests, so extreme a deviation should. At one point the text puts it simply: The nominee "is outside the mainstream of American thought and should not be confirmed."

A fascinating proposition, this. How can someone with legal standing and personal integrity fit to grace the Supreme Court be that far out of the mainstream? What would be the opinions of a man who is such a pillar of the bar and still fails to understand the Bill of Rights?

So it is with no little anticipation that one turns to the issues discussed in the minority report to find just which of Mr. Rehnquist's opinions bar him from the Court service. One expects not merely that he will have debatable opinions on debatable topics. Certainly the four Senators disagree on many things with Lewis F. Powell Jr., the other Supreme Court nominee before the Senate, but they voted to approve him. So in Mr. Rehnquist's case one expects more extreme opinions, those further out of the mainstream on the right, say, than Justice William O. Douglas is on the left.

As sort of a benchmark, recall Justice Douglas' popular book arguing, "We must realize that today's establishment is the new George III. Whether it will continue to adhere to his tactics, we do not know. If it does, the redress, honored in tradition, is also revolution." What right-wing outrages has Mr. Rehnquist uttered, one wonders, that are further from the mainstream than *that?*

As the confirmation hearings started, the best bet for that sort of outrage seemed to lie in the Justice Department position on wiretapping. As the department's chief legal adviser, Mr. Rehnquist must bear no small responsibility for that position, and the department has argued that the Executive Branch has an "inherent right" to wiretap without court order in national security cases. This is tantamount to an assertion that neither Congress nor the courts can control executive wiretapping, and certainly does suggest an insensitivity to the spirit of the Bill of Rights.

Alas for Mr. Rehnquist's critics, though, it turns out that on his advice the Justice Department has dropped the "inherent right" argument in current briefs before the Supreme Court. It now merely argues that in the particular instances of the case, the tap in question was not an "unreasonable" search barred by the Fourth Amendment. He says that the effect of the change is "to recognize that the courts would decide whether or not this practice amounted to an unreasonable search."

Mr. Rehnquist declined to give his personal views, as opposed to the Justice Department position, but he did defend the department's current arguments on the grounds that there are substantial legal questions unresolved, and the Executive is obligated to make its side of the case. "Five preceding administrations have all taken the position that the national security type of surveillance is permissible . . . one Justice of the Supreme Court has expressed the view that the power does exist, two have expressed the view that it does not exist . . . one has expressed the view that it is an open question . . . the government is entirely justified in presenting the matter to the court for its determination."

WIRETAPPING OF RADICALS

This did not satisfy the four critical Senators. They noted that the current issues are somewhat different from those of preceding administrations, not least because the current argument is about wiretapping not of foreign agents but of domestic radicals. The change in the department's position is "more cosmetic than real," they argued, because it is still defending wiretapping rules that would not "provide an adequate restraining effect on the Executive Branch, an adequate deterrent to protect the right of privacy."

For those who may find this particular dispute a matter not of extremist opinions but of reasonable men differing, the minority also delves into Mr. Rehnquist's widely quoted opinion on government surveillance of individuals, that is, not wiretapping but the recording of their activities in public places. In warning against overly restricting such surveillance, he once said, "I think it quite likely that self-restraint on the part of the Executive Branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering."

During the hearings, Mr. Rehnquist noted that in his remark he was addressing the question of whether new legislation is needed in addition to the Bill of Rights and laws already on the books, and that the remark must be understood in that context. In colloquy at the time, he conceded that widespread surveillance should be "condemned," and that an individual might already have legal recourse against a government tail. But in considering the argument that surveillance is unconstitutional because it has a "chilling effect" on freedom of expression, he said any such effect is a question not of constitutional law but of fact. And, "those activities didn't prevent, you know, two hundred, two hundred fifty thousand people from coming to Washington on at least one or two occasions to, you know, exercise their First Amendment rights, to protest the war policies of the President. . . ."

The minority report argues that even if 250,000 appeared, others may have been deterred by surveillance. It agrees that the committee's majority report correctly describes Mr. Rehnquist's attitude: "Information-gathering activity may raise first amendment questions if it is proven that citizens are *actually* deterred from speaking out." The minority argues that this is precisely the problem, "the difficulty of proving a specific chilling effect is obvious, and the notion that a First Amendment question isn't even *raised* until it is 'proven that citizens are *actually* deterred from speaking out' (emphasis in original) is alarming."

But if Mr. Rehnquist's opinions here are outrageously extreme, it would seem, so are the opinions of the majority of the Senate Judiciary Committee. Similarly if his defense of the constitutionality of such laws as "no-

knock" raids and "preventive detention" in the District of Columbia are out of the mainstream, the mainstream does not include the majority of both houses of Congress. So what mostly remains is the question of Mr. Rehnquist's attitudes on the racial issue.

The minority report does not make too much of allegations that Mr. Rehnquist harassed black voters when he was involved in Republican voter challenging teams in Phoenix, but it also does not dismiss them as the majority did. Some of his black opponents have come up with affidavits charging he was personally involved in harassment, and his supporters have come up with a defense of his challenging activities and attitude by a sometime counterpart on the Phoenix Democratic challenging team. The minority report says, "Each Senator will have to decide for himself what weight—if any—to give either the charges or the blanket denial."

On the nominee's general racial attitudes, the majority report also came up with a letter from the principal of the elementary school Mr. Rhenquist's children attended in Phoenix. "Mr. Rhenquist became known to me when I was a teacher here at Kenilworth School. He had moved his family into Phoenix Elementary School District from one of the outlying suburban, and predominantly middle socio-economic, school districts. He wanted his children to have experience and associations with children from minority groups, as well as with the different socio-economic groups."

The minority report argues that "Mr. Rehnquist's record fails to demonstrate any strong affirmative commitment to civil rights, to equal justice for all citizens, let alone a level of commitment which would rebut the strong evidence of insensitivity to such rights." The evidence the report discusses at greatest length is a letter Mr. Rehnquist wrote to The Arizona Republic in 1967, responding to remarks on school integration by Phoenix School Superintendent Howard Seymour.

The minority report says, "The truly alarming aspect of the 1967 letter, however, is Mr. Rehnquist's statement, 13 years after Brown V. Board of Education that 'We are no more dedicated to an "integrated" society than we are to a "segregated" society' . . . Yet at least since the Supreme Court declared that 'separate is inherently unequal,' this nation has not been neutral as between integration and segregation; it stands squarely in favor of the former. And if Mr. Rehnquist does not agree, he is outside the mainstream of American thought and should not be confirmed."

A FREE SOCIETY

The statement in the original letter that must be located with respect to the mainstream runs, "Mr. Seymour declares that we 'are and must be concerned with achieving an integrated society.' . . . But I think many would take issue with his statement on the merits, and would feel that we are no more dedicated to an 'integrated' society than we are to a 'segregated' society; that we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities."

Mr. Rehnquist's extremist position on civil rights, then, turns out to be nothing more than the familiar proposition that the Constitution is color-blind. On surveillance he believes that at this moment the scales are not tipped in such a way that dissent is "chilled." On wiretapping he believes the government side of the national security question deserves its day in court. These opinions, the minority report suggests, are so outrageous the nominee should be defeated.

As the Senate debates the nomination, it seems, it will have to decide more than whether it's proper to weigh a nominee's philosophy. It also needs to weigh whether words like "extreme" and "out of the mainstream" better describe Mr. Rehnquist's philosophy, or the position his critics have been forced to take to oppose him.

MESSAGES FROM THE PRESIDENT

Messages in writing from the President of the United States, were communicated to the Senate by Mr. Leonard, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

The PRESIDING OFFICER (Mr. CHILES) laid before the Senate messages from the President of the United States submitting sundry nominations, which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Berry, one of its reading clerks, announced that the House had passed the bill (S. 248) for the relief of William D. Pender, with an amendment, in which it requested the concurrence of the Senate.

The message also announced that the House insisted upon its amendment to the joint resolution (S.J. Res. 176) to extend the authority of the Secretary of Housing and Urban Development with respect to interest rates on insured mortgages, to extend and modify certain provisions of the National Flood Insurance Act of 1968, and for other purposes, disagreed to by the Senate; agreed to the conference asked by the Senate on the disagreeing votes of the two Houses thereon, and that Mr. PATMAN, Mr. BARRETT, Mrs. SULLIVAN, Mr. REUSS, Mr. ST GERMAIN, Mr. ANNUNZIO, Mr. WIDNALL, Mrs. DWYER, Mr. J. WILLIAM STANTON, and Mr. BROWN of Michigan were appointed managers on the part of the House at the conference.

The message further announced that the House had passed the following bills, in which it requested the concurrence of the Senate:

H.R. 3786. An act to provide for the free entry of a four octave carillon for the use of Marquette University, Milwaukee, Wis.;

H.R. 4678. An act to provide for the free entry of a carillon for the use of the University of California at Santa Barbara;

H.R. 6912. An act for the relief of William Lucas (also known as Vasilios Loukatis);

H.R. 7316. An act for the relief of Mrs. Norma McLeish; and

H.R. 8540. An act for the relief of Eleonora G. Mpolakis.

ENROLLED BILL SIGNED

The message also announced that the Speaker had affixed his signature to the enrolled bill (S. 2007) to provide for the continuation of programs authorized under the Economic Opportunity Act of 1964, and for other purposes.

HOUSE BILLS REFERRED

The following bills were severally read twice by their titles and referred, as indicated:

H.R. 3786. An act to provide for the free entry of a four octave carillon for the use of Marquette University, Milwaukee, Wis.; and

H.R. 4678. An act to provide for the free entry of a carillon for the use of the University of California at Santa Barbara; to the Committee on Finance.

H.R. 6912. An act for the relief of William Lucas (also known as Vasilios Loukatis);

H.R. 7316. An act for the relief of Mrs. Norma McLeish; and

H.R. 8540. An act for the relief of Eleanora G. Mpolakis; to the Committee on the Judiciary.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

Mr. CRANSTON. Mr. President, I have been on the floor through the amount of time I have been able to be here throughout this debate on the Supreme Court nominations. I have reviewed the Judiciary Committee report and the individual views filed by some of the members of the committee. I have read quite widely on the views and on the record of Mr. Rehnquist.

However, since I am not a member of the committee and was unable to attend the committee sessions and engage in the questioning there and am not as fully informed as I would like to be in considering this nomination and taking my position with full cognizance of all the relevant facts and opinions, I would like at this time to address some questions to the Senator from Indiana (Mr. Bayh), who has probably looked into this matter as deeply as anyone on the Senate floor, who is a member of the committee, who has engaged in the deliberations of the committee, and who, I gather, has been on the floor through virtually all the discussions.

Therefore, I would like to ask the Senators from Indiana if he would respond to some inquiries that I would like to put to him.

Mr. BAYH. Mr. President, I am glad to yield to my colleague from California and to answer as best I can. I have been a member of the Judiciary Committee, and, as a result of that responsibility, have had the opportunity to explore most of the facts, as much as one Senator possibly can do.

Mr. CRANSTON. I thank the Senator. I know that not only has he participated to the fullest extent possible, but that he has the ability to cut through to the heart of each matter. Therefore, I am particularly interested in his view of some aspects of the nomination and the record of the nominee.

First of all, I am correct in my understanding, am I not, that the nominee has actively supported the Nixon administration's wiretapping position?

Mr. BAYH. There is no question about the fact that the nominee has not only supported the administration's wiretapping position, but has been one of the most eloquent spokesmen on various college campuses and before various meetings in articulating the validity and the reasons behind this particular position.

Mr. CRANSTON. What have the courts said on this issue? What is the state of the law at this point in regard to this matter, which I think is one of the most important relating to the liberties of each of us?

Mr. BAYH. Of course, the 1968 act, as the Senator from California knows, provided for wiretapping with court order in certain circumstances. The key question which now presents itself to the country and to the Court is over the limits on uncontrolled executive wiretaps. It has been generally concluded that the President has the right, without a court order, to tap, bug, and provide electronic surveillance in those instances of subversion which are characterized as foreign in nature. The effort now is to suggest that he should also have this unchecked, unfettered right to become involved in those instances where there is no foreign element involved, but where the insurrection comes from within.

I think the best way to describe the distinction between the two groups would be to say one involves foreign nations, where persons are landed by submarine or by parachute and set up a cell in Los Angeles or Indianapolis. It is generally accepted that that is a foreign source and that the President, under past precedent, has the right to bug without court order.

The other would be a band of students who are concerned with the state of the Nation, and for some reason or other they are interpreted by the Justice Department to be cause for surveillance.

That particular example, or one very similar thereto, is presently before the Court, and I might read a couple of quotations from the sixth circuit, which has ruled against the uncontrolled executive authority to tap in the case of domestic insurgency.

The court said as follows:

> The Fourth Amendment was adopted in the immediate aftermath of abusive searches and seizures directed against the American colonists under the sovereign and inherent powers of King George III. The United States Constitution was adopted to provide a check upon such powers. The creation of three coordinate branches of the government by that Constitution was designed to require sharing in the administration of that awesome power.

Here we are talking about one of the basic distinctions between the U.S. Constitution and what had happened in the colonies, which precipitated the quest for independence. The sixth circuit concluded, in ruling against this executive power, by saying:

> The government has not pointed to and we do not find one written phrase in the Constitution, in the statutory law, or in the case law of the United States, which exempts the President, the Attorney General, or Federal law enforcement officers from the restrictions of the Fourth Amendment in the case at hand.

Now, the Supreme Court has granted certiorari in this case, so it is before the Court. It would seem, from looking at the record, that because of the nominee's very personal involvement in helping to write the Government's brief in the case, he will probably not sit on that case. But that is the issue that is drawn now. And I might just add that Mr. Powell, who is now Mr. Justice Powell, or will be as soon as the oath has been given him, displayed at the hearings great sensitivity to the problems involved. It is his judgment that in most cases it would be relatively easy to make a distinction between foreign and domestic subversives, and thus to tell where the line is drawn, and it is Justice-to-be Powell's opinion, as it is mine, that the factors to be considered are quite different before we permit any unchecked bugging of the citizens of this country.

I am not suggesting, and I am sure the Senator from California does not suggest, that there could not be insurrections brewing within sight of the Capitol, and certainly the Government of the United States has the right and the responsibility to protect itself against insurgents from all sources. But it is possible under the present law, unquestionably, for the President of the United States to go to a Federal district court and get a court order, and then to eavesdrop, to bug, or to provide electronic surveillance for the domestic type of insurgency which the Department of Justice is so greatly concerned about.

Mr. CRANSTON. And that could be for something that is a domestic-type insurgency, not necessarily connected with any foreign threat.

Mr. BAYH. Yes; that is the question. If you have foreign agents who land by submarine, as we have had in past times, I think the severity of that threat and the protection to be provided against it is one thing. But if we had citizens of this country who were to be bugged by their own Government, then I just feel that we need to require of the Government a little restraint, a little safeguard, to see that that restraint is followed, and the requirement of a warrant provides this.

To suggest that the Federal Government has an inherent right to bug completely belies the point made by the Sixth Circuit Court. The very purpose of the Bill of Rights, whether it is the fourth amendment, the first amendment, or the 10th amendment—all of the Bill of Rights, those 10 amendments, were specifically designed to provide checks, to deny inherent rights and inherent power to the Government, and I still feel that is good law today.

Mr. CRANSTON. If Mr. Rehnquist's view became the view of the Court, would that mean that there would be a change in the interpretation of the law and the Constitution and a change in the situation as it now prevails, so that in that new, changed circumstance, the Attorney General would have the right, without going to any court, to tap your wire, my wire, any Senator's or Congressman's wire, or any citizen's wire, simply for the alleged purpose of dealing with a domestic threat, without having to prove anything in any court before proceeding on his own power of decision to do that?

Mr. BAYH. I do not think any of us know what the mathematics of the Court is right now on this question.

Mr. CRANSTON. No, I say if his view did prevail on the Court.

Mr. BAYH. If his view did prevail, it would clearly, then, give the President broad, sweeping, unfettered power to conduct electronic surveillance against citizens of this country who he may feel are involved in subversive activities against it.

Again, I think it is important for us to underline the fact that if we are going to have a free government, it must be able to protect itself, and thus I think it would be very naive not to be able to recognize that there could well be, either now or at some future time, a domestic insurrection that requires electronic surveillance, so that the Government can protect itself.

But are we so sterile of thought, are we so lacking in dedication to the principles which put this country on the road as a free nation in the first place, that we believe the only way we can protect our freedoms is by destroying them?

The Senator from Indiana is not willing to accept that philosophy. I believe we can provide protection for the Government at the same time that we provide safeguards against abuses of power by the Executive.

Mr. CRANSTON. Under this circumstance, if we were guided by the thinking of Mr. Rehnquist in these matters, the Attorney General, one man, solely on his own power of decision, could make the decision that he wanted someone wiretapped for reasons that might not be clear to anyone else, and that would not be tested by anyone else's power of decision, and then it would be permissible for the Government to place a tap on that individual's phone. Do I understand the Senator correctly insofar as he understands Mr. Rehnquist's position?

Mr. BAYH. Yes. The Senator's interpretation is accurate. There is some distinction between the President and the Attorney General, but the Government claims, since the Attorney General is acting for the President as the agent and chief lawyer for the President, that he has the same right to do it, because he would not become involved in the question unless he had the approval of the President. That is compounding the danger, it seems to me.

Mr. CRANSTON. There is another aspect of this question which is not directly related to Mr. Rehnquist's nomination, except that he would, if on the Court, perhaps participate in a decision that would change the current circumstances. That relates to the fact that the present Attorney General is the man who served as the President's partisan campaign manager in the election of 1968, and according to press reports he will serve as the President's campaign manager in 1972, and presumably would leave the Department of Justice at that point.

I personally wonder about the desirability of letting one man who has that political responsibility or has held that responsibility in the past and will hold it in the future, and is not totally aloof from politics at the present time, have this authority that is vested in the Attorney General. I must confess that it was a Democrat—it happened to be Harry Truman, a President whom I greatly respected—who made the first appointment, I believe, of an Attorney General to serve as chairman of the Democratic National Committee during the time that

he served as Attorney General, which I think was an unwise move; and the role that Mr. Mitchell plays in the current administration is somewhat analogous to that.

In prior times, the Postmaster General used to be the Cabinet member selected for exercising this great political authority now vested in the Attorney General. I think that was far wiser, because while maybe there might be an invasion of freedom by looking at somebody's mail, I think that is a thing quite apart from the great authority vested in the Attorney General with respect to wiretaps and surveillance, on the exercise of which authority Mr. Rehnquist finds no constitutional restraints.

I ask the Senator from Indiana his feeling about mixing the Attorney General to this degree into political responsibilities, when we are dealing with the vast powers the Attorney General now has and the even vaster powers the Attorney General would have if Mr. Rehnquist had his way.

Mr. BAYH. I share the concern of the Senator from California. In fact, I expressed this concern in the hearings. It seems to me that this makes good logic for providing that safeguard independent from the executive branch.

Interestingly enough, we have had two recent Presidents—we do not have to go back as far as Harry Truman—but President Kennedy appointed his personal political adviser as Attorney General, and President Nixon has done the same. I think that to suggest that this is a political argument in which Democrats are trying to deny this power to Republicans is inaccurate. I do not think that a Democratic or a Republican Attorney General or a Democratic or a Republican President ought to have this so-called vested right to bug unchecked.

If electronic surveillance needs to be conducted in a given situation, I think the President and the Attorney General ought to go to court and say, "Here is probable cause to believe that X, Y, and Z is happening. That is why we need the bug." That is particularly so when you get into the domestic surveillance situation, because there the whole reason for surveillance is that citizens of this country want to overthrow the Government.

Frankly, I may say that I am very much desirous of changing the Government. I would like to see a different President. I had that position back in 1968. I want to use the ballot box, and I want to use lawful means. But the line between those who want to peacefully change the Government and those who may want to take to the streets and resort to violence sometimes is a very narrow line. It seems to me it puts the Government on a sounder basis, and it certainly goes much further to protect the individual liberties of the citizens of this country, to say that the President and his chief law enforcement officer, who is now his chief political adviser, should not make that determination. A judge who has no political ties, who is out of the political syndrome, should make the determination as to whether this is based on fact or on politics.

I suppose the Attorney General, under this authority, if it were granted to him, could begin to wonder whether some people who seemed to be prepared to use the ballot box to achieve change in our Nation are even thinking about the possibility of going in a different direction, by a violent route, so that they can be prepared, and on that ground you could tap almost anybody's wire, and one man would make that decision.

I suppose that in the light of what I have just said about favoring a change of Government, that might be good reason for my wire to be tapped. In fact, it may have been tapped before now. I do not know.

I think it is important for those of us who are concerned about this increased power on the part of the Federal Government not to be naive. We have to recognize that there may, indeed, be circumstances which would require the President to have access to electronic surveillance. I hate to think about it. It is despicable. But in the area of organized crime and in the area of some types of subversive activities, I suppose the Senator from Indiana could stretch his thoughts on that.

On the other hand, as I said a moment ago, I think it is very important for those who are concerned with and have the responsibility for enforcing the law, and thus for protecting our country, not to utilize those tactics to protect our freedom—in essence, take our freedoms away and destroy them. The history of man is filled with well-intentioned pronouncements that this junta is going to take over so that freedom can be restored, or that this dictator, in addition to running the trains on time, is going to restore free government.

I do not suggest that we are presently close to having a junta or a dictator. In my judgment, the freedoms of this country are strong. They are inculcated in the minds of the people. I do not think there is going to be a Benito Mussolini or some general who mounts a white charger at the Pentagon and gallops across the 14th Street bridge and ensconces himself at the White House. I do not think that is the way we will lose our freedoms. If we lose our freedoms—and I hope and pray we do not—I think they will be lost a word at a time, a line at a time, a law at a time, an Executive order at a time—perhaps a Supreme Court decision at a time; and that the people of the country will not know what they have lost until it is too late to do anything about it.

That is why I am concerned about the position of this nominee on the matter of electronic surveillance and the right to privacy, as well as the general area of civil rights and human rights.

Mr. CRANSTON. In the same way that I believe we can defend our Nation from a foreign threat without resorting to atomic weapons, I feel we can preserve and keep secure our Nation from domestic threats without resorting to wiretapping. In my view, that threat of wiretapping erodes the freedoms and a sense of confidence in his individual freedom of every American who is aware of the fact that his wire may be tapped at any moment. I am constantly shocked by the number of people in public life and in private life who are uncertain about the freedom they have when they talk on the telephone. To me that is a very frightening thing, and I totally concur with the Senator that we must do all we can to provide greater confidence in their privacy on the part of individual citizens.

Mr. BAYH. The nominee's philosophy and his beliefs in this general area, as I am sure the Senator from California knows, go beyond the technical area that we have talked about here. Here we have been talking about what are traditionally known as fourth amendment rights, but the nominee's philosophy has expanded broadly into what rapidly becomes at least partially first amendment rights—the right to free speceh, free association, and to petition government for redress of grievance.

If the Senator has the time between now and the vote on this nominee to read the hearings of the Subcommittee on the Judiciary, chaired by the distinguished Senator from North Carolina (Mr. ERVIN) and see the responses of the nominee to some of the questions raised by the Senator from North Carolina, he will see it is a rather frightening thing, because here is a man who says that there is no constitutional question in the right to privacy where surveillance is involved. In my view there is a serious constitutional question in this area. In essence if we put this man on the Court, we will at least provide one additional vote to undermine this view and thus our constitutionally protected right to privacy.

Mr. Rehnquist even went so far as to suggest he saw no constitutional question with respect to putting a tail on the distinguished Senator from North Carolina—a tail that would not be attached, I hasten to say to my colleague, but one which would be in the area of surveillance. This is a matter of grave concern to the Senator from Indiana.

Mr. ERVIN. Mr. President, since my good friend, the Senator from Indiana, has brought me into this colloquy, I hope that the Senator from California will yield to me for some observations concerning those hearings.

Mr. CRANSTON. I am delighted to yield to the distinguished senior Senator from North Carolina. I have great respect for him. I am seeking illumination, and I seek it from him as well as from the Senator from Indiana.

Mr. ERVIN. I had occasion to observe Mr. Rehnquist and listen to his testimony before the Senate Subcommittee on Constitutional Rights, of which I have the honor to be chairman, and before the Senate Subcommittee on Separation of Powers, of which I also have the honor of being chairman. While Mr. Rehnquist did not agree with me on the application of the Constitution to all of the questions which arose in those hearings, I am constrained to say that observing his demeanor while testifying, and listening to his testimony, he left me with the abiding conviction that he is a diligent student of the law, that he is a man of intellectual integrity, that he has a fundamental devotion to the Bill of Rights, and that he possesses what Chief Justice John Marshall declared in Marbury against Madison to be the necessary

qualification to serve on the Supreme Court of the United States, and that is an ability and a willingness to accept the Constitution as the rule for the guidance and control and government of his official actions. I do not know that I can point out the qualifications of any man in any more acceptable fashion than to say that.

It is true Mr. Rehnquist and myself disagreed on several occasions and he did inadvertently remark on one occasion that the Federal Government could even place me under surveillance. I told him that if it did so it would be a waste of time because, unfortunately, the statute of limitations has run on all the really evil things I have ever done. [Laughter.]

Mr. Rehnquist modified that statement later, as I recall, by stating that the Government has no power to place a man under surveillance unless it has reasonable cause to believe that he had committed a crime or is about to commit a crime. I think that is a correct proposition of law.

I was urged by some of my colleagues and friends to oppose the nomination of Mr. Rehnquist on the grounds that he had disagreed with me on the application of constitutional principles under certain circumstances. I said that I could not oppose a man for a position on the Court on that basis. I had the privilege, before coming to the Senate, of serving on the Supreme Court of the State of North Carolina with six other members whom I knew to be great lawyers, great citizens, great patriots, and great Americans.

I am bound to confess that on several occasions I disagreed with one or more, or on some occasions with a majority of the members of the Supreme Court of North Carolina with whom I served. I do not proscribe a man from public office who does not accept my sound views on all matters if he reaches what I consider to be honest conclusions different from mine.

With all due respect to the views of my good friend from Indiana, and his sincere convictions regarding the nominee, which are contrary to mine, I am compelled to say that the Constitution of the United States will be just a little bit safer if we have such a person as Mr. Rehnquist serving on the Court.

I say that notwithstanding the fact that he and I will probably differ on the application of constitutional principles, to certain circumstances, on a number of occasions.

I thank the Senator for yielding to me. I just wanted to interject myself into this colloquy in view of the fact that my friend from Indiana mentioned my name.

Mr. CRANSTON. Let me address a question to the distinguished Senator from North Carolina while he is present. I know of his devotion to the Constitution, his devotion to his country, and I know of his grave concern about the issue of the invasion of the individual privacy of citizens, whether in public or private life, by the Government.

There is one particular statement of Mr. Rehnquist that gave me great concern and I would be very much interested in the Senator's reaction to that particular statement. That was his statement that, in matters of surveillance, he would be quite content to rest or put his faith in the executive branch's exercising self-restraint in this matter, as if the constitutional guarantees and the checks-and-balances system are really not necessary.

Here is the actual quote:

> I think it quite likely that self-restraint on the part of the Executive Branch will provide the answer to virtually all of the legitimate complaints against excesses of information gathering.

Mr. ERVIN. That is an expression of a point of view which is entertained by many people. On a number of occasions when I have joined the Senator from Indiana and the Senator from California, and other Senators, who hold libertarian views on the floor of the Senate I have found on some occasions that a majority of the Senate accepted the thesis which Mr. Rehnquist stated on that subject.

A man who is a member of the executive branch of the Government has more confidence in its capacity for rectitude than those of us who happen to think the greatest threat to individual liberty comes from government.

Mr. CRANSTON. I concur totally on that latter concern.

Mr. ERVIN. For that reason, I am in favor of chaining—as Thomas Jefferson once said—Government officials with the Constitution in order that individual liberties may be safe. But there are a great many people who believe that we can trust the executive branch, or the Congress, or the President, or even the courts with unlimited power, and not subject them to external restraints. I do not share that philosophy, but Mr. Rehnquist said that ordinarily we could rely on the executive branch of the Government to protect the rights of the individual. Fortunately, I think that we can, too, ordinarily, but there do come times, perhaps, in the history of a nation, when ordinary conditions may not prevail.

Mr. CRANSTON. When the Senator was referring to recent statements on this issue on the Senate floor, was it not in reference to the battle over no-knock?

Mr. ERVIN. Yes—no-knock and——

Mr. BAYH. Also preventive detention.

Mr. ERVIN. Yes, also preventive detention.

Mr. CRANSTON. Is that not quite a different situation, particularly no-knock, at least, where a warrant issued by a judicial officer, is required before we can proceed on a no-knock basis?

Mr. ERVIN. The no-knock provision I was fighting was a provision which gave lipservice to the fourth amendment, but failed to comply with its spirit or even its letter.

I have no information whatever about Mr. Rehnquist's activities with regard to no-knock or preventive detention laws. I conducted extensive hearings for the Subcommittee on Constitutional Rights with respect to these matters, and the man who appeared for the administration's point of view was Deputy Attorney General Richard G. Kleindienst, not Mr. Rehnquist. The administration was represented in the House Committee on the District of Columbia by Mr. Donald E. Santarelli, from the Office of the Deputy Attorney General. He was the only official of the Government that appeared before the House committee to advocate the adoption of preventive detention laws.

Mr. CRANSTON. I brought up no-knock only because I thought the Senator was referring to that when he was talking about the recent Senate issue related to this question. I stood with the Senator from North Carolina on every vote on that matter, as he recalls.

Mr. ERVIN. On every occasion since he came to the Senate, the distinguished Senator from California has manifested himself to be a great libertarian, a man who prizes above everything the basic freedoms of the individual. I have stood shoulder to shoulder with him on several occasions fighting for what he and I believe to be those basic rights.

Mr. CRANSTON. We have.

Mr. ERVIN. I can say the same thing for the distinguished Senator from Indiana.

Mr. CRANSTON. My point was that under the 1968 statute you referred to a warrant is required for no-knock.

Mr. ERVIN. Yes, of course, the no-knock statute was an exercise in legal and linguistic absurdity. The fourth amendment requires that a search warrant must be based on probable cause.

The no-knock laws that the Senate passed, over the objections of the Senator from California and myself, gave lipservice to the requirement of probable cause. But under those laws, if an officer appears before a judge or a magistrate and applies for a no-knock warrant, he can obtain a no-knock warrant by engaging in a prophecy in respect to what may happen at the time he undertakes to execute the no-knock warrant at some other time and some other place after the search warrant is obtained. And I consider that to be an absolutely invalid proposition, because probable cause can be based only upon facts existing and known at the time the search warrant is applied for.

A search warrant, in my judgment, cannot be constitutionally issued upon the basis of fears or prophecies or predictions of what might happen at some future time when the officer undertakes to execute the search warrant.

Mr. CRANSTON. Mr. President, as I understand it, on the question of preventive detention, as with no-knock statute, it also deals with the decision of a judicial officer. But, with respect to wiretap or surveillance as Mr. Rehnquist would like it to be, the Attorney General, without consulting any court in any way, shape, of manner, could decide to invade an individual's privacy.

If the fellow who is being wiretapped under such a situation were to discover it, there is no way after the fact that he can get at the problem. Under Mr. Rehnquist's view, he could not get a writ of mandamus against the Attorney General if he felt he was being harassed. It seems to me that Mr. Rehnquist is taking a very extreme view in so narrowly construing the Bill of Rights.

Mr. ERVIN. Mr. President, I do not know what view he has on that subject. However, I have noticed over the years that an Assistant Attorney General, or other lesser legal light in the Department of Justice, usually comes down as an advocate of the position taken by the incumbent administration. His arguments are made to sustain the administration position and do not necessarily express his own views.

There is a remedy for the situation which the Senator from California describes, and that is a motion to suppress the evidence obtained by an illegal search and seizure.

I rejoice in the fact that Judge Edwards, of the Michigan circuit, has written one of the greatest opinions that I have read lately. He repudiates in his opinion, the position of the Department of Justice, that the President has the inherent power to wiretap the conversations of individuals suspected of being engaged in domestic subversion.

I do not know exactly what domestic subversion is, except I have noticed that people who use that term a great deal usually apply it to the people who happen to disagree with them on fundamental matters.

Mr. CRANSTON. Mr. President, the Senator from North Carolina got right at the heart of the matter with that remark.

Mr. BAYH. Mr. President, if the Senator will yield, I want to assure the Senator from North Carolina that the context in which I brought his name into debate was intended to be of a laudatory nature.

Mr. ERVIN. Mr. President, the Senator has been very generous in all references he made to me, even on occasions when he and I had reached diametrically opposed views on certain questions. And I appreciate that attitude on the part of the Senator from Indiana.

Mr. BAYH. I thank the Senator, and I appreciate his remark.

The thing concerning the Senator from Indiana, and the reason I brought the committee and the personal investigation of the Senator from North Carolina into the debate, is that we are now being asked to put a man on the Supreme Court who, like all past and present Supreme Court Justices, will not only sit in judgment of what the Attorney General does, but will also sit in judgment of what each State legislature does in its law enforcement and lawmaking capacity.

There is a general pattern of public statements, speeches, articles and, indeed, in testimony before the Judiciary Committee—not just the subcommittee chaired by the distinguished Senator from North Carolina, but the full Judiciary Committee—when Mr. Rehnquist himself was there, not to express the views of the Attorney General or the President, but to give us the views of William Rehnquist, nominee to Associate Justice of the Supreme Court of the United States, which I find disturbing.

He did say, as the Senator from California accurately noted, that he felt in most instances self-restraint would be sufficient to curtail abuse on the part of the Executive. And he did say in response to the Senator from North Carolina (Mr. ERVIN) at the hearings—and I wish I had mentioned this before the Senator from North Carolina left, because it is on point—when the Senator from North Carolina asked the following question:

Senator ERVIN. I would agree with you to the extent that it would not constitute a violation of the Fourth Amendment where surveillance is had of people in public places because there is no search and there is no seizure, no search of a home or building and no search of papers and no seizure, but do you not concede that government could very effectively stifle the exercise of First Amendment freedoms by placing people who exercise those freedoms under surveillance?

Mr. REHNQUIST. No, I don't think so, Senator. It may have a collateral effect such as that, but certainly during the time when the Army was doing things of this nature, and apparently it was fairly generally known that it was doing things of this nature, those activities didn't prevent, you know, two hundred, two hundred fifty thousand people from coming to Washington on at least one or two occasions to, you know, exercise their First Amendment rights, to protest the war policies of the President.

In other words, when we talk about the right of privacy, we are talking not only about the fourth amendment rights but also first amendment rights, 14th amendment rights, and I think the Supreme Court even said ninth amendment rights. When they said there is a right, They consider this to be an umbrella right.

And when the Senator from North Carolina asked:

Do you not concede that Government could very effectively stifle the exercise of the First Amendment freedoms by placing people who exercise those freedoms under surveillance.

Mr. Rehnquist said:

No, no. I don't think so, Senator.

That is about as plain as it can possibly be. Mr. Rehnquist, Associate Justice-to-be Rehnquist, said at the hearings that he did not believe there was a chilling effect as far as surveillance was concerned. And that, in his view, right of privacy is not involved in this problem.

Mr. President, I perhaps should make clear that the testimony to which I just alluded, the exchange between the Senator from North Carolina and Mr. Rehnquist over the exercise of first amendment rights and the chilling effect, was before the subcommittee of the Senator from North Carolina.

Mr. Rehnquist made other statements concerning his views on the right of privacy and the power of the Executive to engage in surveillance before the full Judiciary Committee when it was holding hearings on his nomination.

Mr. CRANSTON. Mr. President, the Senator from Indiana qualified his language in reference to Mr. Rehnquist's views by saying that he has indicated he felt executive branch good faith would suffice to protect against unwarranted invasions of privacy in most cases.

The quotation I read was that self-restraint on the part of the executive branch will provide an answer to virtually all legitimate complaints against excesses of information gathering.

However, the nominee made a still more extreme statement in a speech entitled, "Private Surveillance," on March 17, 1971, when he said:

I do not believe, therefore, that there should be any judicially enforceable limitations on the gathering of this kind of public information by the executive branch of the government.

He said nothing about virtually no restraint, he said absolutely no restraint at all.

It is my understanding that we have been discussing the first amendment and the chilling effect on free expression and freedom of association as far as individuals are concerned in terms of the surveillance and the harassment that inevitably accompanies it.

I gather that Mr. Rehnquist is more concerned about the chilling effect on the Government if additional restraints were available to be imposed on the executive branch in its surveillance activities.

I had not been aware in any informed way of the involvement of the matter of the fourth, ninth, and 14th amendments. Could the Senator explain how they get into the picture?

Mr. BAYH. The key case on this matter is Griswold against Connecticut, which is a landmark case on the right to privacy. I think it was Justice Goldberg who wrote eloquently in that case, as did other concurring Justices.

I do not have the material in my files before me, but I ask unanimous consent that I may have that case printed in the RECORD.

There being no objection, the case was ordered to be printed in the RECORD, as follows:

GRISWOLD AGAINST CONNECTICUT, SYLLABUS, GRISWOLD ET AL. AGAINST CONNECTICUT

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

(No. 496. Argued March 29–30, 1965.—Decided June 7, 1965.)

Appellants, the Executive Director of the Planned Parenthood League of Connecticut, and its medical director, a licensed physician, were convicted as accessories for giving married persons information and medical advice on how to prevent conception and, following examination, prescribing a contraceptive device or material for the wife's use. A Connecticut statute makes it a crime for any person to use any drug or article to prevent conception. Appellants claimed that the accessory statute as applied violated the Fourteenth Amendment. An intermediate appellate court and the State's highest court affirmed the judgment. *Held:*

1. Appellants have standing to assert the constitutional rights of the married people. *Tileston* v. *Ullman*, 318 U.S. 44, distinguished. P. 481.

2. The Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights. Pp. 481–486.

151 Conn. 544, 200 A. 2d 479, reversed.

Thomas I. Emerson argued the cause for appellants. With him on the briefs was *Catherine G. Roraback.*

Joseph B. Clark argued the cause for appellee. With him on the brief was *Julius Maretz.*

Briefs of *amici curiae*, urging reversal, were filed by *Whitney North Seymour* and *Eleanor M. Fox* for Dr. John M. Adams et al.; by *Morris L. Ernst, Harriet F. Pilpel* and

Nancy F. Wechsler for the Planned Parenthood Federation of America, Inc.; by *Alfred L. Scanlon* for the Catholic Council on Civil Liberties, and by *Rhoda H. Karpatkin, Melvin L. Wulf* and *Jerome E. Caplan* for the American Civil Liberties Union et al.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven—a Center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to *married persons* as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 52–32 and 54–196 of the General Statutes of Connecticut (1958 rev.). The former provides:

"Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54–196 provides:

"Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. 151 Conn. 544, 200 A. 2d 479. We noted probable jurisdiction. 379 U.S. 926.

We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. *Tileston* v. *Ullman*, 318 U.S. 44, is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the standards of "case or controversy" in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime.

This case is more akin to *Truax* v. *Raich*, 329 U.S. 33, where an employee was permitted to assert the rights of his employer: to *Pierce* v. *Society of Sisters*, 268 U.S. 510, where the owners of private schools were entitled to assert the rights of potential pupils and their parents; and to *Barrows* v. *Jackson*, 346 U.S. 249, where a white defendant, party to a racially restrictive covenant, who was being sued for damages by the covenantors because she had conveyed her property to Negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection, although no Negro was a party to the suit. And see *Meyer* v. *Nebraska*, 262 U.S. 392; *Adler* v. *Board of Education*, 342 U.S. 485; *NAACP* v. *Alabama*, 357 U.S. 449; *NAACP* v. *Button*, 371 U.S. 415. The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner* v. *New York*, 198 U.S. 45, should be our guide. But we decline that invitation as we did in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379; *Olsen* v. *Nebraska*, 313 U.S. 236; *Lincoln Union* v. *Northwestern Co.*, 335 U.S. 525; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483; *Giboney* v. *Empire Storage Co.*, 336 U.S. 490. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce* v. *Society of Sisters, supra*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer* v. *Nebraska, supra*, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin* v. *Struthers*, 319 U.S. 141, 143) and freedom of inquiry, freedom of thought, and freedom to teach (see *Wieman* v. *Updegraff*, 344 U.S. 183, 195)—indeed the freedom of the entire university community. *Sweezy* v. *New Hampshire*, 354 U.S. 234, 249–250, 261–263; *Barenblatt* v. *United States*, 360 U.S. 109, 112; *Baggett* v. *Bullitt*, 377 U.S. 360, 369. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP* v. *Alabama*, 357 U. S. 449, 462, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Ibid.* In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. *NAACP* v. *Button*, 371 U. S. 415, 430–431. In *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (*id.*, at 244) and was not action of a kind proving bad moral character. *Id.*, at 245–246.

Those cases involved more than the "right of assembly"—a right that extends to all irrespective of their race or ideology. *De Jonge* v. *Oregon*, 299 U. S. 353. The right of "association," like the right of belief (*Board of Education* v. *Barnette*, 319 U. S. 624), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe* v. *Ullman*, 367 U.S. 497, 516–522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in *Boyd* v. *United States*, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." [1] We recently referred in *Mapp* v. *Ohio*, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup. Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960).

We have had many controversies over these penumbral rights of "privacy and repose." See, *e.g.*, *Breard* v. *Alexandria*, 341 U.S. 622, 644; *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451; *Monroe* v. *Pape*, 365 U.S. 167; *Lanza* v. *New York*, 370 U.S. 139; *Frank* v. *Maryland*, 359 U.S. 360; *Skinner* v. *Oklahoma*, 316 U.S. 535, 541. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

MR. JUSTICE GOLDBERG, whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join

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Footnotes at end of article.

in its opinion and judgment. Although I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments (see my concurring opinion in *Pointer* v. *Texas* 380 U.S. 400, 410, and the dissenting opinion of Mr. JUSTICE BRENNAN in *Cohen* v. *Hurley*, 366 U. S. 117, 154), I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution [3] is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, *ante*, at 484. I add these words to emphasize the relevance of that Amendment to the Court's holding.

The Court stated many years ago that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105. In *Gitlow* v. *New York*, 268 U.S. 652, 666, the Court said:

"For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the *fundamental* personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." (Emphasis added.)

And, in *Meyer* v. *Nebraska*, 262 U.S. 390, 399, the Court, referring to the Fourteenth Amendment, stated:

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also [for example,] the right . . . to marry, establish a home and bring up children . . . ."

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights.[3] The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights [4] could not be sufficiently broad to cover all essential rights and that the specific mention of these rights would be interpreted as a denial that others were protected.[5]

In presenting the proposed Amendment, Madison said:

"It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment]." I Annals of Congress 439 (Gales and Seaton ed. 1834).

Mr. Justice Story wrote of this argument against a bill of rights and the meaning of the Ninth Amendment:

"In regard to . . . [a] suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis. . . . But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people." II Story, Commentaries on the Constitution of the United States 626–627 (5th ed. 1891).

He further stated, referring to the Ninth Amendment:

"This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others." *Id.*, at 651.

These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.[6]

While this Court has had little occasion to interpret the Ninth Amendment,[7] "[i]t cannot be presumed that any clause in the Constitution is intended to be without effect." *Marbury* v. *Madison*, 1 Cranch 137, 174. In interpreting the Constitution, "real effect should be given to all the words it uses." *Myers* v. *United States*, 272 U.S. 52, 151. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold.

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people." (Emphasis added.)

A dissenting opinion suggests that my interpretation of the Ninth Amendment somehow "broaden[s] the powers of this Court." *Post*, at 520. With all due respect, I believe that it misses the import of what I am saying. I do not take the position of my Brother BLACK in his dissent in *Adamson* v. *California*, 332 U.S. 46, 68, that the entire Bill of Rights is incorporated in the Fourteenth Amendment, and I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth.

Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. See, *e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Kent* v. *Dulles*, 357 U.S. 116; *Cantwell* v. *Connecticut*, 310 U.S. 296; *NAACP* v. *Alabama*, 357 U.S. 449; *Gideon* v. *Wainwright*, 372 U.S. 335; *New York Times Co.* v. *Sullivan*, 376 U.S. 254. The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a *State's* infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon *federal* power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. Cf. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 94–95.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. . . ." *Powell* v. *Alabama*, 287 U.S. 45, 67. "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe* v. *Ullman*, 367 U. S. 497, 517 (dissenting opinion of MR. JUSTICE DOUGLAS).[8]

I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live." *Id.*, at 521. Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 478, comprehensively summarized the principles underlying the Constitution's guarantees of privacy:

"The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect.

Footnotes at end of article.

They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home. This Court recognized in *Meyer* v. *Nebraska, supra,* that the right "to marry, establish a home and bring up children" was an essential part of the liberty guaranteed by the Fourteenth Amendment. 262 U.S., at 399. In *Pierce* v. *Society of Sisters,* 268 U.S. 510, the Court held unconstitutional an Oregon Act which forbade parents from sending their children to private schools because such an act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S., at 534–535. As this Court said in *Prince* v. *Massachusetts,* 321 U.S. 158, at 166, the *Meyer* and *Pierce* decisions "have respected the private realm of family life which the state cannot enter."

I agree with Mr. Justice Harlan's statement in his dissenting opinion in *Poe* v. *Ullman,* 367 U.S. 497, 551–552: "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

My Brother STEWART, while characterizing the Connecticut birth control law as "an uncommonly silly law," *post,* at 527, would nevertheless let it stand on the ground that it is not for the courts to " 'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.' " *Post,* at 528. Elsewhere, I have stated that "[while I quite agree with Mr. Justice Brandeis that . . . 'a . . . State may . . . serve as a laboratory; and try novel social and economic experiments,' *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 280, 311 (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens. . . ."[8] The vice of the dissenters' views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

Footnotes at end of article.

The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," *Bates* v. *Little Rock,* 361 U.S. 516, 524. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida,* 379 U.S. 184, 196. See *Schneider* v. *Irvington,* 308 U.S. 147, 161.

Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any "subordinating [state] interest which is compelling" or that it is "necessary . . . to the accomplishment of a permissible state policy." The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations.

The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception, see *Tileston* v. *Ullman,* 129 Conn. 84, 26 A. 2d 582. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples.

See *Aptheker* v. *Secretary of State,* 378 U.S. 500, 514; *NAACP* v. *Alabama,* 377 U.S. 288, 307–308; *McLaughlin* v. *Florida, supra,* at 196. Here, as elsewhere, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438. The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. See Conn. Gen. Stat. §§ 53–218, 53–219 *et seq.* These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to "invade the area of protected freedoms." *NAACP* v. *Alabama, supra,* at 307. See *McLaughlin* v. *Florida, supra,* at 196.

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in *Poe* v. *Ullman, supra,* at 553.

"Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow less but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

MR. JUSTICE HARLAN, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers BLACK and STEWART in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to *restrict* the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to *impose* upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them. See, *e. g.,* my concurring opinions in *Pointer* v. *Texas,* 380 U.S. 400, 408, and *Griffin* v. *California,* 380 U.S. 609, 615, and my dissenting opinion in *Poe* v. *Ullman,* 367 U.S. 497, 522, at pp. 539–545.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," *Palko* v. *Connecticut,* 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in *Poe* v. *Ullman, supra,* I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

A further observation seems in order respecting the justification of my Brothers BLACK and STEWART for their "incorporation" approach to this case. Their approach does not rest on historical reasons, which are of course wholly lacking (see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949)), but on the thesis that by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance in the Bill of Rights, judges will thus be confined to "interpretation" of

specific constitutional provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the "vague contours of the Due Process Clause." *Rochin* v. *California*, 342 U.S. 165, 170.

While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times" (*post*, p. 522). Need one go further than to recall last Term's reapportionment cases, *Westberry* v. *Sanders*, 376 U.S. 1, and *Reynolds* v. *Sims*, 377 U.S. 533, where a majority of the Court "interpreted" "by the People" (Art. I, § 2) and "equal protection" (Amdt. 14) to command "one person, one vote," an interpretation that was made in the face of irrefutable and still unanswered history to the contrary? See my dissenting opinions in those cases, 376 U.S., at 20; 377 U.S., at 589.

Judicial self-restraint will not, I suggest, be brought about in the "due process" area by the historically unfounded incorporation formula long advanced by my Brother BLACK, and now in part espoused by my Brother STEWART. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. See *Adamson* v. *California*, 332 U.S. 46, 59, (Mr. Justice Frankfurter, concurring). Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.[10]

MR. JUSTICE WHITE, concurring in the judgment.

In my view this Connecticut law as applied to married couples deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment. I therefore concur in the judgment of the Court reversing these convictions under Connecticut's aiding and abetting statute.

It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," *Meyer* v. *Nebraska*, 262 U.S. 390, 399, and "the liberty . . . to direct the upbringing and education of children," *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–535, and that these are among "the basic civil rights of man." *Skinner* v. *Oklahoma*, 316 U.S. 535, 541. These decisions affirm that there is a "realm of family life which the state cannot enter" without substantial justification. *Prince* v. *Massachusetts*, 321 U.S. 158, 166. Surely the right invoked in this case, to be free of regulation of the intimacies of the marriage relationship, "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (opinion of Frankfurter, J.).

The Connecticut anti-contraceptive statute deals rather substantially with this relationship. For it forbids all married persons the right to use birth-control devices, regardless of whether their use is dictated by considerations of family planning, *Trubek* v. *Ullman*, 147 Conn. 633, 165 A. 2d 158, health, or indeed even of life itself *Buxton* v. *Ullman*, 147 Conn. 48, 156 A. 2d 508. The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. *Tileston* v. *Ullman*, 129 Conn. 84, 26 A. 2d 582.

And the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control, *State* v. *Nelson*, 126 Conn. 412, 11 A. 2d 856; *State* v. *Griswold*, 151 Conn. 544, 200 A. 2d 479. In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Skinner* v. *Oklahoma*, 316 U.S. 535; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *McLaughlin* v. *Florida*, 379 U.S. 184, 192.

An examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demeans the marriage relationship. The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty to, under the cases of this Court, require "strict scrutiny," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541, and "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U.S. 516, 524. See also *McLaughlin* v. *Florida*, 379 U.S. 184. But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause, *Zemel* v. *Rusk*, 381 U.S. 1.[11]

As I read the opinions of the Connecticut courts and the argument of Connecticut in this Court, the State claims but one justification for its anti-use statute. Cf. *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 530; *Martin* v. *Walton*, 368 U.S. 25, 28 (DOUGLAS, J., dissenting). There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion. Rather, the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.

Without taking issue with the premise that the fear of conception operates as a deterrent to such relationships in addition to the criminal proscriptions Connecticut has against such conduct. I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships. See *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239. Connecticut does not bar the importation or possession of contraceptive devices; they are not considered contraband material under state law, *State* v. *Certain Contraceptive Materials*, 126 Conn. 428, 11 A. 2d 863, and their availability in that State is not seriously disputed. The only way Connecticut seeks to limit or control the availability of such devices is through its general aiding and abetting statute whose operation in this context has been quite obviously ineffective and whose most serious use has been against birth-control clinics rendering advice to married, rather than unmarried, persons. Cf. *Yick Wo* v. *Hopkins*, 118 U.S. 356.

Indeed, after over 80 years of the State's proscription of use, the legality of the sale of such devices to prevent disease has never been expressly passed upon, although it appears that sales have long occurred and have only infrequently been challenged. This "undeviating policy . . . throughout all the long years . . . bespeaks more than prosecutorial paralysis." *Poe* v. *Ullman*, 367 U. S. 497, 502. Moreover, it would appear that the sale of contraceptives to prevent disease is plainly legal under Connecticut law.

In these circumstances one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State's policy against such relationships. Neither the state courts nor the State before the bar of this Court has tendered such an explanation. It is purely fanciful to believe that the broad proscription on use facilitates discovery of use by persons engaging in a prohibited relationship or for some other reason makes such use more unlikely and thus can be supported by any sort of administrative consideration.

Perhaps the theory is that the flat ban on use prevents married people from possessing contraceptives and without the ready availability of such devices for use in the marital relationship, there will be no or less temptation to use them in extramarital ones. This reasoning rests on the premise that married people will comply with the ban in regard to their marital relationship, nothwithstanding total nonenforcement in this context and apparent nonenforcibility, but will not comply with criminal statutes prohibiting extramarital affairs and the anti-use statute in respect to illicit sexual relationships, a premise whose validity has not been demonstrated and whose intrinsic validity is not very evident.

At most the broad ban is of marginal utility to the declared objective. A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, or ineffectiveness, as the broad anti-use statute under attack in this case. I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

MR. JUSTICE BLACK, with whom MR. JUSTICE STEWART joins, dissenting.

I agree with my Brother STEWART's dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers HARLAN, WHITE and GOLDBERG who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be de-

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sirable, or for telling people how devices could be used, I can think of no reasons at this time why their expressions of views would not be protected by the First and Fourteenth Amendments, which guarantee freedom of speech. Cf. *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1; *NAACP* v. *Button*, 371 U.S. 415. But speech is one thing; conduct and physical activities are quite another. See, *e.g.*, *Cox* v. *Louisiana*, 379 U.S. 536, 554–555; *Cox* v. *Louisiana*, 379 U.S. 559, 563–564; *id.*, 575–584 (concurring opinion); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490; cf. *Reynolds* v. *United States*, 98 U.S. 145, 163–164. The two defendants here were active participants in an organization which gave physical examinations to women, advised them what kind of contraceptive devices or medicines would most likely be satisfactory for them, and then supplied the devices themselves, all for a graduated scale of fees, based on the family income.

Thus these defendants admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law. Merely because some speech was used in carrying on that conduct—just as in ordinary life some speech accompanies most kinds of conduct—we are not in my view justified in holding that the First Amendment forbids the State to punish their conduct. Strongly as I desire to protect all First Amendment freedoms, I am unable to stretch the Amendment so as to afford protection to the conduct of these defendants in violating the Connecticut law. What would be the constitutional fate of the law if hereafter applied to punish nothing but speech is, as I have said, quite another matter.

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures.

I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. See, *e. g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 293 (concurring opinion); cases collected in *City of El Paso* v. *Simmons*, 379 U.S. 497, 517, n. 1 (dissenting opinion); Black, The Bill of Rights, 35 N.Y. U.L. Rev. 865.

For these reasons I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions.[12] I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

This brings me to the arguments made by my Brothers HARLAN, WHITE and GOLDBERG for invalidating the Connecticut law. Brothers HARLAN [13] and WHITE would invalidate it by reliance on the Due Process Clause of the Fourteenth Amendment, but Brother GOLDBERG, while agreeing with Brother HARLAN, relies also on the Ninth Amendment. I have no doubt that the Connecticut law could be applied in such a way as to abridge freedom of speech and press and therefore violate the First and Fourteenth Amendments. My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this particular case.

But my disagreement with Brothers HARLAN, WHITE and GOLDBERG is more basic. I think that if properly construed neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law. I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." [14] If these formulas based on "natural justice," or others which mean the same thing,[15] are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body.

Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose.

While I completely subscribe to the holding of *Marbury* v. *Madison*, 1 Cranch 137, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." [16] Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them.

The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.[17]

Of the cases on which my Brothers WHITE and GOLDBERG rely so heavily, undoubtedly the reasoning of two of them supports their result here—as would that a number of others which they do not bother to name, *e.g.*, *Lochner* v. *New York*, 198 U.S. 45, *Coppage* v. *Kansas*, 236 U.S. 1, *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504, and *Adkins* v. *Children's Hospital*, 261 U.S. 525. The two they do cite and quote from, *Meyer* v. *Nebraska*, 262 U.S. 390, and *Pierce* v. *Society of Sisters*, 268 U.S. 510, were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner* v. *New York*, *supra*, one of the cases on which he relied in *Meyer*, along with such other long-discredited decisions as, *e.g.*, *Adams* v. *Tanner*, 244 U.S. 590, and *Adkins* v. *Children's Hospital*, *supra*.

Meyer held unconstitutional, as an "arbitrary" and unreasonable interference with the right of a teacher to carry on his occupation and of parents to hire him, a state law forbidding the teaching of modern foreign languages to young children in the schools.[18] And in *Pierce*, relying principally on *Meyer*, Mr. Justice McReynolds said that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an "arbitary, unreasonable and unlawful interference" which threatened "destruction of their business and property." 268 U.S., at 536.

Without expressing an opinion as to whether either of those cases reached a correct result in light of our later decisions applying the First Amendment to the States through the Fourteenth,[19] I merely point out that the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept. Brothers WHITE and GOLDBERG also cite other cases, such as *NAACP* v. *Button*, 371 U.S. 415, *Shelton* v. *Tucker*, 364 U.S. 479, and *Schneider* v. *State*, 308 U.S. 147, which held that States in regulating conduct could not, consistently with the First Amendment as applied to them by the Fourteenth, pass unnecessarily broad laws which might indirectly infringe on First Amendment freedoms.[20] See *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7–8.[21] Brothers WHITE and GOLDBERG now apparently would start from this requirement that laws be narrowly drafted so as not to curtail free speech and assembly, and extend it limitlessly to require States to justify any law restricting "liberty" as my Brethren define "liberty." This would mean at the very least, I suppose, that every state criminal statute—since it must inevitably curtail "liberty" to some extent—would be suspect, and would have to be justified to this Court.[22]

My Brother GOLDBERG has adopted the recent discovery [23] that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," or is contrary to the

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"traditions and [collective] conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not consider "their personal and private notions." One may ask how they can avoid considering them.

Our Court certainly has no machinery with which to take a Gallup Poll.[24] And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "[collective] conscience of our people." Moreover, one would certainly have to look far beyond the language of the Ninth Amendment[25] to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress.

Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and Bill of Rights points the other way, and the very material quoted by my Brother GOLDBERG shows that the Ninth Amendment was intended to protect against the idea that "by enumerating particular exceptions to the grant of power" to the Federal Government, 'those rights which were not singled out, were intended to be assigned into the hands of the General Government [the United States], and were consequently insecure."[26] That Amendment was passed, not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication.

If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the "[collective] conscience of our people" is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court. This fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational.

The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.[27]

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I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.

And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, *e. g., Lochner v. New York*, 198 U. S. 45.

That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; *Olsen v. Nebraska ex rel. Western Reference & Bond Assn.*, 313 U. S. 236, and many other opinions.[28] See also *Lochner v. New York*, 198 U. S. 45, 74 (Holmes, J., dissenting).

In *Ferguson v. Skrupa*, 372 U. S. 726, 730, this Court two years ago said in an opinion joined by all the Justices but one[29] that—

"The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

And only six weeks ago, without even bothering to hear argument, this Court overruled *Tyson & Brother v. Banton*, 273 U.S. 418, which had held state laws regulating ticket brokers to be a denial of due process of law.[30] *Gold v. DiCarlo*, 380 U.S. 520. I find April's holding hard to square with what my concurring Brethren urge today. They would reinstate the *Lochner, Coppage, Adkins, Burns* line of cases, cases from which this Court recoiled after the 1930's, and which had been I thought totally discredited until now. Apparently my Brethren have less quarrel with state economic regulations than former Justices of their persuasion had. But any limitation upon their using the natural law due process philosophy to strike down any state law, dealing with any activity whatever, will obviously be only self-imposed.[31]

In 1798, when this Court was asked to hold another Connecticut law unconstitutional, Justice Iredell said:

"[I]t has been the policy of all the *American* states, which have, individually, framed their state constitutions since the revolution, and of the people of the *United States*, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." *Calder v. Bull*, 3 Dall. 386, 399 (emphasis in original).

I would adhere to that constitutional philosophy in passing on this Connecticut law today. I am not persuaded to deviate from the view which I stated in 1947 in *Adamson v. California*, 332 U.S. 46, 90–92 (dissenting opinion):

"Since *Marbury v. Madison*, 1 Cranch 137, was decided, the practice has been firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another. 'In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution: in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people." *Federal Power Commission v. Pipeline Co.*, 315 U.S. 575, 599, 601, n. 4.[32]

The late Judge Learned Hand, after emphasizing his view that judges should not use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their "personal preferences,"[33] made the statement, with which I fully agree, that:

"For myself it would be most irksome to be ruled by a bevy of Platonic Guardians even if I knew how to choose them, which I assuredly do not."[34]

So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK joins, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We are told that the Due Process of the Fourteenth Amendment is not, as such, the "guide" in this case. With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. Compare *Lochner* v. *New York*, 198 U.S. 45, with *Ferguson* v. *Skrupa*, 372 U.S. 726. My Brothers HARLAN and WHITE to the contrary, "[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa, supra* at 730.

As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States.[35] It has not even been argued that this is a law "respecting an establishment of religion, or prohibiting the free exercise thereof."[36] And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[37] No soldier has been quartered in any house.[38] There has been no search, and no seizure.[39] Nobody has been compelled to be a witness against himself.[40]

The Court also quotes the Ninth Amendment, and my Brother GOLDBERG'S concurring opinion relies heavily upon it. But to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the Tenth, which this Court held "states but a truism that all is retained which has not been surrendered," *United States* v. *Darby*, 312 U.S. 100, 124, was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.[41]

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.[42]

FOOTNOTES

[1] The Court said in full about this right of privacy:

"The principles laid down in this opinion [by Lord Camden in *Entick* v. *Carrington*, 19 How. St. Tr. 1029] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." 116 U.S., at 630.

[2] My Brother STEWART dissents on the ground that he "can find no . . . general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court." *Post*, at 530. He would require a more explicit guarantee than the one which the Court derives from several constitutional amendments. This Court, however, has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name. See, *e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Kent* v. *Dulles*, 357 U.S. 116; *Carrington* v. *Rash*, 380 U.S. 89, 96; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *NAACP* v. *Alabama*, 360 U.S. 240; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Meyer* v. *Nebraska*, 262 U.S. 390. To the contrary, this Court, for example, in *Bolling* v. *Sharpe*, *supra*, while recognizing that the Fifth Amendment does not contain the "explicit safeguard" of an equal protection clause, *id.*, at 499, nevertheless derived an equal protection principle from that Amendment's Due Process Clause. And in *Schware* v. *Board of Bar Examiners*, *supra*, the Court held that the Fourteenth Amendment protects from arbitrary state action the right to pursue an occupation, such as the practice of law.

[3] See, *e.g.*, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Gitlow* v. *New York*, *supra*; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Wolf* v. *Colorado*, 338 U.S. 25; *Robinson* v. *California*, 370 U.S. 660; *Gideon* v. *Wainwright*, 372 U.S. 335; *Malloy* v. *Hogan*, 378 U.S. 1; *Pointer* v. *Texas*, *supra*; *Griffin* v. *California*, 380 U.S. 609.

[4] Madison himself had previously pointed out the dangers of inaccuracy resulting from the fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist, No. 37 (Cooke ed. 1961), at 236.

[5] Alexander Hamilton was opposed to a bill of rights on the ground that it was unnecessary because the Federal Government was a government of delegated powers and it was not granted the power to intrude upon fundamental personal rights. The Federalist, No. 84 (Cooke ed. 1961), at 578–579. He also argued,

"I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power." *Id.* at 579.

The Ninth Amendment and the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," were apparently also designed in part to meet the above-quoted argument of Hamilton.

[6] The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government.

[7] This Amendment has been referred to as "The Forgotten Ninth Amendment," in a book with that title by Bennett B. Patterson (1955). Other commentary on the Ninth Amendment includes Redlich, Are There "Certain Rights . . . Retained by the People"? 37 N. Y. U. L. Rev. 787 (1962), and Kelsey The Ninth Amendment of the Federal Constitution, 11 Ind. L. J. 309 (1936). As far as I am aware, until today this Court has referred to the Ninth Amendment only in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 94–95; *Tennessee Electric Power Co.* v. *TVA*, 306 U. S. 118, 143–144; and *Ashwander* v. *TVA*, 297 U. S. 288, 330–331. See also *Calder* v. *Bull*, 3 Dall. 386, 388; *Loan Assn.* v. *Topeka*, 20 Wall. 655, 662–663.

In *United Public Workers* v. *Mitchell*, *supra*, at 94–95, the Court stated: "We accept appellants' contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments [is] involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment."

[8] In light of the tests enunciated in these cases it cannot be said that a judge's responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion. In fact, a hesitancy to allow too broad a discretion was a substantial reason leading me to conclude in *Pointer* v. *Texas*, *supra*, at 413–414, that those rights absorbed by the Fourteenth Amendment and applied to the States because they are fundamental apply with equal force and to the same extent against both federal and state governments. In *Pointer* I said that the contrary view would require "this Court to make the extremely subjective and excessively discretionary determination as to whether a practice, forbidden the Federal Government by a fundamental constitutional guarantee, is, as viewed in the factual circumstances surrounding each individual case, sufficiently repugnant to the notion of due process as to be forbidden the States." *Id.*, at 413.

[9] *Pointer* v. *Texas*, *supra*, at 413. See also the discussion of my Brother DOUGLAS, *Poe* v. *Ullman*, *supra*, at 517–518 (dissenting opinion).

[10] Indeed, my Brother BLACK, in arguing his thesis, is forced to lay aside a host of cases in which the Court has recognized fundamental rights in the Fourteenth Amendment without specific reliance upon the Bill of Rights. *Post*, p. 512, n. 4.

[11] Dissenting opinions assert that the liberty guaranteed by the Due Process Clause is limited to a guarantee against unduly vague statutes and against procedural unfairness at trial. Under this view the Court is without authority to ascertain whether a challenged statute, or its application, has a permissible purpose and whether the manner of regulation bears a rational or justifying relationship to this purpose. A long line of cases makes very clear that this has not been the view of this Court. *Dent* v. *West Virginia*, 129 U.S. 114; *Jacobson* v. *Massachusetts*, 197 U.S. 11; *Douglas* v. *Noble*, 261 U.S. 165; *Meyer* v. *Nebraska*, 262 U.S. 390; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Zemel* v. *Rusk*, 381 U.S. 1.

The traditional due process test was well articulated, and applied, in *Schware* v. *Board of Bar Examiners*, *supra*, a case which placed no reliance on the specific guarantees of the Bill of Rights.

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Dent* v. *West Virginia*, 129 U.S. 114. Cf. *Slochower* v. *Board of Education*, 350 U.S. 551; *Wieman* v. *Updegraff*, 344 U.S. 183. And see *Ex parte Secombe*, 19 How. 9, 13. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas* v. *Noble*, 261 U.S. 165; *Cummings* v. *Missouri*, 4 Wall. 277, 319–320. Cf. *Nebbia* v. *New York*, 291 U.S. 502. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." 353 U.S., at 238–239. Cf. *Martin* v. *Walton*, 368 U.S. 25, 26 (DOUGLAS, J., dissenting).

[12] The phrase "right to privacy" appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others. The Right to Privacy, 4 Harv. L. Rev. 193. Largely as a result of this article, some States have passed statutes creating such a cause of action, and in others state courts have done the same thing by exercising their powers as courts of common law. See generally 41 Am. Jur. 926–927. Thus the Supreme Court of Georgia, in granting a cause of action for damages to a man whose picture had been used in a newspaper advertisement without his consent, said that "A right of privacy in matters purely private is . . . derived from natural law" and that "The conclusion reached by us seems to be . . . thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law . . ." *Pavesich* v. *New England Life Ins. Co.*, 122 Ga. 190, 194, 218. 50 S. E. 68, 70, 80. Observing that "the right of privacy . . . presses for recognition here," today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with "privacy."

[13] Brother HARLAN's views are spelled out at greater length in his dissenting opinion in *Poe* v. *Ullman*, 367 U.S. 497, 539–555.

[14] Indeed, Brother White appears to have gone beyond past pronouncements of the natural law due process theory, which at least said that the Court should exercise this unlimited power to declare state acts unconstitutional with "restraint." He now says that, instead of being presumed constitutional (see *Munn* v. *Illinois*, 94 U.S. 113, 123; compare *Adkins* v. *Children's Hospital*, 261 U.S. 525, 544), the statute here "bears a substantial burden of justification when attacked under the Fourteenth Amendment."

[15] A collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice would fill many pages. Thus it has been said that this Court can forbid state action which "shocks the conscience," *Rochin* v. *California*, 342 U.S. 165, 172, sufficiently to "shock itself into the protective arms of the Constitution," *Irvine* v. *California*, 347 U.S. 128, 138 (concurring opinion). It has been urged that States may not run counter to the "decencies of civilized conduct," *Rochin*, *supra*, at 173, or "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U.S. 97, 105, or to "those canons of decency and fairness which express the notions of justice of English-speaking peoples," *Malinski* v. *New York*, 324 U.S. 401, 417 (concurring opinion), or to "the community's sense of fair play and decency," *Rochin*, *supra*, at 173. It has been said that we must decide whether a state law is "fair, reasonable and appropriate," or is rather "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into . . . contracts," *Lochner* v. *New York*, 198 U.S. 45, 56. States, under this philosophy, cannot act in conflict with "deeply rooted feelings of the community," *Haley* v. *Ohio*, 332 U.S. 596, 604 (separate opinion), or with "fundamental notions of fairness and justice," *id.*, 607. See also, *e.g.*, *Wolf* v. *Colorado*, 338 U.S. 25, 27 ("rights . . . basic to our free society"); *Hebert* v. *Louisiana*, 272 U.S. 312, 316 ("fundamental principles of liberty and justice"); *Adkins* v. *Children's Hospital*, 261 U.S. 525, 561 ("arbitrary restraint of . . . liberties"); *Betts* v. *Brady*, 316 U.S. 455, 462 ("denial of fundamental fairness, shocking to the universal sense of justice"); *Poe* v. *Ullman*, 367 U.S. 497, 539 (dissenting opinion) ("intolerable and unjustifiable"). Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can "not tolerate." *Linkletter* v. *Walker*, *post*, p. 618, at 631.

[16] See Hand, The Bill of Rights (1958) 70: "[J]udges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision." See also *Rochin* v. *California*, 342 U.S. 165, 174 (concurring opinion). But see *Linkletter* v. *Walker*, *supra*, n. 4, at 631.

[17] This Court held in *Marbury* v. *Madison*, 1 Cranch 137, that this Court has power to invalidate laws on the ground that they exceed the constitutional power of Congress or violate some specific prohibition of the Constitution. See also *Fletcher* v. *Peck*, 6 Cranch 87. But the Constitutional Convention did on at least two occasions reject proposals which would have given the federal judiciary a part in recommending laws or in vetoing as bad or unwise the legislation passed by the Congress. Edmund Randolph of Virginia proposed that the President

". . . and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that a particular Legislature be again negatived by * * * [original wording illegible] of the members of each branch." 1 The Records of the Federal Convention of 1787 (Farrand ed. 1911) 21.

In support of a plan of this kind James Wilson of Pennsylvania argued that:

". . . It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature." 2 *id.*, at 73.

Nathaniel Gorham of Massachusetts "did not see the advantages of employing the Judges in this way. As Judges they are not to be presumed to possess any pecular knowledge of the mere policy of public measures." *Ibid.*

Elbridge Gerry of Massachusetts likewise opposed the proposal for a council of revision:

". . . He relied for his part on the Representatives of the people as the guardians of their Rights & interests. it [the proposal] was making the Expositors of the Laws, the Legislators which ought never to be done." *Id.*, at 75.

And at another point:

"Mr. Gerry doubts whether the Judiciary ought to form a part of it [the proposed council of revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. . . . It was quite foreign from the nature of ye. office to make them judges of the policy of public measures." 1 *Id.*, at 97–98.

Madison supported the proposal on the ground that "a Check [on the legislature] is necessary." *Id.*, at 108. John Dickinson of Delaware opposed it on the ground that "the Judges must interpret the Laws they ought not to be legislators." *Ibid.* The proposal for a council of revision was defeated.

The following proposal was also advanced:

"To assist the President in conducting the Public Affairs there shall be a Council of State composed of the following officers— 1. The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the laws of the U.S. may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union . . . ." 2 *id.* at 342. This proposal too was rejected.

[18] In *Meyer*, in the very same sentence quoted in part by my Brethren in which he asserted that the Due Process Clause gave

an abstract and inviolable right "to marry, establish a home and bring up children," Mr. Justice McReynolds also asserted the heretofore discredited doctrine that the Due Process Clause prevented States from interfering with "the right of the individual to contract." 262 U.S., at 399.

[19] Compare *Poe* v. *Ullman*, 367 U.S. at 543–544 (HARLAN, J., dissenting).

[20] The Court has also said that in view of the Fourteenth Amendment's major purpose of eliminating state-enforced racial discrimination, this Court will scrutinize carefully any law embodying a racial classification to make sure that it does not deny equal protection of the laws. See *McLaughlin* v. *Florida*, 379 U.S. 184.

[21] None of the other cases decided in the past 25 years which Brothers WHITE and GOLDBERG cite can justly be read as holding that judges have power to use a natural law due process formula to strike down all state laws which they think are unwise, dangerous, or irrational. *Prince* v. *Massachusetts*, 321 U.S. 158, *upheld* a state law forbidding minors from selling publications on the streets. *Kent* v. *Dulles*, 357 U.S. 116, recognized the power of Congress to restrict travel outside the country so long as it accorded persons the procedural safeguards of due process and did not violate any other specific constitutional provision. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, held simply that a State could not, consistently with due process, refuse a lawyer a license to practice law on the basis of a finding that he was morally unfit when there was no evidence in the record, 353 U.S., at 246–247, to support such a finding. Compare *Thompson* v. *City of Louisville*, 362 U.S. 199, in which the Court relied in part on *Schware*. See also *Konigsberg* v. *State Bar*, 353 U.S. 252. And *Bolling* v. *Sharpe*, 347 U.S. 497, merely recognized what had been the understanding from the beginning of the country, an understanding shared by many of the draftsmen of the Fourteenth Amendment, that the whole Bill of Rights, including the Due Process Clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law. Compare *Chambers* v. *Florida*, 309 U.S. 227, 240–241. With one exception, the other modern cases relied on by my Brethren were decided either solely under the Equal Protection Clause of the Fourteenth Amendment or under the First Amendment, made applicable to the States by the Fourteenth, some of the latter group involving the right of association which this Court has held to be a part of the rights of speech, press and assembly guaranteed by the First Amendment. As for *Aptheker* v. *Secretary of State*, 378 U.S. 500, I am compelled to say that if that decision was written or intended to bring about the abrupt and drastic reversal in the course of constitutional adjudication which is now attributed to it, the change was certainly made in a very quiet and unprovocative manner, without any attempt to justify it.

[22] Compare *Adkins* v. *Children's Hospital*, 261 U.S. 525, 568 (Holmes, J., dissenting):

"The earlier decisions upon the same words [the Due Process Clause] in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts."

[23] See Patterson, The Forgotten Ninth Amendment (1955). Mr. Patterson urges that the Ninth Amendment be used to protect unspecified "natural and inalienable rights." P. 4. The Introduction by Roscoe Pound states that "there is a marked revival of natural law ideas throughout the world. Interest in the Ninth Amendment is a symptom of that revival." P. iii.

In Redlich, Are There "Certain Rights . . . Retained by the People"?, 37 N. Y. U. L. Rev. 787, Professor Redlich, in advocating reliance on the Ninth and Tenth Amendments to invalidate the Connecticut law before us, frankly states.

"But for one who feels that the marriage relationship should be beyond the reach of a state law forbidding the use of contraceptives, the birth control case poses a troublesome and challenging problem of constitutional interpretation. He may find himself saying, 'The law is unconstitutional—but why?' There are two possible paths to travel in finding the answer. One is to revert to a frankly flexible due process concept even on matters that do not involve specific constitutional prohibitions. The other is to attempt to evolve a new constitutional framework within which to meet this and similar problems which are likely to arise." *Id.*, at 798.

[24] Of course one cannot be obvious to the fact that Mr. Gallup has already published the results of a poll which he says show that 46% of the people in this country believe schools should teach about birth control. Washington Post, May 21, 1965, p. 2, col. 1. I can hardly believe, however, that Brother GOLDBERG would view 46% of the persons polled as so overwhelming a proportion that this Court may now rely on it to declare that the Connecticut law infringes "fundamental" rights, and overrule the long-standing view of the people of Connecticut expressed through their elected representatives.

[25] U.C. Const., Amend. IX, provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[26] 1 Annals of Congress 439. See also II Story, Commentaries on the Constitution of the United States (5th ed. 1891): "This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies." *Id.*, at 651 (footnote omitted).

[27] Justice Holmes in one of his last dissents, written in reply to Mr. Justice McReynolds' opinion for the Court in *Baldwin* v. *Missouri*, 281 U.S. 586, solemnly warned against a due process formula apparently approved by my concurring Brethren today. He said: "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law,' if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass." 281 U.S., at 595. See 2 Holmes-Pollock Letters (Howe ed. 1941) 267–268.

[28] *E.g.*, in *Day-Brite Lighting, Inc.*, v. *Missouri*, 342 U.S. 421, 423, this Court held that "Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."

Compare *Gardner* v. *Massachusetts*, 305 U.S. 559, which the Court today apparently overrules, which held that a challenge under the Federal Constitution to a state law forbidding the sale or furnishing of contraceptives did not raise a substantial federal question.

[29] Brother HARLAN, who has consistently stated his belief in the power of courts to strike down laws which they consider arbitrary or unreasonable, see, *e.g.*, *Poe* v. *Ullman*, 367 U.S. 497, 539–555 (dissenting opinion), did not join the Court's opinion in *Ferguson* v. *Skrupa*.

[30] Justice Holmes, dissenting in *Tyson*, said: "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." 273 U.S., at 446.

[31] Compare *Nicchia* v. *New York*, 254 U.S. 228, 231, upholding a New York dog-licensing statute on the ground that it did not "deprive dog owners of liberty without due process of law." And as I said concurring in *Rochin* v. *California*, 342 U.S. 165, 175, "I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards" urged by my concurring Brethren today.

[32] *Gideon* v. *Wainwright*, 372 U.S. 335, and similar cases applying specific Bill of Rights provisions to the States do not in my view stand for the proposition that this Court can rely on its own concept of "ordered liberty" or "shocking the conscience" or natural law to decide what laws it will permit state legislatures to enact. *Gideon* in applying to state prosecutions the Sixth Amendment's guarantee of right to counsel followed *Palko* v. *Connecticut*, 302 U.S. 319, which had held that specific provisions of the Bill of Rights, rather than the Bill of Rights as a whole, would be selectively applied to the States. While expressing my own belief (not shared by MR. JUSTICE STEWART) that all the provisions of the Bill of Rights were made applicable to the States by the Fourteenth Amendment, in my dissent in *Adamson* v. *California*, 332 U.S. 46, 89, I also said:

"If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process."

Gideon and similar cases merely followed the *Palko* rule, which in *Adamson* I agreed to follow if necessary to make Bill of Rights safeguards applicable to the States. See also *Pointer* v. *Texas*, 380 U.S. 400; *Malloy* v. *Hogan*, 378 U.S. 1.

[33] Hand, The Bill of Rights (1958) 70. See note 5, *supra*. See generally *id.*, at 35–45.

[34] *Id.*, at 73. While Judge Hand condemned as unjustified the invalidation of state laws under the natural law due process formula, see *id.*, at 35–45, he also expressed the view that this Court in a number of cases had gone too far in holding legislation to be in violation of specific guarantees of the Bill of Rights. Although I agree with his criticism of use of the due process formula, I do not agree with all the views he expressed about

construing the specific guarantees of the Bill of Rights.

[33] The Amendments in question were, as everyone knows, originally adopted as limitations upon the power of the newly created Federal Government, not as limitations upon the powers of the individual States. But the Court has held that many of the provisions of the first eight amendments are fully embraced by the Fourteenth Amendment as limitations upon state action, and some members of the Court have held the view that the adoption of the Fourteenth Amendment made every provision of the first eight amendments fully applicable against the State. See *Adamson* v. *California*, 332 U.S. 46, 68 (dissenting opinion of Mr. JUSTICE BLACK).

[34] U. S. Constitution, Amendment I. To be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the First Amendment relating to religion, then most criminal laws would be invalidated. See, *e. g.*, the Ten Commandments. The Bible, Exodus 20:2–17 (King James).

[37] U. S. Constitution, Amendment I. If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial First Amendment claim. But their activities went far beyond mere advocacy. They prescribed specific contraceptive devices and furnished patients with the prescribed contraceptive materials.

[38] U. S. Constitution, Amendment III.

[39] U. S. Constitution, Amendment IV.

[40] U. S. Constitution, Amendment V.

[41] Cases like *Shelton* v. *Tucker*, 364 U. S. 479 and *Bates* v. *Little Rock*, 361 U. S. 516, relied upon in the concurring opinions today, dealt with true First Amendment rights of association and are wholly inapposite here. See also, *e. g.*, *NAACP* v. *Alabama*, 357 U. S. 449; *Edwards* v. *South Carolina*, 372 U. S. 229. Our decision in *McLaughlin* v. *Florida*, 379 U. S. 184, is equally far afield. That case held invalid under the Equal Protection Clause, a state criminal law which discriminated against Negroes.

The Court does not say how far the new constitutional right of privacy announced today extends. See, *e. g.*, Mueller, Legal Regulation of Sexual Conduct, at 127; Ploscowe, Sex and the Law, at 189. I suppose, however, that even after today a State can constitutionally still punish at least some offenses which are not committed in public.

[42] See *Reynolds* v. *Sims*, 377 U. S. 533, 562. The Connecticut House of Representatives recently passed a bill (House Bill No. 2462) repealing the birth control law. The State Senate has apparently not yet acted on the measure, and today is relieved of that responsibility by the Court. New Haven Journal-Courier, Wed., May 19, 1965, p. 1, col. 4, and p. 13, col. 7.

Mr. BAYH. I do recall reading the case, and I have read it extensively. The Court stresses importance of privacy and freedom to all individuals. We are talking about due process, we are talking about equal protection, and we are talking about first amendment freedoms.

Now on a more general level, it would take a pretty brave soul to be willing to stand up and say, "Senator CRANSTON, Senator BAYH, et cetera, et cetera," if they are surrounded by government agents taking pictures, or if they know someone is following them in and out of the shopping center and this type of thing.

It is pretty hard for the Senator from California or me to envision how others might feel about free speech because he and I say pretty much what we wish to say and let the sticks, stones, and brickbats fall where they may.

The Supreme Court has said that the average citizen shall have his right to free speech unhampered and unharassed by government activity. Harassment, continually putting an individual under surveillance, is a violation of the right to privacy. There is sort of an umbrella of protection for those rights.

Mr. CRANSTON. I would appreciate it if the Senator, in addition to placing in the RECORD the material to which he referred, at a future time would develop for me the significance of the Griswold case and the significance or lack of significance of it with respect to Mr. Rehnquist's statements and views. That would be of great benefit to those of us who are considering the matter, as well as the entire matter of the right of privacy which is involved here.

Mr. BAYH. Let me point out that Mr. Rehnquist declined to comment specifically on Griswold, when I inquired of him.

Mr. CRANSTON. His lack of argument in favor of such a case may be of some significance here.

Mr. BAYH. He did not comment on the Griswold case. Let me make clear that he declined to comment on the doctrine of that case.

Mr. CRANSTON. Is it possible that a nominee of his intellectual capacity and scholarly background is not aware of the Griswold decision?

Mr. BAYH. I doubt that very much. And if his memory ever did slip him, you may be sure that the Senator from Indiana would remind him. It is just that philosophically the Senator believes that the nominee is not fully cognizant of this, as well as the importance of several other rights.

Mr. CRANSTON. On another matter that I noted in looking at the committee report, and a matter I am not entirely clear on, Mr. Rehnquist's proponents in the committee report cite that his vote in favor of the Model State Antidiscrimination Act as significant in terms of his news on human rights. I would like to inquire is to what significance the Senator from Indiana places upon it, and how he interprets it.

Mr. BAYH. I appreciate the Senator asking that question because this is an important point. When I asked some of the supporters of the nominee to come forward with evidence that the nominee did in fact have the kind of sensitivity in human rights and civil rights they said he did, this was the only thing that has been forthcoming. I think it is a very thin reed on which to base one's commitments to human rights.

In the hearings I asked the nominee for evidence of activity and interest he previously expressed that showed a commitment to equal rights or civil rights. The nominee apparently did not feel his participation in this uniform commission was of such importance to cause him to mention it. It was not until it was brought to light—in fact, it was in the discussion of the Committee on the Judiciary at the time we voted on the nominee—that suddenly one of the proponents said the fact that he finally voted for this is evidence of the fact he believes now in a major commitment to human rights.

The record will show that Mr. Rehnquist represented the State of Arizona on the Uniform Commission. Before the commission was a Model Antidiscrimination Act. The transcript of the record shows that on one occasion Mr. Rehnquist sought to strike from the Model Act the provision which would make it unlawful to participate in blockbusting, that insidious tactic followed by a few unscrupulous realtors to make a fast buck.

I have cited several times for the RECORD that members of the commission felt that Mr. Rehnquist's argument was that not only a policy matter, but also a constitutional law matter, was involved in this provision. That is example No. 1.

Example No. 2 was the fact that Mr. Rehnquist also tried to strike from the provisions of the Model Act a section that would permit employers voluntarily—not mandatorily but voluntarily—to compensate in future hiring practices for discrimination that had gone on in previous hiring practices to try to sustain some balance in the work force. This is sort of a Philadelphia plan in the embryo stage, and Mr. Rehnquist, although he states he was an advocate of the Philadelphia plan, when this plan was before the Commissioners he tried to wipe out that provision. He was defeated on both of those occasions.

Point three is that he succeeded in leading an effort that made the Antidiscrimination Act a model act instead of a uniform act. The distinction between a uniform act and a model act, I think is relevant. A uniform act binds each Commissioner to go forth to his own State legislature at home and try to get the uniform act enacted. A model act is one proposed where there is little chance of a substantial number of the States enacting such provision. So here on two occasions did he not only try to strike the provision but he also tried to make it into a model act.

In the final analysis he did, along with all other Commissioners, except the Commissioners of Mississippi and Alabama, vote for the act. But that is hardly the kind of major commitment to human rights or even tacit commitment to human rights that would be expected. It is like the fellow who does everything he can to derail the train and then when he sees he is going to be defeated he rushes to jump on the back platform before the train gets out of the station.

Mr. CRANSTON. As I understand it, the action of Mr. Rehnquist in voting for that model act was not significant in the way the committee report would indicate it was, first, because before he finally cast a vote for it, he tried his best to get the act transformed from a more sweeping measure as a uniform law into a model law.

Second, he did not place significance on it because he apparently did not even remember it when he was testifying and citing his record in the field.

Third, I would like to point out to the Senator that the President stated, be-

fore making the two nominations, one of which has been disposed of and one of which is still pending, that he proposed to nominate men to the Supreme Court who reflected his own philosophy, and he said that was a conservative philosophy.

Given what the Senator from Indiana has said, the facts now appear to be that Mr. Rehnquist does not even reflect the President's philosophy in this specific matter. In fact, Mr. Rehnquist's philosophy represents a more conservative, radical, extreme view, because the equal employment opportunities procedures mandated by President Nixon in a Federal Employment Executive order promulgated in 1969 required affirmative action to redress past discrimination in hiring whereas what Mr. Rehnquist actually opposed having done at the local level was to permit individual private employers, if they wished, to adopt such equal employment plans.

Mr. BAYH. And the President has also said he was against blockbusting.

Mr. CRANSTON. Yes. So here we have a nominee who is more extreme by far than Mr. Nixon in his attitudes on this matter.

Mr. BAYH. I appreciate the fact that the Senator from California brought that up, because I think to submit that a Supreme Court nominee is a great humanitarian, or meets even the minimum standards of human sensitivity that a Supreme Court judge should have, when he has a rather bad record as a commissioner of uniform laws, is to base the case, as I said a moment ago on a rather shaky reed.

Mr. EASTLAND. Mr. President, I have received a letter from the nominee about something which has been mentioned in the debate—the memorandum which he wrote to Mr. Justice Jackson. I did not think that he needed to write this letter, because the memorandum was certainly what was the law at that time, which was in 1952. I judge that he wrote this letter to be perfectly fair with the Senate. The letter is addressed to me:

DEAR MR. CHAIRMAN: A memorandum in the files of Justice Robert H. Jackson bearing my initials has become the subject of discussion in the Senate debate on my confirmation, and I therefore take the liberty of sending you my recollection of the facts in connection with it. As best I can reconstruct the circumstances after some nineteen years, the memorandum was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of *his* views at the conference of the Justices, rather than as a statement of my views.

At some time during the October Term, 1952, when the School Desegregation Cases were pending before the Supreme Court, I recall Justice Jackson asking me to assist him in developing arguments which he might use in conference when cases were discussed. He expressed concern that the conference should have the benefit of all of the arguments in support of the constitutionality of the "separate but equal" doctrine, as well as those against its constitutionality. In carrying out this assignment, I recall assembling historical material and submitting it to the Justice, and I recall considerable oral discussion with him as to what type of presentation he would make when the cases came before the Court conference.

The particular memorandum in question differs sharply from the normal sort of clerk's memorandum that was submitted to Justice Jackson during my tenure as a clerk. Justice Jackson expected case submissions from his clerks to analyze with some precision the issues presented by a case, the applicable authorities, and the conflicting arguments in favor either of granting or denying *certiorari*, or of affirming or reversing the judgments below. While he did expect his clerks to make recommendations based on their memoranda as to whether *certiorari* should be granted or denied, he very definitely did not either expect or welcome the incorporation by a clerk of his own philosophical view of how a case should be decided.

In other words, right there, Justice Jackson gave assignments to his clerk, and this was an assignment which he gave to Mr. Rehnquist, the nominee.

I read further:

The memorandum entitled "Random Thoughts on the Segregation Cases" is consistent with virtually none of these criteria. It is extremely informal in style, loosely organized, largely philosophical in nature, and virtually devoid of any careful analysis of the legal issues raised in these cases. The type of argument made is historical, rather than legal. Most important, the tone of the memorandum is not that of a subordinate submitting his own recommendations to his superior (which was the tone used by me, and I believe by the Justice's other clerks, in their submissions), but instead quite imperious—the tone of one equal exhorting other equals.

Because of these facts, I am satisfied that the memorandum was not designed to be a statement of *my* views on these cases. Justice Jackson not only would not have welcomed such a submission in this form, but he would have quite emphatically rejected it and, I believe, admonished the clerk who had submitted it. I am fortified in this conclusion because the bald, simplistic conclusion that "*Plessy* v. *Ferguson* was right and should be re-affirmed" is not an accurate statement of my own views at the time.

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 any introductory language make me think that it was prepared very shortly after one of our oral discussions of the subject. It is absolutely inconceivable to me that I would have prepared such a document without previous oral discussion with him and specific instructions to do so.

In closing, I would like to point out that during the hearings on my confirmation, I mentioned the Supreme Court's decision in *Brown* v. *Board of Education* in the context of an answer to a question concerning the binding effect of precedent. I was not asked my views on the substantive issues in the *Brown* case. In view of some of the recent Senate floor debate, I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision.

Yours very truly,
WILLIAM H. REHNQUIST,
Assistant Attorney General,
Office of Legal Counsel.

Mr. BAYH subsequently said: I read a recent letter from Mr. Rehnquist received by our distinguished chairman of the Committee on the Judiciary, and since it has been introduced into the RECORD, I will not ask that it be introduced. But I would hope that each Member of this Senate will read that letter and then judge the veracity of it for himself, so that each Senator may do so in proper perspective.

Mr. President, I ask unanimous consent that immediately following the letter from the nominee, the memorandum from the nominee to Justice Jackson be printed in the RECORD.

Thus, each of us will have the opportunity to look at the wording of the memorandum and of the letter which attempts to explain it.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

A RANDOM THOUGHT ON THE SEGREGATION CASES

One-hundred fifty years ago this Court held that it was the ultimate judge of the restrictions which the Constitution imposed on the various branches of the national and state government. *Marbury* v. *Madison,* other than the personal predilections of the Justices.

As applied to questions of inter-state or state-federal relations, as well as to inter-departmental disputes within the federal government, this doctrine of judicial review has worked well. Where theoretically co-ordinate bodies of government are disputing, the Court is well suited to its role as arbiter. This is because these problems involve much less emotionally charged subject matter than do those discussed below. In effect, they determine the skeletal relations of the governments to each other without influencing the substantive business of those governments.

As applied to relations between the individual and the state, the system has worked much less well. The Constitution, of course, deals with individual rights, particularly in the First Ten and the Fourteenth Amendments. But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. *Fletcher* v. *Peck,* in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. *Scott* v. *Sanford* was the result of Taney's effort to protect slaveholders from legislative interference.

After the Civil War, business interest came to dominate the Court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. Championed first by Field, then by Peckham and Brewer, the high water mark of the trend in protecting corporations against legislative influence was probably *Lochner* v. *N.Y.* To the majority opinion in that case, Holmes replied that the Fourteenth Amendment did not enact Herbert Spencer's Social Statics. Other cases coming later in a similar vein were *Adkins* v. *Children's Hospital, Hammer* v. *Dagenhart, Tyson* v. *Banton, Ribnik* v. *McBride.* But eventually the Court called a halt to this reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

In these cases now before the Court, the Court is, as Davis suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction. If this Court, because its

members individually are "liberal" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction. To the argument made by Thurgood, not John Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are.

One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy* v. *Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's Social Statics, it just as surely did not enact Myrdahl's American Dilemma.

Mr. EASTLAND. Mr. President, I have noticed that the Senators who have read from this memorandum did not know where it came from, and did not realize the facts that were behind it.

Of course, a clerk is not going to give the judge that he works for his own views on a subject. In this instance, he was simply given an assignment, and he fulfilled that assignment, which he was bound to do. It was just like the administrative assistant of a Senator. They do not come in unsolicited, at least mine do not, and try to influence me. But I do give them assignments and expect them to fulfill those assignments.

Mr. Rehnquist is being mistreated here, and being badly mistreated, because there was no attempt to get the facts, but just to read a bald statement that appeared in Justice Jackson's papers, when, after all, this was an assignment which the judge had instructed Mr. Rehnquist to perform.

Mr. SCOTT. Mr. President, will the distinguished chairman of the committee yield, without losing his right to the floor?

Mr. EASTLAND. I yield.

Mr. SCOTT. I would like it to be noted that this letter is in accordance with what I said publicly yesterday, and I would like to repeat those comments now.

First of all, I agree that it is customary for Senators as well as Justices to ask their staffs to prepare points of view on one side or another of a case. We have often had the experience that we ask our staffs to prepare separate memorandums on each side, and then we make up our own minds. It is perfectly clear that this is what was done here, and I am informed reliably that Mr. Justice Jackson had already informed himself on one side of the issue in discussions with the other members of his staff, but that he wished some additional commentary and light on the opposing point of view, namely, the point of view of stare decisis: Shall we stand by the decisions? As law clerks have done from time immemorial——

Mr. EASTLAND. After all, is that not what that statement was? That statement to Justice Jackson was just simply a reiteration of what the law was at that time.

Mr. SCOTT. That is what he was doing, as law clerks have done from time immemorial.

Mr. EASTLAND. And the doctrine of stare decisis certainly applied.

Mr. SCOTT. At that point the doctrine of stare decisis clearly applied, and law clerks, I suspect, as far back as Coke and Blackstone were supplying memorandums on one side or the other to their principals.

I happen to be one who strongly disagreed with Plessy against Ferguson when I read it as a lawyer. But it was the law of the land for 75 years. The Court was in the process of reviewing and considering whether to arrive at new directions. A law clerk is asked to survey the status of the law: What is the law where we are now, what does it say? And he did that.

I was concerned about something else, and I mentioned this publicly yesterday:

Some of the press said to me:

Oh, yes, Mr. Rehnquist says that Brown against Board of Education is the law of the land. But is he for it?

I said:

I have talked to him. He said he expected it to continue to be the law of the land, that it was a humane decision, and he says it is his judgment that it was good law.

Immediately my friends from the press leapt on me almost as one man, and said:

Oh, yes, but does he really believe it is good law? Now he says so.

Senator after Senator has stood up here and testified to the integrity of this man. The Senators who criticize him support his integrity and his reputation for truthfulness. He says it is good law, it is a good case, he believes in it. And then someone asks me:

Oh, yes, but does he think it is morally right?

Well, we fought that issue out for over a year 20 years ago, and if necessary, I will ask him whether it is morally right or not. But he says it is fair; he says it is forthright; he says in his letter he fully supports the legal reasoning and the rightness from the standpoint of fundamental fairness of the Brown decision. I do not see how you can go any farther than that.

It seems to me that this knocks into a cocked hat all of this skillfully constructed house of cards—this lonely effort, largely by a very few people, to create a condition which does not exist, to create in the minds of the Senate and the public the fact that there is something in the record which, if they could only get it out, would be detrimental.

Here is the answer. He was a law clerk. The Senators who criticize him would fire members of their own staffs if they told them how to vote. This law clerk said he would not dare tell the Justice how to vote, and he wrote this as a memorandum, so far as his recollection certifies, to be used by equals among equals. As a matter of fact, as we all know, Mr. Justice Jackson voted in the unanimous opinion of the court in Brown against Board of Education.

Mr. EASTLAND. That was 2 years later.

Mr. SCOTT. It was 2 years later. But it seems to me that we are going through a charade here. We are going through a charade where those who are devoid of a case are using time as a substitute for logic. They are using the days of the week as an alternative to reason. They are using the clock in lieu of conceding the right to other Senators to proceed with the business of the Nation.

We can be through; we can be out of here Saturday. There is now pending an agreement which is not for me to state, but we are very close to an agreement whereby the other body and the Senate can agree on everything pending before us which we undertook to take up this year. We can agree on it and be out of here Friday or Saturday.

But, here or there, a lone objector stands up and says:

You can't go home until I can continue my fruitless search. You can't leave this Chamber until my bootless effort to find some reason for my arguments somehow succeeds because somewhere, somehow, some other newspaper or magazine is going to come up with another flash bulletin and it will take two or three days to demolish it.

This is only an effort to gain time. It is unfortunate, and there is a way to stop it. The way to stop it is by cloture. The way to stop it is to file a cloture motion, and I feel like filing that cloture motion. It will be filed—a motion to get out of here by Saturday—because we have finished our business, if we can vote on this nomination.

I cannot believe that one, two, or three Senators really want to keep the rest of the Senators here until Christmas. If they do, let them bear the onus. There is onus enough to go around, and I will bring in a large package of onus each day and distribute it generally and apply it where it will do the most good, I hope. If they are going to keep Senators here until Christmas, all right; I will join in that; and if necessary I will file a cloture motion every day from now to the end of the session. I do not believe it will be necessary. I think Senators want to finish their business. I think they want to proceed responsibly. I do not think they want to lead the rest of their colleagues into an unwilling residence in a Chamber in which we have become far too much accustomed to the company of each other, for the good of the Nation or for our own good.

So let us see what happens. A cloture motion will be filed. It may be this afternoon; it may be tomorrow morning. Senators will have a chance to vote on Friday; on Saturday; on Monday, if necessary, and Tuesday, Wednesday, Thursday, Friday, and Saturday. I can call the days of the week too; I can count, too, and I can read time, too.

I know what is going on around here. Let us find out. There is no cause for

extended further debate here. Every issue has been raised except the latest flash excitements; and as these excitements arise, they can be put out—these brush fires—one by one. We will not run out of water to extinguish the brush fires that have no reason to be ignited in the first place. But we can do better than that. We can be responsible. We can be responsible and vote for cloture. We can say to those who have nothing to say in this cause, and we can say to those who having nothing to add to this cause, and we can say to those who have nothing to contribute to this cause, except their suspicion that they do not like what the nominee will do on the bench, let the Senate exercise its constitutional duty and vote on the President's nominee.

I probably will not like some things this nominee or that nominee or the other may do on the Bench. I never wholly agreed with a Supreme Court Justice yet. That is not proof that they are wrong and I am right.

As the Romans said, "Carpe diem." We will seize this day. We will seize it by cloture.

But wait until the day when another President comes in with another Supreme Court Justice nominee, with a different philosophy, and then the argument will be made, if we are so unwise as to make it a precedent:

> No, we don't agree with his opinions. We don't know what they will be. He has changed them in 20 years.

I know Members of the other body—two from a single State, for example—who have changed their views on busings in 1 year. By golly, if Representatives and Senators can change their views in a year—and I know some Senators, including myself, who have changed them in 5 minutes when we have found evidence to support it—why cannot he change his views in 20 years?

They say they believe him. But they are afraid he will not agree with them on the Bench. That is the most murderous, antilibertarian theory I have ever heard. I am a Jeffersonian. The room I occupy here was first occupied by Thomas Jefferson, and I believe in his point of view—the freedom of the mind to explore, to generate ideas, to change, to quest, to look, and to look with wonder, on the changes of the world, and to meet them as the need comes.

This man can be a good judge. In my opinion, he will be. He certainly can help to mold the interpretation of the law. But what law is there that says that a man must agree with the Senate?

As the Senator from Wisconsin said this morning, if we are going to reject nominees because of disagreement with their views:

> We will have a court of political weathervanes. We do not need another U.S. Senate interpreting the law.

In terms of changing one's mind, I think we have had some illustrations of that, illustrations which the critics of this nominee have cited with great approval and approbation. The President of the United States, for years, was one of the leaders in opposition to U.S. relations with Communist China. He changed his mind and said:

> I will go out there and meet with Mao Tse-tung.

The very people who denominated themselves as liberals cheered to the heavens and said:

> How wonderful! This is great! He has changed his mind. How noble it is, how good it is, how refreshing it is that a man has changed his mind!

Well, I say that those who criticize this nominee are not going to change any minds, except against them. I said yesterday that I understand there are some Senators who were going to vote against the nominee but are now going to vote for him because they do not like these tactics and they do not like this delay and they think it is unwarranted.

It is within the privilege of the Senators; we know that. But there is a time when the exercise of one person's privilege impinges on the privileges of all, and there is a time when the individual's commitment to his singular point of view operates with singular unfairness toward the collective point of view of the body in which he serves. We all have enough selfishness to be tempted to do just this. The reason the Senate functions is that most of us withhold most of the time what we privately think of each other when these occurrences develop.

So let it be understood that if there are to be brush fires, they will be fought with something more than brush fires; they will be fought with the rules of the Senate.

Having made perfectly clear my commitment to Brown against Board of Education, my commitment to civil rights and to civil liberties, I hope this nominee will share my point of view. I would welcome him. I would do my best, if I were before the bench, to persuade him that that is right. He says to me and to all of us, in this letter, that that is right. I welcome him to the company of those who wear the white hats, and I would hope for other white-hat decisions accordingly. But whether he decides one way or another, if he decides according to his conscience, in strict obligation as a sworn upholder of the law, and if he acts with fairness and with integrity, he is entitled to be on that bench.

Here I have to disagree with people with whom I have agreed over and over many times. I believe that you cannot try a man for what you think he thinks or what you suspect he may say. That is antiliberalism.

I thank the distinguished Senator from Mississippi.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. EASTLAND. I yield.

Mr. HRUSKA. Mr. President, this memorandum of 1952, written by Mr. Rehnquist for Mr. Justice Jackson under the circumstances discussed in the letter just alluded to, should be considered in light of the context of the time. At that moment four cases were pending in the Supreme Court from lower courts, one of which was the Brown case. In three cases there was absolute reliance upon a case that had been decided in 1896. That was 56 years prior to the time the memorandum was drawn. In one of the pending matters, the Delaware case, there was a partial disavowal of Plessy against Ferguson, but in the other three cases the opinions below said that "We rely on Plessy against Ferguson and the petitions of the plaintiffs are denied"—an application for an injunction in each instance. Against that background, Justice Jackson said,

> I want all the arguments for sustaining the logic and constitutionality of Plessy vs. Ferguson and the proposition of law which it contains.

So Mr. Rehnquist, being a law clerk, subject to that kind of order and mandate, complied with the request of the Justice.

Writing memoranda or briefs or opinions for the use of others is not a new position for a nominee to the Supreme Court to find himself in where he acts in a representative capacity.

An attempt was made some time ago to say that this is the first time the relationship of attorney-client or related forms of privilege has been relied on by a nominee for the Supreme Court.

That is not so.

In 1967, during the hearings on Thurgood Marshall there was brought out the fact that Thurgood Marshall had drawn up the brief in one of the Miranda cases—there were four in that series of cases—the Westover case. At the hearing that nominee refused to answer any questions about the brief or of the substance which it contained.

At a later time, attention was called to a speech he made at the Texas University School of Law, to the students there, in which he discussed this case. He was asked why the case—in discussing this at the Texas University Law School with the students there—was different from the position he took in the hearings. He said he was not privileged to discuss the case before the committee because, as he put it:

> Judge MARSHALL. Well, the answer to Senator Kennedy is that once the President announced the nomination, I have not made any statements to anybody about anything.

That was his attitude during the course of the hearings. However, the Senator from Massachusetts (Mr. KENNEDY) was there as a member of the committee, and he said this to Mr. Marshall at the time when he was asked about the Texas Law School lecture:

> Senator KENNEDY. Actually, Mr. Solicitor General, there would have been nothing improper for you to express an opinion down in Texas Law School, because you were not nominated to the Supreme Court at that time.
>
> Judge MARSHALL. That was the position I took.
>
> Senator KENNEDY. So, actually, now having received the nomination, then I assume that you have a different responsibility as far as commenting on these matters.

And then ensued some further dialog. Senator KENNEDY at a later point said:

> Senator KENNEDY. But the point that I am driving at is that you have, as a nominee, a different responsibility, as I understand it, as to commenting on questions that might come up before the Court——

At another juncture in the hearings, the Senator from Massachusetts said this:

I am submitting for the record briefs filed by Solicitor General Marshall in the Court criminal cases which were heard by the Supreme Court during the past two terms.

* * * * *

In putting this material into the record, I think we ought to offer it for the permanent committee files, I emphasize that these were briefs filed by Judge Marshall in his role as an Advocate. I respect the point which you made yesterday, that he is perfectly willing that this committee examine and consider all the statements of record and it reflects his briefs as filed and opinions as written, but does not believe in his present status as a nominee that he should express any opinion concerning specific issues which are likely to come before him in the future as a Justice.

On this point, the Senator from Michigan (Mr. HART) also said:

The dilemma is that as a lawyer, we are free to make an expression of whether a court opinion is good or bad. We may or may not have read the briefs and records, but that does not inhibit us. As a judge, you speak only after reading the briefs and records and listening to the argument, and that is all you say. You put it in writing, period.

Now, as a lawyer nominated to the Court, you are hung with this dilemma. You do not want to box yourself in by a statement here, because after you read the briefs and records and arguments, you may find that your intellectual training suggests that you might have been wrong here, that there is additional illumination developed as a result of the argument. Yet, you would be hung on exactly what you are saying, having told us that your impression as a lawyer is such and such about a case. If as a judge later you discover that if you had known now what you knew then, your answer would have been different, you are inhibited from reaching a right judgment as a judge because you are afraid somebody in this committee will confront you with your previous statement.

That is the dilemma I am afraid we are facing here.

So, Mr. President, we have a situation that is not new at all. Always we on the committee have heard nominees decline to answer for a variety of reasons. This instance is no different.

There are always in these cases the matter of a nominee being called upon to forego and forswear loyalties that he has previously held and placing in their stead loyalty to the Supreme Court and the duties devolving on Associate Justices, which will also devolve upon Mr. Rehnquist by his nomination and confirmation.

That occurred with Justice Goldberg, with Justice Marshall—with everyone. That is the case here.

Let me read into the RECORD an excerpt from a letter dated November 18, 1971, to the Chairman of the Judiciary Committee, the distinguished Senator from Mississippi (Mr. EASTLAND), written by Benno C. Schmidt, Jr. I ask unanimous consent that the entire letter be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER (Mr. ROTH). Without objection, it is so ordered.

(See exhibit 1.)

Mr. HRUSKA. Mr. President, the excerpt I wish to read is as follows:

I do not doubt that Mr. Rehnquist's positions on matters before the Supreme Court will be opposed, often diametrically, to my understanding of the mandates of our Constitution. One who reveres the person and performance of Chief Justice Warren, as I do, cannot but look forward to Mr. Rehnquist's likely decisions with some misgivings. But protecting the independence of the Supreme Court by subjecting nominees to an outcome determining test is self-defeating. Ultimately, those who believe in the essential role of the Supreme Court as an active and principled protector of individual liberties trust rest their faith on process, not on outcome. Candor, force of logic, attention to pertinent detail, openmindedness in approaching the discrete and varied problems which come before the Court—these are the conditions of independence and purpose in our judicial institutions. They are attributes which I believe Mr. Rehnquist possesses in abundance.

Mr. President, again we come to the proposition: Where does he stand in regard to the attributes that really count in considering a person for the position of Associate Justice of the Supreme Court? A few comments on that point may be in order considering some of the unfounded charges that have been made during this debate.

Now, Mr. President, those who oppose Mr. Rehnquist's appointment to the Supreme Court do so, because of his alleged lack of sensitivity to civil rights and individual liberties. When all the embellishments are removed, this is what it amounts to. On all other aspects of his record of achievement he is unassailable, of course, and his opponents recognize this. They believe, however, that in civil rights they have found Mr. Rehnquist's Achilles heel, the one area in which they feel he is vulnerable.

I have said before that this is nonsense, Mr. President, a conclusion borne out by the majority section of the report by which Mr. Rehnquist's nomination was presented to the full Senate. As the floor debate continues, however, it is clear to me that further comments by this Senator are necessary to balance the record. I do this not out of fear that Mr. Rehnquist's confirmation will be defeated. On the contrary, I have full confidence in the ability of my colleagues to separate the wheat from the chaff. Rather, I would like the record to be plain as to the real Mr. Rehnquist, the man the Senate will shortly place on the Supreme Court.

Mr. President, the man who has been described by a principal detractor as one who "has persistently been hostile to efforts by court or legislature to use law to correct the racial injustices of the past two centuries" is not the candidate before us for consideration. That description fits only the straw man who has been set up by the opponents of this nomination. Having set the straw man up as a person "of persistent indifference to the evils of discrimination" with a record that "reveals a dangerous hostility to the great principles of individual freedom under the Bill of Rights," these opponents now propose to knock such a man down. Such a description would no doubt alarm any thinking person, were it true. Fortunately, it is not. I will now proceed to discuss why Mr. Rehnquist is not such a man.

Let us examine the negative aspects first, Mr. President. What objective evidence exists to support the claim that Mr. Rehnquist is, at the least, insensitive to civil rights of minority groups and, at the worst, opposed to the granting of these rights.

Three events have been relied upon by those who are resisting confirmation: Mr. Rehnquist's opposition to a Phoenix public accommodations ordinance in 1964, his concern about two provisions in a 1966 Model State Antidiscrimination Act, and a 1967 letter to the Arizona Republic in support of the neighborhood school concept.

I believe anyone reading the discussion of these three incidents in both the majority and minority portions of the committee report on Mr. Rehnquist, plus those portions of the hearing record which relate to them, could only come to the conclusion that they do not represent a persistent hostility or indifference to civil rights issues. To ascribe such a pattern to these three events is to create a fiction which is both inaccurate and unjust. It eliminates every other reasonable hypothesis for Mr. Rehnquist's actions on these occasions.

These instances have now been joined by a fourth, in the form of a memorandum written by Mr. Rehnquist to Mr. Justice Jackson while serving as the Justice's law clerk in 1952. This memorandum expressed the view that Plessy against Ferguson was right and should be sustained as the law of the land. Plessy was, of course, overturned in 1954 when the Supreme Court decided Brown against Board of Education.

Mr. Rehnquist has since responded in a letter to the chairman of the Judiciary Committee, which is now a matter of record. It is obvious that Mr. Rehnquist's response, which affirms that the memo was done at Justice Jackson's request to discuss a particular point of view which was not the nominee's, completely eliminates this document as a basis on which to base objections to Mr. Rehnquist's position on civil rights. On the contrary, special note should be made of the nominee's strong support of the decision in Brown against Board of Education and, in his words, "the legal reasoning and the rightness from the standpoint of fundamental fairness."

Examined objectively, these points do not in fact by themselves support the conclusion that Mr. Rehnquist is unsympathetic or insensitive to civil rights. But there is another and more serious aspect to this criticism of the nominee. It is alleged that the unrelated events on which Mr. Rehnquist's opponents rely are, in their words, "unrelieved by actions showing an affirmative commitment to racial justice." It is here, Mr. President, that they overextend themselves factually and tactically.

By this statement they have revealed their true objections to the nominee. They would like Mr. Rehnquist to be a civil rights activist, one who will use the Constitution and the law to correct

improper practices. I emphasize the word "use," Mr. President, because it has been employed on several occasions by those who would not see the candidate confirmed. This is the real test being applied to the nominee. He has not done enough to advance the cause of civil rights.

I urge my colleagues to consider the impracticability and even danger involved in such a standard. A nominee must now come forward and demonstrate his deeds in a particular area of interest to show he is worthy to sit on the Highest Court. He must place his activities on a ledger sheet, to be checked off against those deeds which a select group of people believe he should perform. Who then adds up the totals? How many acts of good faith are enough? What about other areas? May unions now come forward and ask the nominee to show what he has done for labor? May farmers ask to see his accomplishments in their field? And so on, ad infinitum.

Certainly civil rights is a vital matter, and certainly there is something there for all of us. But we are talking about a man who is to sit on a court of law, not one of equity. Everyone is entitled to know whether a candidate is antagonistic to issues that will be brought before him. But I believe this cannot and should not be done by requiring an affirmative showing in certain areas.

This brings me to the nominee himself. It is time to discuss the true man, the living William Rehnquist—not some caricature created by those who see patterns where they do not exist, who choose to apply great significance to certain words and deeds while totally ignoring others.

We are talking about a man who was described by Walter Craig, distinguished jurist and former ABA president, as having "a humanity about him and a human warmth that would make him, if anything, more sensitive to the needs of the people—and the necessity—of improving their life and their society." A man about whom Prof. Benno Schmidt of Columbia Law School, a former clerk to Chief Justice Warren and a former coworker with Mr. Rehnquist, said:

> In our work together, he was open to reasoned persuasion, tolerant and respectful of my quite different constitutional and political outlook, and ever willing to examine his position in the light of the fullest possible analysis of facts and legal principle.

This is a man who chose to move into an integrated neighborhood in Phoenix and to send his children to an integrated school. It is a practice which he still follows. In the words of a former principal of his children, he wanted "his children to have experience and associations with children from minority groups, as well as with the different socioeconomic groups." He and his children had this opportunity many times in school and neighborhood undertakings. And as a neighbor has stated:

> Working with us was always a cross-section of parents from mixed ethnic, racial, and economic backgrounds. In all of these contacts, never have I heard or seen Mr. Rehnquist act in a negative way towards a person or show preference because of his race, background, or economic disadvantage.

Mr. President, the Senate is considering a nominee who wrote the opinion for the Justice Department upholding the Philadelphia plan, an arrangement to secure greater employment of minority workers. A man who, only last year, rendered the opinion providing the legal basis for the present requirement in regulations of the Law Enforcement Assistance Administration that States provide a nondiscrimination pledge before receiving LEAA grants. This opinion was rendered even though the relevant statute is silent on this point.

This is a man who went out of his way to help two black messengers in his office by upgrading their positions from GS–1 to GS–2 in one case and GS–3 in the other. Both of these men had been GS–1 at the Department of Justice for over 20 years. He has also gone out of his way to hire women lawyers for the Office of Legal Counsel, which now has 4 out of 17 attorneys who are female.

Mr. President, the Senator from Indiana has said on this floor that "the issues involved in this nomination are subtle." He has pointed out that there is no headline making controversy. In this we completely agree. Until his nomination, William Rehnquist was not a national figure. He is not a headline maker. He has been a practicing lawyer, and now a public servant. Indeed, he has not openly and publicly demonstrated an affirmative commitment to civil rights—he has merely lived this way. This type of fair, balanced approach to life does not get headlines. All it does is make believers out of those who know such a person.

In my individual views on this nomination I pointed out that those who know Mr. Rehnquist best have the best things to say about him. I cannot overemphasize this point. Certainly we have to look at the cold record, at past events, and at written statements—even those rendered as an advocate. But all these things must be viewed with the perspective that comes from knowing what kind of man William Rehnquist really is. Those who know him best can tell us the most about this, and they have—including those like Jarril F. Kaplan of the Arizona Bar, or Congressman PAUL MCCLOSKEY, whose political views differ widely from those of the nominee.

Mr. President, I take strong exception to the idea voiced by Mr. Rehnquist's opponents that "if you're not for me you're against me." It is a gross oversimplification to say that if you do not actively and publicly support civil rights issues you oppose them. Every day in this Chamber Senators who vote their consciences oppose bills that have been proposed to accomplish high purposes or cure substantial ills. They oppose them for a number of reasons, but never because of the goals these measures pursue. And so it has been with the nominee.

William Rehnquist is, first and foremost, a servant of the law. He is the living example of what we try to convince our people to do every May 1 on Law Day, for he is dedicated to the rule of law and not the rule of man. This does not mean that he is insensitive to any one area of human concern; it means that he is equally sensitive to all of them.

Why, for example, would he vote in favor of the 1966 Model State Antidiscrimination Act if he were so against minority progress. Much is made of his concern, as a lawyer, over two provisions of this act. But if he were so against them, why did he vote in favor of the act which included them on final passage? Where was his "persistent hostility" then? Did he predict his current nomination?

And why, just last year, did he support the requirement of a nondiscrimination pledge from States receiving LEAA grants? The law is silent on this requirement. His persistency should have led him to direct his talents against such a requirement.

Mr. President, the balanced and reasoned approach which this nominee will bring to the Supreme Court has been lacking in that body in recent years. It is that very balance which has been lacking in the arguments advanced by Mr. Rehnquist's opponents, who chose to place great emphasis on certain words and deeds, while ignoring others. I have full confidence, however, that my colleagues will consider the entire record and place this nominee on the Court without undue delay.

Mr. President, I yield the floor.

EXHIBIT 1

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
New York, N.Y., November 18, 1971

HON. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR EASTLAND: I am writing to you as Chairman of the Senate Judiciary Committee to state my hope that the Committee will recommend and the Senate will confirm the appointment of William H. Rehnquist to the Supreme Court of the United States. Ordinarily, I would not think my impressions of a nominee to the Supreme Court were worthy of any special interest by the Committee. However, Mr. Rehnquist has been subjected to such extravagant denunciation by groups and persons with whom I am usually in accord that I feel justified in making my views a matter of record.

In assessing what weight to give my views, it may be helpful for you to know that I am Associate Professor of Law at Columbia University School of Law. My primary teaching interest and responsibility is Constitutional Law. After graduating from Yale Law School in 1966, I served for one year as law clerk to Chief Justice Earl Warren, and then for the next two years I served as Special Assistant to the Assistant Attorney General in charge of the Office of Legal Counsel.

In that latter capacity, I had the bulk of my working relationship with Mr. Frank M. Wezencraft, Mr. Rehnquist's gifted predecessor as Assistant Attorney General. When Mr. Rehnquist became Assistant Attorney General, I remained in the Office of Legal Counsel at his request for about five months while he became acquainted with the operations and responsibilities of the Office. During that time I worked closely with him on a daily basis on a variety of constitutional and other legal problems. I should make clear that my impressions of Mr. Rehnquist were formed solely on the basis of this close association over a relatively short period of time.

In working with Mr. Rehnquist, I developed clear impressions of his attributes of character and intellect which seem to me most

relevant in assessing his qualifications to be a Justice of the Supreme Court. First, and most important, Mr. Rehnquist is a person of great intelligence. He is a painstaking legal craftsman with a lively and subtle interest in the interplay of constitutional law and social policy. I will not elaborate this point, since I believe no fairminded person could doubt Mr. Rehnquist's exceptional intellectual qualifications to sit at the highest level of our judicial system. Instead, I want to address myself to Mr. Rehnquist's fairness and objectivity.

In my work with Mr. Rehnquist he seemed to me unusually openminded and free of reliance upon dogma in dealing with constitutional questions. His approach to legal problems is highly discriminating; few persons in my experience have exhibited more alert skepticism as to the utility of sweeping generalizations and ideological positions. Always I had the impression that careful analysis governed his response to legal questions.

Mr. Rehnquist approaches legal issues with the utmost forcefulness and honesty. In our work together, he was open to reasoned persuasion, tolerant and respectful of my quite different constitutional and political outlook, and ever willing to examine his position in the light of the fullest possible analysis of facts and legal principle. He is an independent, even iconoclastic, thinker.

Candor, openness to argument, and forcefulness of logic and expression are critically important to the performance of the Supreme Court, with its unique and delicate power of constitutional review. I believe Mr. Rehnquist's appointment will help restore these necessities of judicial process, sadly diminished by recent events and losses from the Court.

I do not doubt that Mr. Rehnquist's positions on matters before the Supreme Court will be opposed, often diametrically, to my understanding of the mandates of our Constitution. One who reveres the person and performance of Chief Justice Warren, as I do, cannot but look forward to Mr. Rehnquist's likely decisions with some misgivings. But protecting the independence of the Supreme Court by subjecting nominees to an outcome determining test is self-defeating. Ultimately, those who believe in the essential role of the Supreme Court as an active and principled protector of individual liberties must rest their faith on process, not on outcome. Candor, force of logic, attention to pertinent detail, openmindedness in approaching the discrete and varied problems which come before the Court—these are the conditions of independence and purpose in our judicial institutions. They are attributes which I believe Mr. Rehnquist possesses in abundance.

I respectfully urge the Judiciary Committee to recommend confirmation of William H. Rehnquist to the Supreme Court.

Respectfully,

BENNO C. SCHMIDT, Jr.

Mr. HART. Thurgood Marshall, as distinguished from the present nominee, told the committee that the briefs that had been filed during the period he was the Solicitor General, and which were in question before the committee, indeed did reflect his views. That is the meat and potatoes of this perhaps important, perhaps subsidiary argument.

I have not looked at the record of the recent past, but even the excerpt that the Senator from Nebraska read, as I heard it, had Thurgood Marshall saying, "And those are my views."

Mr. Rehnquist says with respect to some of those pleadings and positions of the department that because of an attorney-client relationship he could not give us his view on those questions. To the extent that we ought to look at the precedent set in the Thurgood Marshall case, I suggest that the precedent makes overwhelming the proposition that Mr. Rehnquist was not acting, and is not acting, as did Thurgood Marshall in responding to the inquiry of the committee.

Mr. BAYH. Mr. President, I have been here almost continuously observing and participating in the debate during its entirety, but being only human, a Senator on occasion has to leave the floor for personal reasons. I regret that, when I was briefly absent, the distinguished minority leader decided to gain the floor and to berate at some length the effort that some of us are making to try to present a case.

Mr. President, I think it would be wrong to become involved in personalities. I have the greatest respect for the minority leader as an individual, as a dedicated human being, and I think that the RECORD would show that on most instances we vote similarly.

Indeed, on the first Supreme Court nomination battle that was waged here in recent history, the distinguished minority leader joined with the Senator from Indiana and 53 other Members of the Senate—some 15 or 16 or 17 of whom were Members of his party—to reject the Haynsworth nomination. Although there was significant minority opposition to the Carswell nomination, the minority leader felt disposed to vote for Judge Carswell. I do not know whether he was quoted accurately or not, but I understand that shortly thereafter he said he thought he made "a damn fool mistake" in doing so. Thus, at least in hindsight, the distinguished minority leader and the Senator from Indiana have been on the same side up to this point on five Nixon nominations: Burger, Haynsworth, Carswell, Blackmun, and Powell.

I find it ironic that in the second full day of debate on this controversial question the minority leader comes to the floor of the Senate and accuses some of us who are in opposition of arbitrary tactics, dilatory tactics, of lonely vigils, and then is not present to let us discuss this matter.

It seemed patently unfair to me that the distinguished minority leader decided to gather the clan in the press corps and tell them that a filibuster was being conducted exactly when the time the distinguished junior Senator from Massachusetts was making one of the most eloquent appeals of the last 2 days in opposition to the Rehnquist nomination. In fact, on yesterday morning before the Senator from Indiana even had a chance to commence his opening speech, the minority whip rose and expressed his opinion that a filibuster was in process and we had better be prepared not to leave the floor, or the question would be put.

Mr. President, I think it is a sad day if Members of this Senate cannot take each other at their words. I have not participated in a filibuster in the 9 years I have been a Member of this body, and I am not inclined now to participate in a filibuster. I defy the minority leader, or anyone else, to find any legitimate basis, any objective evidence, that debating a matter as critical as this—putting a man on the Supreme Court for 30 years—debating that for 2 days, 3 days, or 4 days is a filibuster. If that is a filibuster, and if the minority leader wants to shut off the debate, why does he not stop talking about it and come on the floor of the Senate and put in a cloture motion? Let the people of the country see what is happening—that they are trying to stick a Supreme Court nominee down the throats of the Senate at a time when we all want to go home and be with our families, at a time when the world is filled with turmoil, and the news of this nomination has not yet reached the public. It is rather obvious that those who are supporting the Rehnquist nomination seem to fear that with the passage of a little time, and the passage of free debate—which is characteristic of this body—that something else might be disclosed.

Let me turn our attention to Mr. Rehnquist's recent response to the Newsweek article. The news of this Newsweek article and the memorandum, which disclosed for the first time Mr. Rehnquist's memorandum to Justice Jackson on Brown against Board of Education, came to me on Sunday.

The Justice Department also knew of this on Sunday. Yet it took until Wednesday afternoon, about 2:15 or 2 p.m., for the first effort on the part of the Justice Department or the nominee to explain it to be forthcoming.

Always before we have had an immediate response. I think it is fair to ask: Why do we go through Monday, Tuesday, and almost through Wednesday before we received an explanation, an explanation which I think, if anyone would read it carefully, raises questions in my mind. I am dubious about its veracity.

I know that is not a light charge to make; I nevertheless feel it is accurate.

ANNOUNCEMENT OF CONFERENCE ON THE ELECTION REFORM BILL

Mr. PASTORE. Mr. President, as in legislative session, I should like to announce that the committee of conference on the disagreeing votes of the two Houses on S. 382, the election reform bill, will meet at 2 o'clock tomorrow afternoon, in room H-326.

THE NOMINATION OF WILLIAM H. REHNQUIST TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT

Mr. PASTORE. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. PASTORE. The Senator mentioned this Rehnquist letter read into the RECORD today. I have not been able to be in the Chamber during the entire debate. As the Senator will notice, I was a conferee yesterday on the supplemental appropriation bill. We met at 11:30 a.m. and left at quarter of 7 last night, which was about an hour and a half later than the Senate recessed. But I have sought to keep abreast of the discussion.

Referring to the letter, on page 3, I am looking at the final paragraph which states:

In closing, I would like to point out that during the hearings on my confirmation, I mentioned the Supreme Court's decision in *Brown* v. *Board of Education* in the context of an answer to a question concerning the binding effect of precedent. I was not asked my views on the substantive issues in the *Brown* case. In view of some of the recent Senate floor debate, I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision.

Does the Senator from Indiana question this man's veracity?

Mr. BAYH. The Senator from Rhode Island does not reach the same conclusion in looking at the same facts. We can all look at the record, but the Senator from Indiana believes there was ample opportunity for the nominee to suggest here his views on the principles of Brown long before this. I cannot imagine why he waited so long.

At the hearings he was asked to explain his position on Brown. He said that it was the law of the land, which is as simple as the nose on my face, because it is the law of the land. In discussing whether he would overrule Brown, he talked of the weight he would give to a nine-man decision and that a unanimous decision should be given more weight than a 5-to-4 vote.

Mr. PASTORE. But he said "a question concerning the binding effect of precedent."

Does the Senator have the question that was asked Mr. Rehnquist in a hearing and the answer?

Mr. BAYH. We can get it.

Mr. PASTORE. I have been following this debate by reading the RECORD very carefully. I review the RECORD every morning on the debate.

I was wondering here if we are raising a question of doubt in the last paragraph. That is all I would like to know. What was the question asked of him?

Mr. BAYH. The question was a more generalized question relative to what the nominee's opinion was and his position would be on Brown against Board of Education.

If you look at his discussion of precedent on this and anticipate how he might vote, then you have to look at his discussion elsewhere in the RECORD on precedent.

He did say it was the law of the land, and elsewhere that a nine-man precedent was more significant than a 5-to-4 precedent.

Mr. PASTORE. The reason I asked the question is that here he states unequivocally;

I was not asked my views on the substantive issues in the Brown case.

Can we raise a question about that? Was he or was he not asked?

Mr. BAYH. I do not know. I will look at the RECORD to see the specific wording.

Mr. PASTORE. Then he states in the letter:

In view of some of the recent Senate floor debate, I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the Brown decision.

He goes beyond his capacity as a lawyer; he is speaking now as a man. "The rightness from the standpoint of fundamental fairness." Not fundamental jurisprudence, but a fundamental fairness of the Brown decision. I repeat I have not made up my mind, but I would like to hear from those opposing the nomination in order to help us make up our minds in a rightful way, what do they think of this last paragraph? Do they question this man's statement here? Do they doubt his veracity, or is there anything in the RECORD to contradict his affirmation?

Mr. BAYH. I appreciate the fact that my colleague from Rhode Island is struggling with this. I have struggled with it for some time now.

Mr. PASTORE. I am not struggling. I am asking a question. The Senator should see me when I am really struggling.

Mr. BAYH. I have seen the Senator when he is struggling.

Mr. PASTORE. When I struggle, I struggle.

Mr. BAYH. Yes, sir; pound for pound more than anybody in this body.

The Senator from Indiana feels the question asked by the Senator from Rhode Island is a good question. If we are really trying to explore the feelings of Mr. Rehnquist on Brown against Board of Education and about the entire issue of quality education and integrated education, I feel disposed to suggest that the letter before us is a rather self-serving effort to disavow a most persuasive and compelling indicator of his feelings on civil rights before the Senate.

Mr. EASTLAND. Mr. President, will the Senator yield?

Mr. BAYH. I will yield gladly but first I would like to take about 2 additional minutes to complete my statement.

I would ask the Senator from Rhode Island as he is deliberating upon this, to look not only at the letter which has arrived and not only at the 1952 memorandum. I earnestly hope that he will read, on page 307 of the hearings, the letter to the editor that Mr. Rehnquist wrote to the Phoenix newspaper in opposition to a plan of voluntary integration of the Phoenix school system.

I asked the nominee how he could rationalize his letter if he did believe in Brown against Board of Education and letting minority students have access to the educational system. How could he write this letter to the editor criticizing the superintendent of schools of Phoenix under the circumstances?

He replied, "I did so, because I was against long-distance busing."

I suggest to my friend from Rhode Island that long-distance busing was not in question. He simply avoided the issue in replying. The superintendent of schools said he was opposed to arbitrary forced, long-distance busing. This plan represented an effort to open the school system. The desegregation plan in question was a freedom of choice plan. For the nominee to state his letter to the editor was written, because he was against long-distance busing is not supportable on the facts.

Mr. PASTORE. In other words, the Senator is saying that he does question the veracity of the last paragraph.

Mr. BAYH. That is exactly what I am saying.

Mr. PASTORE. That is what I asked the first time. Does the Senator from Indiana question this man's veracity?

Mr. BAYH. I cannot know what was in Mr. Rehnquist's mind in 1952. I suppose it is a reasonable conclusion that if he wrote a letter to the editor in 1967 that was what he meant and that was in his mind. Well, Brown against Board of Education was written when he was a 28-year-old law clerk. I would not venture to demean law clerks, but 28 is an age when you should know what you are discussing. But at the age of 43 or 44, when he was a leading member of the bar in Phoenix, he wrote this letter to the editor and now he attributes the motive to long-distance busing, but long-distance forced busing was not in question at the time.

I shall be glad to yield to my distinguished committee chairman. I appreciate his patience in waiting so long.

Mr. EASTLAND. Am I right that my friend from Indiana has been stating on the floor that Mr. Rehnquist was a man of integrity?

Mr. BAYH. That is right.

Mr. EASTLAND. A man of unimpeachable integrity?

Mr. BAYH. The Senator from Indiana has not said "unimpeachable integrity."

Mr. EASTLAND. I asked the Senator a question.

Mr. BAYH. No.

Mr. EASTLAND. But he is a man of integrity?

Mr. BAYH. The Senator from Indiana said he thought Mr. Rehnquist had acceptable integrity, and he was not questioning that. But the more certain documents are disclosed, the more questions the Senator from Indiana has.

Mr. EASTLAND. The thing that gets me is that Mr. Powell was not asked anything about Brown against Board of Education by anyone. He was not asked what his views were on the law in 1952 and 1964. He was not challenged at all, was he?

Mr. BAYH. I must say, if the chairman remembers the record, and I ask this with all due respect. I know the Senator from Indiana asked Mr. Powell many questions. He was not handled with kid gloves. We asked him detailed and explicit questions about past decisions and past cases and the minutia of his actions when he was on the city and State school boards. We asked him whether he opposed that decision in 1954. We asked him what exactly he did to implement it. We asked him what he did to oppose the growing pressure to meet the Brown decision with massive resistance. His actions left us with no doubt about his views.

Mr. EASTLAND. Frankly, I do not recall that he was asked a question about his view on the Brown against Board of Education case. Am I right or wrong?

Mr. BAYH. Frankly, I do not think we had any evidence that he wrote a memorandum to a Justice.

Mr. EASTLAND. Will the Senator answer the question?

Mr. BAYH. I do not remember asking him that. In those words there was no

need to do so. I asked him a lot more basic questions, myself. I asked him a number of questions about why he took a number of certain positions as a member of the school board of Richmond and as a member of the school board of Virginia. That was his post. He was never a law clerk to a Supeme Court Justice, as Mr. Rehnquist was.

May I read from page 277 of the hearings and call the attention of my chairman to the fact that the Senator from Indiana did ask Mr. Powell questions concerning Brown against Board of Education?

Mr. EASTLAND. Yes.

Mr. BAYH. As it appears on page 277 of the hearings I asked him the following question:

> May I ask you, please, to just give your thoughts relative to how some of the following programs or strategies fit into or should be excluded from the provisions of the Constitution, which seem to be laudatory, very similar to the doctrine put down in *Brown* v. *Board of Education*. You were serving in an official capacity in the educational system at the time that *Brown* v. *Board* came down?

Then I go down to a whole series of questions relative to Brown against Board of Education and the decisions he was making on the local scene to implement Brown against Board of Education.

Mr. EASTLAND. My question was, Did the Senator ask him what his views were on that decision?

Mr. BAYH. Very frankly, it never occured to me—perhaps it should have—that either one of these nominees would have been a part of a memorandum the likes of which we have here.

Mr. EASTLAND. It just takes a simple yes or no answer.

Mr. BAYH. The Senator is not going to deny me the use of three or four other words, is he?

Mr. EASTLAND. No, or 3 or 4 hours more.

Mr. BAYH. I wish the Senator would speak to the minority leader about that.

Mr. EASTLAND. The fact is that Mr. Powell was not asked that question by any member of the committee. Is not that a fact?

Mr. BAYH. I respectfully——

Mr. EASTLAND. The Senator has brought up a lot of matters against Rehnquist that were not brought up against Powell. Nobody asked Mr. Powell what he thought the law was or what he thought of the law before 1964.

Mr. BAYH. I respectfully suggest that I do not think the chairman is right on that. I know he thinks he is, but if he will start reading on page 277 of the hearings, he will see that a number of questions were asked by Mr. BAYH of Mr. Powell relative to Brown against Board of Education, and then, if he will look at another place in the record, he will see similar questions directed to Mr. Rehnquist. I think the questions directed to Mr. Powell were more specific relative to Brown against Board of Education than the questions that were directed to Mr. Rehnquist. The reason is that Mr. Powell was in an official capacity in the school system of Virginia, both as a school board member and as a member of the State school system. His actions told us of his views in concrete, irrebuttable terms. I was interested in learning how he looked at Brown against Board of Education. If the Senator will look at the transcript, he will see I asked him about the Gray Commission report and his position on that.

Mr. EASTLAND. Did the Senator ask him about his law firm representing the State of Virginia in the Brown case?

Mr. BAYH. I am sure it was a matter of knowledge.

Mr. EASTLAND. It was not in the record. Did anybody ask him that question?

Mr. BAYH. I am not responsible for all the questions——

Mr. EASTLAND. Those questions were not relevant against Mr. Powell?

Mr. BAYH. I should say, to the contrary, that they were relevant.

Mr. EASTLAND. I think this is being blown into a big balloon about Mr. Rhenquist, and I do not think it is justified.

Mr. BAYH. Of course, all of us are entitled to our own individual rights.

Mr. EASTLAND. Of course, the Senator is entitled to his rights.

Mr. BAYH. I know the Senator never has and I do not think he ever will want to have any difference in our relations, but I think if anyone would care to read the number of questions that were addressed to the nominee Powell on the whole area of Brown against Board of Education and his involvement and whether his acts were indeed consistent with Brown against Board of Education—in fact, if the Senator would read the statement that I made when I finally reached the decision to support Mr. Powell—he will see that the Senator from Indiana questioned Mr. Powell about these matters. Now, I did not agree with all of the positions assumed by Mr. Powell in that capacity on the school boards. But if we look not only at the Rehnquist memorandum of 1952, and the so-called explanation of it now, but if we look at what has happened since, if we look at the letter to the editor relative to opposition to opening the schoolhouse door in Phoenix in 1967, if we look at his opposition to letting black people in drugstores in 1964, and if we look at the clear pattern of the preference of property rights over individual rights, there is a great consistency, I say to my friend and my chairman, between what appears in the 1952 memorandum and what appears in the letters to the editor which appear under the name of Mr. Rehnquist, which he has not denied.

Mr. PASTORE. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. PASTORE. I think, in maintaining fairness in the discussion, there is a distinction between the two. Either the question was not asked or it was not raised.

Mr. EASTLAND. It was not raised.

Mr. PASTORE. It was not raised, and I can understand why it was not raised relative to Mr. Powell.

There have been some items in the record of Mr. Rehnquist that have raised some questions, justifiably so in the minds of many people, including myself, matters which I think need explanation and justification.

I am not one of those who maintains that every man of 50 looks at life in the same light he did when he was in his twenties. We all change. To me it is of little moment how this man thought when he was in his twenties. I want to know how he feels now, because now is the time when he is being considered for the Court.

That is why I asked the question about the last paragraph. I am not too deeply interested in the memorandum of 1952. Perhaps he was wrong. Perhaps he did write a memorandum then that today he regrets. I have seen a man on the floor of the Senate vote consistently against civil rights bills and then, when he became President, score the finest record on civil rights this country has ever known. That happened in my time.

After all, how far can you go in making a man carry his past on his back when he has reached the point of making atonement and declares. "I do not look at it the same any more, and this is how I feel now?"

That is the reason why I asked the question. If the Senator from Indiana questions the credibility of the last paragraph in the letter in which Mr. Rehnquist declares, "I wish to state unequivocally that I fully support the legal reasoning and the rightness." He is talking as a man, and not as a lawyer, not as a judge. He as talking as a human being, because to me there are two requisites to making a fine judge. First of all, he has to be learned in the law; but above everything else, he has to be a man.

To be a good judge you have to be a whole man. I do not care how smart you are. We have gone through several wars where the people who perpetrated them were brilliant, but their minds were twisted. It is not a question of how brilliant a man is; the bigger question is, how fair is the man? How well does he understand human nature? How deeply does he love people? How much does he love his family? How much does he love this great country of ours?

Those are the questions we have to ask.

If this man, in 1952, said something that today he regrets, and he stands up like a man and says, "I was wrong, but today this is the way I feel," it is as of today we must make judgment. If you believe the man, if we have a man who has made his own act of contrition, if we have a man who has made atonement, it may well be that we have a good man.

That is what I am truly interested in, and I keep searching this record to find out what kind of a man he is today. That is the important question, and I hope to be enlightened on that.

We keep dragging out the things that happened 20 years ago. I would like to know a little more about what kind of a man he is today, and whether his conduct is inconsistent with this allegation in the last paragraph. If it is, he has to explain it to me. If he really means what he said, I say that has to be given serious consideration.

Mr. GOLDWATER. Mr. President, will the Senator yield?

Mr. BAYH. Mr. President, if the Senator will permit me to respond——

Mr. GOLDWATER. Yes, indeed.

Mr. BAYH. I feel that the logic of the Senator's argument is well taken. It is a logic which I share and agree with. It is the same kind of struggle I went through, and I am going to call it a struggle, because as far as I was concerned, I struggled with it in the decisionmaking process, not only on this nomination, but on the Carswell nomination.

As Senators will recall, there we had a case that Judge Carswell, when he was 28—the same age as Mr. Rehnquist when this memorandum was written—when Mr. Carswell was 28, he made that statement: "I yield to no man in my belief in white supremacy."

Some said that ought to disqualify him without further consideration. It is a pretty terrible statement, but the Senator from Indiana thought that perhaps he was a little wiser at 43 than he had been at 28, and that we should examine the record further; and it was not until we saw the clear pattern in Judge Carswell's cases in the other instances that came to the attention of the Senate and the committee that I was convinced he had not changed his views.

I can honestly say, I say to the Senator from Rhode Island, that no one can tell what thoughts the nominee possesses now. He alone is in possession of those thoughts. We are familiar with the fact that some such pronouncements are self-serving. I would prefer to look and see what the nominee said before he was nominated as a Supreme Court Justice, to see what he really believed.

I ask my friend from Rhode Island, as he considers this important issue, to look, not just at the context of the 1952 memorandum, but at what William Rehnquist has done long after he was 28.

In 1964, when he was 40 years of age, he testified before the Phoenix City Council in opposition to an equal accommodations ordinance to let black people into the drugstores of Phoenix. He was the only one to so testify. The city council unanimously overrode his objection, and passed the ordinance, after which Mr. Rehnquist was not satisfied, and wrote a very strong letter to the editor of the newspaper, decrying this fact; and in the final analysis, his whole argument was the importance of property rights over individual rights.

Now, a copy of that testimony, for those who care to look at it, will be found on page 305 of the hearings record. He was 40 years of age then.

In 1966, when he was 42 years of age, he was a commissioner on Uniform State Laws, and in the meeting of the commission, he moved to strike the anti-blockbusting provision out of the Model Act.

The Senator from Rhode Island knows what blockbusting is. That is the unscrupulous act of a few unscrupulous individuals who go in and try to wreck neighborhoods.

Mr. Rehnquist argued that he had a policy question on this—in other words, that he thought it was bad policy to say it should be against the law—and also a constitutional question.

Mr. ERVIN. Mr. President, may I ask the Senator a question?

Mr. BAYH. May I just finish? Then I shall be glad to yield for a question. But I think the Senator from Rhode Island has asked a very real question, and I am prepared to try to answer it.

The chairman of the committee studying the act was a fellow by the name of Robert Braucher, who was a Harvard law professor, and is now on the Supreme Judicial Court of the State of Massachusetts. Here is how he responded to that effort to say that we are not going to outlaw blockbusting:

> However, I would like to speak for just a moment to the merits of this. The practices that are dealt with in this provision are practices that have no merit whatever. They are vicious, evil, nasty, and bad. These are people who go around—and this is not a hypothetical situation; this is something that has happened in every big city in the United States—and run up a scare campaign to try to depress the value of real estate. They will, if possible, buy one house, and then they will throw garbage out on the street; they will put up "For Sale" signs; they will perhaps hire twenty badly clad and decrepit-looking Negroes to occupy a single-family house, and so forth, and then they go around to the neighbors and say: Wouldn't you like to sell before the bottom drops out of your market?

This is not a hypothetical situation, as the Senator from Rhode Island knows very well. It is something that has happened in every big city of the United States.

Braucher concludes by saying:

> And the notion that type of conduct should be entitled to some kind of protection under the bans of free speech is a thing which doesn't appeal to me a tiny bit.

That was what happened in 1966. In 1967—as I mentioned to my friend from Rhode Island, at that time Mr. Rehnquist was aged 43—he was a leading attorney in Phoenix. He wrote a letter, the letter to the editor I referred to a moment ago, entitled "De Facto Schools Seem Serving Well," in which he took isssue with then Superintendent of Schools Seymour, who was trying to open a door with a voluntary freedom of choice proposal, not the arbitrary 2.2-percent long-distance busing schemes that have been proposed by some now, but a voluntary effort. Here is one paragraph, in Mr. Rehnquist's own words, when he was 43 years of age, which reads as follows:

> Mr. Seymour declares that we "are and must be concerned with achieving an integrated society." Once more, it would seem more appropriate for any such broad declarations to come from policy-making bodies who are directly responsible to the electorate, rather than from an appointed administrator. But I think many would take issue with his statement on the merits, and would feel that we are no more dedicated to an "integrated" society than we are to a "segregated" society;

Mr. PASTORE. I read that.

Mr. BAYH. Well, then I shall not include it.

Several Senators addressed the Chair.

Mr. BAYH. I am not afraid of losing the floor. I yield to the Senator from North Carolina.

Mr. ERVIN. The Senator from Indiana has laid great stress on the supposed iniquity of the views which Mr. Rehnquist, as a law clerk to Justice Jackson, expressed to Justice Jackson in regard to the constitutional question relating to school segregation based on race.

I would like to point out that 15 years before that, namely, in 1927, in the unanimous decision in *Gong Lum* v. *Rice* 275 U.S. 78, which was still the interpretation placed on the Constitution at the time Rehnquist wrote the memorandum, the Supreme Court, in an opinion written by Chief Justice William Howard Taft, ruled that it was perfectly consistent with the 14th amendment in general and the Equal Protection Clause in particular for a State to operate segregated schools. So I cannot understand why it is a manifestation of iniquity on the part of Mr. Rehnquist to take a position which a unanimous Supreme Court had taken just 15 years before on this question. And that Supreme Court, which was unanimous on this question, included among its membership such great liberals as Oliver Wendell Holmes, Jr., and Louis D. Brandeis.

With respect to blockbusting, I want to ask the Senator from Indiana whether a blockbuster is not a real estate agent who attempts to make a profit by integrating racially segregated residential sections, and why the activity of a blockbuster is not absolutely consistent with those who desire a compulsorily integrated society?

It seems to me that the Senator from Indiana ought to be praising blockbusters who seek to integrate racially segregated residential areas instead of condemning them, because their action appears to be in harmony with the views he is expounding.

Mr. BAYH. May I answer the question, if indeed that was a question by the Senator from North Carolina, by posing another one?

Mr. ERVIN. There is a questionmark after what I said.

Mr. BAYH. I want to get the record clear. Perhaps the Senator from North Carolina can serve as my leader in answering that question. Is he in favor of the tactics of blockbusting for Winston-Salem and Greensboro and other places in his State? Does he feel that this is the kind of tactic he wants to support on any grounds?

Mr. ERVIN. I agree with Mr. Rehnquist in the statement that our Constitution does not contemplate a compulsorily integrated society any more than it contemplates a compulsorily segregated society. It contemplates a free society in which men shall live in freedom.

Mr. BAYH. The Senator from Indiana is not suggesting a compulsorily integrated society. What the Senator is suggesting is that when you have a Supreme Court nominee—who just is not anybody we drag in off the street—who is a fellow who graduated magna cum laude, a great intellect, nobody is arguing with that, and uses the sophisticated reasoning he used in that letter, that suggests that everybody should have a maximum of

freedom in a free society, how free is a black child in a society that will not let him in the schoolhouse?

Mr. ERVIN. The Supreme Court decision in Brown versus Board of Education of Topeka was not handed down until 2 years after Mr. Rehnquist wrote his letter to Justice Jackson. While the Brown case adjudged for the first time that no child can be excluded from a public school on account of his race, neither it nor any other case holds that the Constitution requires a State to compulsorily mingle the races. Moreover, nothing in the Constitution says that a man cannot attempt to desegregate racially segregated residential sections, as a blockbuster undertakes to do.

Mr. BAYH. The Senator from North Carolina has not answered my question, I say with all respect. Is he in favor of blockbusting? Is he in favor of that kind of insidious tactic, where you play on fears and frustrations and hatreds?

Mr. ERVIN. I am in favor of any American being allowed to sell his property to any person of his choice and that is the reason why I do not support open-occupancy bills. I am in favor of freedom, and I am in favor of allowing a man to sell his property to any person he pleases, and I am in favor of any person being permitted to buy property where he can find a willing seller to sell him property.

Mr. BAYH. I think we have strayed somewhat from the thrust of the actual reallty of blockbusting.I will not read the very dramatic and accurate description by Justice Braucher as to how this blockbusting proceeds—playing on the fears and frustrations. It is the kind of practice which makes it absolutely impossible to have a free, integrated society, because it plays on hatred, fear that you are going to lose the value of your mortgage, fear that you are going to have somebody living next door to you who has disease, fear that you are going to have somebody living next door to you who is going to have a teenage son who is going to molest your teenage daughter. There is nothing in this country for the U.S. Senate to rationalize that kind of tactic.

Mr. ERVIN. I do not know that Judge Braucher ever heard any real estate agents saying that. But I did hear it suggested on one occasion that the devil was the the first real estate agent. The Bible informs us that the devil took the Lord to the top of a high mountain and showed him all the lands of earth; and told the Lord, "If you will bow down and worship me, I will give you all those lands." And the devil did this even though he did not own a damn foot of them.

Mr. BAYH. With all respect to the Senator, I would hate to argue the Bible with him, but I think the Good Lord, who created the earth, was the first real estate agent.

Mr. ERVIN. He may have done a little blockbusting Himself because he made a number of different races and left them to dwell on the same earth. So He might be alleged to be the original blockbuster.

Mr. BAYH. I am not too sure that we should give Him that title without letting Him be here to have a chance to defend Himself.

I should like to suggest that one point raised by the Senator from North Carolina is a bit far afield of what we are talking about here. We are looking at some of the things Mr. Rehnquist said. We got into the blockbusting business. But the original discussion between the Senator from Indiana and the Senator from Rhode Island—and I am glad that the Senator from North Carolina and the Senator from Mississippi joined in it—was relative to the memorandum of Mr. Rehnquist to Justice Jackson on the merits of Brown against Board of Education.

Mr. ERVIN. Rehnquist was a young fellow at that time, but he did have enough legal erudition at the time he wrote that memorandum to know that what he was saying was in complete harmony with what the Supreme Court had held just a few years before, in a unanimous opinion which had not been reversed up to that time. The opinion was written by Chief Justice Taft, and was concurred in by all the other eight Justices, including such recognized liberals as Holmes and Brandeis.

Mr. BAYH. And he was so out of touch with the direction in which the country was going and the problems which confronted the Court that nine members of the Court, including his own former boss, Justice Jackson, voted the other way, when they decided the case, which was argued contrarywise by Mr. Rehnquist.

Mr. ERVIN. Yes, but until the time they voted the other way the equal protection clause had always been interpreted by the Congress, the President, and the Supreme Court in the manner advocated by Mr. Rehnquist in his memorandum.

Mr. BAYH. It is a little more than setting precedent. There is a great deal of personal conviction involved in this memorandum:

> I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of the extreme cases which commands intervention from one of any conviction.

That is a rather broad, reaching statement. The merits of segregation are not important enough for the Court to get involved. So if you take that passage, put it together with everything else in that memorandum, you get the impression that Mr. Rehnquist does not feel that striking down segregation and opening the doors on opportunity is proper ground for the Court to consider.

Mr. ERVIN. And 2 years later, as great a lawyer as ever lived on the North American Continent, John W. Davis, stood before the Supreme Court in the Clarendon County case and argued the same position Mr. Rehnquist had taken as being a correct exposition of the Constitution, which had been appealed from a ruling made by Chief Judge John J. Parker conforming to what Mr. Rehnquist said.

Mr. BAYH. I say to my colleague, lawyers are lawyers. We can find one on each side of every issue, and perhaps in between.

But the question before us is that nine lawyers who happened to wear the black robes of the Supreme Court of the United States voted the other way, contrary to the recommendation of Mr. Rehnquist.

I think there is rather compelling logic in the question asked by the Senator from Rhode Island. This was a statement made back in 1952. Here was a young man 28 years of age. Has he changed his mind?

Unfortunately, the record of change is not written. We cannot look only to statements or pronouncements of policy and beliefs after he was appointed to the Supreme Court. We must also look to views expressed before he was nominated for the Supreme Court, when, say, he was 43, when a man should be fairly mature. If he is not, then perhaps at 47, as he is now, he will be, though I wonder. I would suggest that he should be held subject, liable, and accountable for what he said when he was 43. Yet he wrote that letter to the editor, not opposing long distance busing as we now understand it, as he testified before the Senate Committee. I have a question about what was going on in his mind when he was asked by the Senator from Indiana, "Why did you write that letter?" And he said, "I was against long distance busing." But compulsory long-distance busing was not involved in that issue. This was a voluntary integration plan and the nominee was even opposed to voluntary integration of the schools.

Mr. ERVIN. Mr. President, will the Senator from Indiana yield for a question?

Mr. BAYH. I am glad to yield.

Mr. ERVIN. It was not voluntary on the part of the little children who were made the pawns for the busing. It also was not voluntary on the part of the parents.

Mr. BAYH. On the contrary. It was freedom of choice.

Mr. ERVIN. It was imposed on them by the school board. Does the Senator from Indiana take the position that little children should be bused all over the place merely to integrate their bodies rather than to enlighten their minds?

Mr. BAYH. Not necessarily.

Mr. ERVIN. I say frankly to the Senator that I do not believe in the busing of little children. It is contrary to the Constitution as I read it. I will tell the Senator why, if he will let me have enough time.

Mr. BAYH. I shall be glad to let the Senator have as much time as he wants to discuss the constitutionality of busing.

Mr. GOLDWATER. Mr. President, will the Senator from Indiana yield for a question?

Mr. ERVIN. I will not aid or abet the filibuster much longer.

Mr. BAYH. Which one, yours or mine?

Mr. ERVIN. Yours.

Mr. GOLDWATER. Mr. President, will the Senator from Indiana yield for a question?

Mr. ERVIN. The equal protection clause of the 14th amendment says that no State shall deny any person within its jurisdiciton the equal protection of the laws. That has always been interpreted to place upon a State the obligation to treat everyone in like circumstances in like manner and to forbid the State from treating differently persons similarly situated.

When the Federal court says to a school board, "You must deny a part of the children in this school district the right to attend their neighborhood school but let the other children attend their neighborhood school," the Court is ordering the board to violate the equal protection clause because it is requiring the school board to treat in a different manner children who are similarly situated. When the Court says to the school board, "We are requiring you to treat little children in a different manner in respect to attendance at neighborhood schools because we are ordering you to bus some of them to schools in other areas, either to decrease the number of children of their race in their neighborhood school or to increase the number of children of their race in schools elsewhere," it is ordering the school board to deny them the equal protection of the law. No kind of legal sophistry can erase the plain fact that such action on the part of the Court requires the school board to deny the children being bused admission to their neighborhood schools on account of their race in violation of the equal protection clause as it is interpreted in Brown against Board of Education, Topeka.

I thank the Senator very much for yielding.

Mr. BAYH. The Senator from North Carolina must always feel free to interject his thoughts here because, although I do not always agree with him, I know that he feels them strongly and he expresses them very well. But I think it is important, before we move on, and I will be glad then to yield to the distinguished chairman of the committee, the Senator from Mississippi (Mr. EASTLAND), who wants me to yield to him, as well as the distinguished Senator from Arizona (Mr. GOLDWATER), when I shall be very glad to yield to them both, but before that, it is important before we leave this 1967 school question to understand what we are talking about. We are not talking about a school that was ordered to integrate under a Federal court order. This was an effort on the part of local school authorities to broaden the opportunity and accessibility of the school system. There was no court order pending.

Here is the program right here as reported in the Arizona Republic of September 1, 1967, and if anyone cares to look beyond the minority report, take a look at page 19 of the newspaper.

These points are:

Appointment of a policy adviser skilled in interpersonal relations and urban problems;

Organization of a citywide advisory committee representing minority groups;

Formation of a Human Relations Council at each high school;

Promotion of voluntary exchanges of pupils among racially imbalanced schools in various ways, including the location of special enrichment programs and extra-curricular activities;

In the long run, a series of seminars on the nature of prejudice;

Curriculum changes designed to accent the contributions of various ethnic groups and individuals;

Without setting a ratio of minority teachers at each school, the assignment of staff in a way which redressed the existing imbalance.

Further, in the public proclamation, the superintendent of schools came out himself and said that he did not think busing was a panacea and resisted the very kind of long-range busing to which the nominee alludes. He said further:

It is much more preferable for us to demonstrate a willingness to broaden the spectrum of school populations through such actions as voluntary transfers, a local peace corps of students and teachers, . . . and other devices intended to lift the aspirations of those who live and learn without them.

The research evidence tentatively supports the premise that minority pupils achieve more in an atmosphere of high motivation.

Mr. President, that was the school plan and the purpose of Superintendent Seymour, and to suggest that this is a forced long distance busing plan, which is the reason the nominee gave for opposing it, it seems to me, is absolutely either to be ignorant of the facts or to attempt to distort them.

Now I am happy to yield to the Senator from Arizona.

Mr. GOLDWATER. I would like for the Senator from Indiana to get clear, as well as to get my own mind clear, as to the situation here. There was one high school and one grammar school at which this particular movement was aimed. That was the grammar school and the high school which I attended. Back in those days, we did not have segregated schools, of course, in Arizona. However, during the war, that particular school district was segregated and the high school was filled with black children. When we took this to court in 1940, and I was glad to participate in breaking this down, the Court ruled that segregation was improper. So the school became integrated. But at that time the families of the black students refused to allow their children to attend the Phoenix Union High School, because the Phoenix Union High School had become largely peopled with children of Mexican-American extraction. Eventually, by the way, we had to make a warehouse out of that high school which we built for the black children, and it is still a school warehouse.

The question came up, because the black people and the Mexican-American people—I hate to say this but they have never gotten along too well, they get along but not so well as we would like to see them get along—objected strenuously to this "mix," so Mr. Seymour of the school board proposed that the students be voluntarily bused. We did not use the term "busing" in those days—I forget what it was—but immediately there began to develop a hue and cry against it, not from the white people but from the people of black and Mexican-American extraction, none of them wanted their children to go to the school outside their district.

My hometown is like most other hometowns, I suppose. We have an area where the Mexican-Americans prefer to live and we have an area where the black people have always lived and prefer to live together because they live together. They did not want their children being bused, not because they did not want them to mingle with white children, but because they did not want them moved great distances. I am talking about great distances, and that is exactly what I mean.

At that time the nearest high school to my old high school was 10 or 11 miles away. Others have been built since then that might be closer.

That is the whole gist of the argument that the Senator from Indiana keeps bringing up about Mr. Rehnquist and the situation that developed in Phoenix.

I do have a question, because I notice on page 60 that the Senator stated, "I am more concerned about what you believe now than what you may have believed 2 years ago."

Yet, in the last several days since Newsweek magazine has published an article prepared by Mr. Rehnquist back in 1952, the Senator from Indiana has indicated he wants to go back into ancient history.

If the Senator believes this is a man of honesty—and I can attest from 18 years of personal knowledge of him, that there is no more honorable man that I have ever known—why can he not believe what Mr. Rehnquist said in the last paragraph of his letter written today relative to his memo for the then Justice Jackson?

This is what baffles me. I do not know what more justification we can give unless we bring him down here and put his hand on the Bible and make him swear to it.

As the Senator from Indiana knows, I did not vote for the Civil Rights Act of 1964 because I felt that two parts of it were unconstitutional. The Supreme Court has since ruled me wrong on one. And Lawyer Rehnquist ruled me wrong on the other and convinced me of it. I made a public statement on that matter long ago.

Furthermore, both in the case of the legislation and the Brown decision, when I felt that the Federal Government did not have the right to take away from the States the separation of their local schools, he convinced me that the Supreme Court did say that, whether it was in that language or not, and that I was wrong.

I mention these things because of personal experience. No one suspects me of being a lawyer. I do not know whether I would like that or not. However, I do know a man when I see one, and I know a man who is dedicated to his church, his family, and his friends, and who is a very honest and sincere man. And I do not like to hear a man whom I know to be above reproach constantly questioned when he has repeatedly said the things that I think needed saying to bring us up to date.

I thank the Senator for yielding to me.

Mr. BAYH. Mr. President, I am glad that the Senator expressed his thoughts on this matter. I find it a little difficult for me to be able to resolve in my own mind. If I may, I will pursue it a bit further, because the Senator is sincere and the Senator does know Mr. Rehnquist personally. He is familiar with the whole issue involving the school integration.

First of all, the Senator from Indiana is more concerned about what Mr. Rehnquist seems to think now than what he thought 2 or 12 or certainly 20 years ago. But I think we had a responsibility to look at everything he says he believes in now and compare that to everything that he has done in the past in order to decide the matter.

Mr. GOLDWATER. Mr. President, no one is denying the Senator that right. It is his duty. However, when the Senator says that he is not interested in what he said 2 years ago——

Mr. BAYH. That is not what I said.

Mr. GOLDWATER. And yet the Senator dwells on the past. He has referred many times to the memorandum prepared for then Associate Justice Jackson that was reported by Newsweek magazine without any questioning of Mr. Rehnquist as to what it was and why it was written.

I cannot understand why it is we have to keep on bringing up these points that the Senator says he is not interested in.

Mr. BAYH. That is not what the Senator said, with all due respect, and that is not what the Senator from Arizona said he said.

Mr. GOLDWATER. According to page 60, I have just read.

Mr. BAYH. Will the Senator read it again?

Mr. GOLDWATER. The Senator said:

> I am more concerned about what you believe now than what you may have believed 2 years ago.

Mr. BAYH. That is exactly what I said. I did not say that I was not concerned with what he said 2 years ago. I said that I was more concerned with what he believes now than I was with what he believed 2 years ago.

I think it is within the realm of reason to look at everything that the man has said and done over the past 4 or 5 years as a basis for what he believes now.

The Senator discussed Phoenix and the integration program. It is difficult for me to understand why there was resistance to a busing situation that was voluntary when the Mexican Americans and the blacks were the people that opposed the voluntary busing.

Mr. GOLDWATER. The Senator is correct.

Mr. BAYH. How in the world could I, as a parent, be opposed to busing if it is a voluntary program and no one could force the child to be bused?

Mr. GOLDWATER. Mr. President, I would like to clarify that at the time that letter was written by Mr. Rehnquist, there was a voluntary freedom of choice plan in effect in Phoenix and Mr. Rehnquist supported that. A plan had been proposed to permit students to pay their own bus fare to attend other high schools and it had already been adopted by the authorities.

The opposition however—and I have to say it was violent opposition—got so violent that the police had to patrol the high school that the senior Senator from Arizona (Mr. FANNIN) and I attended some years ago because of the constant fights between these two groups of people that historically have not gotten along together as well as I would like to see them get along.

It was not that the white people in the other schools objected to it. My own school district is about 15 miles from this. We thought it was a good idea, but nothing ever came of it, because we could not get the people involved in the basic school to even agree to bus or go any place else, and they would not go together. It is not some sectional problem. It is something that we would find in Muncie, Ind., or in any other city in Indiana.

It took place in a very peculiar, historic circumstance that we in Arizona all understand personally. Everyone understands it.

Mr. BAYH. Mr. President, I appreciate the explanation of the Senator from Arizona. However, I must say that as I read that letter to the editor and it is hard to believe that, as the Senator just said, it was a voluntary busing program.

Mr. GOLDWATER. It was a voluntary busing program then in effect.

Mr. BAYH. It was a voluntary busing program and there was no mandatory law on busing or no mandatory busing of any kind.

Mr. SCOTT. Mr. President, will the Senator yield for a unanimous-consent request?

Mr. BAYH. I yield.

CHANGE OF CONFEREE

Mr. SCOTT. Mr. President, as in legislative session, I ask unanimous consent that for the conference on Senate Joint Resolution 176, to be held tomorrow, the Senator from Delaware (Mr. ROTH), be substituted for the Senator from Utah (Mr. BENNETT), who is absent due to illness.

The PRESIDING OFFICER. Without objection, it is so ordered.

THE NOMINATION OF WILLIAM H. REHNQUIST TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT

Mr. BAYH. Mr. President, I appreciate the fact that the Senator from Pennsylvania is participating in our "filibuster" here. I am glad to have his contribution as well.

Mr. SCOTT. Mr. President, the Senator from Indiana may be sure that I would not do anything voluntarily to help him. These unanimous-consent requests have to be made from time to time.

I will help the Senator to get off the floor, however, at any time he is ready.

Mr. BAYH. I am glad the Senator is finally having an opportunity to observe some of the debate that is going on here, inasmuch as he did not have the courtesy to inform me about the statement he was making concerning the "arbitrary," "Lone Ranger" tactics we were engaged in.

I was trying to suggest to the Senator as he was leaving that I would respond, and I did so. In the RECORD I suggested that I had nothing but love and kindness for the Senator as a human being, but that I thought he was rather ill-advised and misinformed to suggest that we were participating in a filibuster.

I hope that since that time the Senator would have had an opportunity to witness this debate, and to settle it in his own mind.

Mr. SCOTT. Mr. President, if the Senator will yield, at the very moment that it became clear that the supporters of the nominee were going to rise in debate, the Senator from Indiana absented himself, although I thought he saw the chairman of the Judiciary Committee seeking recognition. Perhaps he did not. However, the Senator is constantly informed as to what is going on, on the floor. The Senator seemed to be well aware of the fact that we were taking after him. I would be glad to repeat it if the Senator feels it would serve any purpose. However, I have only love and affection for him at any time when he is not talking.

Mr. BAYH. Mr. President, with all of these notes of love and harmony, it is almost like Dear Abbey going back and forth. It is almost unfair for the Senator from Pennsylvania to suggest that the Senator from Indiana ran, turned tail, and ran.

Mr. SCOTT. I did not suggest that.

Mr. BAYH. Mr. President, all morning I sat here until nature and other personal concerns caused me to absent myself.

Maybe it was only ironic, unfortunate, and coincidental that this whole thing started at that one particular moment when I was off the floor. And when I came back I grabbed with affection the arm of my friend, the Senator from Pennsylvania and said, "You have been saying things about me and I am going to take off after you."

But the Senator did not remain in the Chamber. Perhaps the Senator was following the same calling that caused me to absent myself.

Mr. SCOTT. On the contrary, the Senator from Pennsylvania is more continent in all regards.

Mr. BAYH. Mr. President, will the official reporter please read the last statement by the Senator from Pennsylvania. I was unable to hear what was said.

The official reporter (G. Russell Walker) read as follows:

> Mr. SCOTT. On the contrary, the Senator from Pennsylvania is more continent in all regards.

Mr. BAYH. I though there might have been some content involved, but I did not get it all.

Mr. HARRIS. Mr. President, will the Senator yield?

Mr. BAYH. I yield the floor.

Mr. HARRIS. Mr. President, I rise in opposition to the nomination of Mr. William Rehnquist for membership on the Supreme Court. I feel as a Senator that one of my basic duties is to scrutinize closely every nominee placed before this body by the President. When the nomination is to the Supreme Court of the United States, I feel that duty especially strongly; for, as we well know, once confirmed, a Supreme Court Justice is virtually free from review—not totally free, but virtually free from review.

The distinguished Senator from Indiana (Mr. BAYH) has inserted copies of Mr. Rehnquist's public statements and excerpts from the hearings of the Subcommittee on Constitutional Rights into the RECORD for our individual study. Each person in the Senate is free to decide for himself whether or not William Rehnquist should be appointed to the Supreme Court. I use the word "appointed" advisedly.

We all recall in regard to an earlier nomination that was turned down by the Senate, the President had ill-advisedly used the word "appoint" in respect to his powers, and it was called to his attention and the attention of the public that the President does not have the power to appoint. He has the power to nominate—but only, by and with the advice and consent of the Senate, to appoint.

Therefore, Mr. President, each of us is free to decide whether or not William Rehnquist should be appointed to the Supreme Court. I made my own decision and my decision is that he should not be. There has been considerable discussion in the Senate since I have been here about what sort of restrictions or limitations there are on Senators in respect to going into the philosophy or ideology of a nominee to the Supreme Court.

Mr. President, I do not believe that a Senator deciding whether or not to vote to confirm a person for the Supreme Court is under any greater restriction or limitation than was the President of the United States in making the nomination.

President Nixon has said several times that he has chosen the nominees he sent up for the Supreme Court precisely because of their ideology and conservatism or what has been called strict constructionist views, and that he feels the Court should be turned more in that direction.

I believe if the President of the United States can choose a nominee because of his legal ideology, then Members of the Senate can reject him for the same reason.

Mr. Rehnquist has made it very clear that he is committed to an almost indefinite extension of Government powers, with a corresponding minimizing of constitutional safeguards designed to insure the rights of individual citizens. In case after case he weighed the needs of the Government against the rights of citizens and concluded that these rights must be sacrificed.

He sees no constitutional prohibition of pretrial detention, or as it is customary now to say in more euphonistic terms, preventive detention.

He considers there to be no restriction on governmental surveillance of citizens. In fact, he opposes, in his own words, "any legislation which, whether by an opening the door to unnecessary and unmanageable judicial supervision of such activities or otherwise, would effectively impair this extraordinary important function of the Federal Government."

He opposes that kind of legislation. I think that is a very serious matter since anyone who is appointed, if the Senate should agree, serves on the Supreme Court for the rest of his life.

Mr. Rehnquist views the expansion of civil liberties as a "further expansion of the constitutional rights of criminal defendants, of pornographers and of demonstrators"—to use some of his own words, and I do not think out of context.

To Mr. Rehnquist, those who protest against the Government are "barbarians"; and he feels that such protests are a threat "every bit as serious as the 'crime wave' in our cities."

But there has been one instance in which William Rehnquist has been an outspoken advocate of individual rights. While fighting, with amazing tenacity, integration and civil rights laws in Phoenix, Rehnquist spoke articulately of his dedication to a "free society—in which every man is accorded a maximum of freedom of choice in his individual activities." The "freedom" spoken of by Mr. Rehnquist, refers to the freedom to avoid attending integrated schools. In 1967 he asserted that "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society." In 1967, Mr. President, only 5 years ago, there was an overwhelming concurrence, on the part of State and national legislatures and courts, that we were, in fact, committed to an integrated society.

I served as a member of the National Advisory Commission on Civil Disorders. I have been one of those who felt that the Supreme Court of the United States should have acted when it did, at a very crucial time in the history of this country, when the President of the United States would not act and when the Congress of the United States would not act to make real the basic rights of all Americans, for black people, and other minority groups. These had been denied even basic rights like voting rights. When those other branches of the Government, the executive and legislative, failed to act—and we had come upon increasingly disruptive and divisive days in this country—the Supreme Court of the United States headed by one of the great Chief Justices of all time, Chief Justice Earl Warren, began to hold that the Constitution of the United States extended to all people, including black people. And the Court held that the Constitution applied to little black children in America who were being denied their constitutional rights insofar as an equal education was concerned, the right to attend schools irrespective of their color. I believe that it would be a terrible thing now to move backward from that.

I read the memorandum, which first appeared in Newsweek, which was purported to have been written by Mr. Rehnquist. The letter read in the Senate today by the distinguished Senator from Mississippi (Mr. EASTLAND) was received by him from Mr. Rehnquist concerning the Brown against Board of Education decision.

I find the letter singularly unconvincing. I think the nominee would probably have been better off not to have written it at all, because it does not state very much in a factual way, but it looks almost like a judicial interpretation or construction of a document or a piece of legislation by one who is not himself the author of the document, whereas it is admitted that Mr. Rehnquist did write that document. I must say that I find singularly unconvincing the statement in the letter that he does not know precisely why it was written, but he feels he never would have done what Newsweek charges he did. This is particularly true when we note Mr. Rehnquist does not say he did not do what Newsweek contends.

The Ripon Society, the progressive Republican organization, has urged in its publication "The Ripon Forum" that the Rehnquist nomination be rejected. Its article on Mr. Rehnquist, I think, is very well and carefully reasoned. The article appeared on November 15, 1971, and it is entitled "The Weak Constitution of a 'Legal Giant'." The article states in part:

> The Senate faces severe limitations in resisting a President determined to remake the Supreme Court. The President has the initiative, and as in nuclear strategy, the advantage is with the offense. The President can merely keep submitting names; the Senate must mobilize its somewhat cumbersome machinery and political resources to investigate, disqualify and reject each one. Now, moreover, in the age of MIRV, when the President may launch as many as six bombs at once—or fill the air with chaff and decoys—the role of the defense is further complicated.

The article goes on to say:

> It is somewhat difficult to muster a struggle against a man like William Rehnquist when lined up behind him are men like Robert Byrd and women like Sylvia Bacon and when the President maintains his nominations have something to do with "respect for the law" or reducing crime.
>
> Still we believe it is just as well that we know what we are doing. Approval of William Rehnquist's nomination will for the first time give credence to what has until recently seemed an alarmist fear: that we are moving into an era of repression, in which the U.S. democracy gives up its most noble enterprise—the maintenance of a free and open society.

I call the attention of Senators again to the fact that this is not an article written by the Democratic Party or by members of the Democratic Party. It is not some partisan attack upon President Nixon and his government and his appointment of Supreme Court Justices. This is an article which appears in the regular publication of the Ripon Society, a progressive Republican society, written by people of the President's own party.

The article goes on:

> A scenario may be envisaged. The Communist party and other political action organizations that can be alleged to advocate revolution would be blacklisted and outlawed. Wiretapping and other even more sophisticated modes of individual surveillance would be extended without judicial review. All but the most flagrant acts of discrimination and collusion against blacks would be permitted. The courts would return to the unedifying business of poring over pornography, and arbitrarily incarcerating improvident writers, photographers, and bookstore proprietors. The "third-degree"—extorted confessions and the like—would be effectively authorized. Ever larger numbers of dissenters and other noncomformists who affront the police or marginally violate the law would be imprisoned for long periods. Police brutality and lawlessness, on the other hand, would be condoned. At a time when the government provides an ever larger pro-

portion of available jobs, the firing of dissenters from federal employment would be legitimized. And finally the Executive, in illicit tandem with the judiciary, would reduce the legislative branch to inconsequence on vital matters of war and peace and to irrelevance in the always elastic realm of "national security." And, of course, the real problems of crime and instability in our society would persist.

Mr. President, that is the scenario which this organization is able to envisage. I do not envisage it, but I think it is based upon some very legitimate fears about the background and beliefs and ideology of this nominee. For he can, together with others like him, who now or soon may serve on the Supreme Court of the United States and constitute for the next many, many years a majority on that court. And his views must cause many to have very real fears regarding the Court's role in the future in the field of civil rights and civil liberties..

Not too long ago, CBS made a poll around the United States concerning the Bill of Rights. People were asked whether or not they believed in specific provisions of the Bill of Rights, but the question was couched in such a way as to fail to reveal that the question had anything to do with the Bill of Rights. In most cases, it turned out that the person questioned disagreed with the Bill of Rights provision in question. For example, if he were asked, "Do you believe that a person has a right just to sit silent and not to be required to answer one way or another as to whether that person is guilty of a crime with which he is charged?" most people would say that the person should not have that kind of right.

There were similarly alarming opinions about other provisions of the Bill of Rights—the right to speak out as one wants to, the right of organizations, even in peacetime when the security of the country was not in jeopardy or not threatened by the actions of the organization, to freely promote their own programs and beliefs. All those things were questioned.

It is alarming enough that people who are not trained in the law would not be knowledgeable about the civil liberties and civil rights embraced in the Bill of Rights, which had been won at such dear cost throughout the years during the history of this country.

That is alarming enough. But what is more alarming is that people trained in the law should have such little regard for similar and equally fundamental and basic civil rights and civil liberties. I speak, Mr. President, of legislation which has passed this body in the past having to do with what is called preventive detention, meaning that a person's liberties can be taken away if the judge finds that he or she is likely to commit a crime.

That, I think, is in violation of the Constitution. Mr. Rehnquist does not believe it is. That would not be so alarming, Mr. President, if Mr. Rehnquist were going to continue to be in the executive branch of the Government; but if he is approved by a majority of this body, Mr. Rehnquist will be making decisions upon whether or not preventive detention is allowable under the Constitution of the United States, because the Supreme Court is going to be, over and over, required to rule on just that kind of civil liberties question.

I find it very alarming that he would have that power, and he will not have that power with my vote.

Mr. President, I continue with this article from the Ripon Forum, because I think it is right on target here with what we are faced with in this Rehnquist nomination.

It states:

Such developments are not, of course, inevitable.

Here the writer is referring to that scenario he envisages about the gradual slipping away of civil liberties:

They will occur only if the Supreme Court abandons its role as ultimate guarantor of the Constitution and the legislative branch refuses to recognize the new responsibilities such as the judicial abdication would impose on the Congress.

But the entire scenario of repression consists of measures that Rehnquist, on the record, has strongly and explicitly invited; and most of them are not strongly opposed by the other three Nixon appointees.

So even if, in view of the President's determination to transform the Court, it proves tactically necessary for the Senate to accept Rehnquist, we want to register our opinion that he is Nixon's most dangerous nominee yet. Younger and smarter than the others, he will have a longer and more deleterious impact on our political and social order.

I interject right there, Mr. President, that a noted attorney in this town, who has been a considerable part of the national conscience as far as the approval or disapproval of Supreme Court nominations in the past is concerned, has said to me that, as strongly as he opposed the nominations of Mr. Haynsworth and Mr. Carswell, both of whom, as we know, were rejected by this body, he feels that the nomination of Mr. Rehnquist is the worst nomination that he has seen come before the Senate for the Supreme Court in his lifetime.

I continue with the article:

There has been much nonsense written in recent weeks on Rehnquist's good character and legal expertise, as if these qualities alone justify confirmation. In fulfilling its Constitutional responsibility for advice and consent, however, the Senate does not stand, like the Bar Associations Committee on Judiciary, as a mere judge of ethical and professional credentials. The Senate must also consider the impact of such judicial appointments on the balance between the executive and legislative branches and on the direction of America over the next decades.

Mr. President, I agree with that statement very strongly. As I said awhile ago, I do not believe that a Senator is any more restricted or limited regarding the factors that enter into his decision about whether or not to confirm a nomination than the President of the United States is restricted in making the decision to nominate the person in the first place.

I wish to refer to another paragraph of this Ripon article, because it has to do with the nomination of Lewis Powell, which I voted against:

Applying such standards to the current Supreme Court nominations, the Ripon Society supports, with some reservations, the confirmation of Richmond attorney Lewis Powell, a former President of the ABA.

Although his writings do not display a staunch concern with preserving individual liberties, his persistent advocacy of the legal services for the poor, his mediating role in Virginia's school integration controversy, and his continuing reputation for fairness allay many of our fears.

Even for the Ripon Society, Mr. President, all fears were not allayed, and in my case that was true as well, and I did not vote for that nomination. I particularly did not vote for that nomination because, with the one now before us, we will now begin to see a majority on the Court which alines itself with President Nixon's conservative legal ideology, and which in my view will begin to turn this country back to those days preceding the Warren Court, when no one in the land stood up for civil rights and civil liberties until the Court moved in. Now I am afraid we are going to see it move back, and therefore I think it is terribly important that this nominee, at least, not be confirmed.

The article then goes on:

William Rehnquist, on the other hand, has remorselessly allowed his personal prejudices to supersede legal precedent. Unlike Lewis Powell's career of moderate judicial conservatism, Rehnquist's record does not show a consistent and scrupulous application of legal principle; rather it shows a consistent and unabashed manipulation of legal rhetoric in the service of right-wing social and political objectives. His voluminous public statements and his private comments of which we are aware show him to be a thoroughgoing authoritarian, a nearly absolute believer in executive supremacy over the legislature, and a slack reconstructionist of the Constitution.

Mr. President, I believe that people throughout this country feel powerless. They feel almost inconsequential in the face of concentrated political and, I believe, economic power. We have got to begin to decentralize the decisionmaking, to do away with executive government by bureaucracy and regulations, and, whereever we can, make the market operate, rather than have the Government intervening.

That is why, Mr. President, I voted against an extension of the Economic Stabilization Act, which gives the President, I think, unwarranted and totally unprecedented powers to change our economic management system in radical ways, with far more Government intervention.

I believe the Government ought to intervene in wage and price and related decisions, as I said during that debate, when the market does not work. But it ought to try to limit those instances where the market does not work by breaking up the concentrations of economic power which prevent it from working.

I was really rather surprised, Mr. President, to see this wave of socialism from the right that was evidenced by Mr. Nixon's program in regard to these seemingly permanent across-the-board wage and price controls. I think that is wrong, as I think it was equally wrong to bail out Lockheed—I think that Lockheed ought to have the right to fail as well as to succeed—and as I think it was wrong to build the kind of socialized

SST which, luckily, eventually the Senate did turn down.

Now we are involved with the powerlessness of people. We are involved with the right of the Government to take away people's liberties with regard to wiretapping, with regard to preventive detention, with regard to what was called the no-knock law, which was passed here—another unconstitutional intervention into private lives in my opinion.

Rather than move in the direction of greater individual power, greater attention to individual rights, this nomination would mean that we would be moving more toward Government control of the lives of people and less power of the individuals over their own lives.

The Ripon Society says in that article:

Rehnquist's authorization bent is not tempered by judicial conservatism. Unlike such believers in judicial restraint as the late Justice Felix Frankfurter and former Justice John Marshall Harlan, Rehnquist is a militant judicial activist, who explicitly rejects the doctrine of *stare decisis*. Writing in the *Harvard Law Record* in 1959 Rehnquist stated: "It is high time that those critical of the present Court recognize with the late Charles Hughes that for 175 years the Constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases 'due process of law' or 'equal protection of the laws,' then men sympathetic to such desires must sit upon the high court."

In a letter that he wrote in 1959 Rehnquist then in private practice in Phoenix, made clear the "different interpretation" of the Constitution he had in mind: "a judicial philosophy which consistently applied would reach a conservative result."

The kind of "conservative" result which Rehnquist would seek is diametrically opposed to the American conservative tradition of vigorously opposing the extension of governmental powers.

To justify the Justice Department's policy of encouraging indiscriminate mass arrests of Mayday demonstrators and bystanders (with the charges against them filed in randomly by police who had often never seen the accused or the crime), and of having thousands of patently spurious cases litigated with virtually no convictions, Rehnquist invented after the fact the doctrine of "qualified martial law."

Now even if one believe the Capitol was in dire jeopardy on Mayday, the Rehnquist rationale is legally slovenly. Rehnquist would have us believe that government can commit countless violations and then sanction them by some flip post-facto improvisation.

Rehnquist was also a major strategic in the preparation of the controversial "no knock" and "preventive detention" provisions of the D.C. Crime Bill.

Mr. President, I voted against and spoke against that bill. I believe it was terribly ill advised, and I believe that it is an unwarranted and unconstitutional interference and intervention into the rights of individual citizens. I hope it will be knocked down by the courts, and promptly. That will be very much in question if we put men such as Mr. Rehnquist on the Court.

The article states:

He has strongly asserted a governmental right to fire employees, even if covered by civil service, when they question Administration War policies. Furthermore he has maintained that the executive has the right to engage in wiretapping and other electronic surveillance without court supervision as long as it claims a "national security" justification.

Mr. President, George Wallace is a candidate for President on a third-party ticket, the American Party ticket. I find most of what he stands for abhorrent; and as the 1968 elections show so do the overwhelming majority of Americans. Mr. Wallace, however, is in many ways plugged in with a great deal of the deep feelings of powerlessness that many people in the country feel. I was interested to see the other day that he spoke out against wiretapping. I believe that does not show that Mr. Wallace is a great constitutional lawyer because I do not think he is; but it does show something about what he hears as he goes around this country. I have heard the same. People feel that the Government is far too powerful, that it is entangled with their lives far too much.

Mr. Rehnquist does not agree with that and has advocated legislation, which as a Supreme Court Justice he would pass upon, that would interfere further in the lives of people; and he has been one of those who have justified rather extensive wiretapping and other electronic surveillance of citizens.

The article states:

If we contend that such unaccountable government powers might become a threat to individual liberty and privacy, Rehnquist tells us to rely on the "self restraint" of the Executive—which might be conceivable if we could forget that in recent years the Attorney General's arbiter on such matters was one William Rehnquist.

In only one area in all his career has Rehnquist shown any opposition to the extension of governmental powers.

Mr. President, this is a situation in Arizona to which I referred earlier.

While an attorney in Phoenix he was a vocal and insistent opponent of legislation to outlaw racial discrimination in public accommodations. It is a truly remarkable fact, worthy of contemplation by the Senate, that nowhere in his extensive writings has he displayed a keen concern for any individual liberty except what he quaintly calls the "traditional freedom" to discriminate against blacks.

Mr. President, the distinguished Senator from Mississippi (Mr. EASTLAND), as I said earlier, read into the RECORD a letter dated December 8 from Mr. Rehnquist, explaining his role in the memorandum to Justice Jackson in opposition to Brown against Board of Education. As I said earlier, I find that letter singularly unconvincing and, as a matter of fact, rather confusing about what it says or reports to us about what Mr. Rehnquist was thinking at the time that memorandum was written.

But I do think we get a very important clue as to what his thinking was at that time, as pointed out by the distinguished Senator from Indiana (Mr. BAYH), when he read a letter to the editor of the Phoenix newspaper on that subject—that is, the subject of integration of schools—which indicated that even voluntary integration of schools was repugnant to Mr. Rehnquist, who now would sit on the Court, if the Senate agrees, and have enormous power for the rest of his life in just those kinds of decisions.

Mr. President, the article goes on:

Rehnquist now says he has reconsidered his attitude toward the public accommodations ordinance of 1964; this is understandable since even Barry Goldwater endorsed it seven years ago and it has worked smoothly, contrary to Rehnquist's lugubrious expectations. Before we rejoice too readily, however, we should note that he has only endorsed the local ordinance, not the Civil Rights Bill of 1964, and that in 1965 and 1967, virtually alone among prominent Arizonans he opposed other civil rights legislation.

Now to another subject. I was pleased by press reports yesterday that the Committee on Foreign Relations is going to bring before Congress proposed legislation which would limit the power of the President to send troops into other countries without prior approval by Congress. I think that is greatly needed legislation. The country has come to believe as strongly as does the majority of the Senate that the power of the executive in relationship to the power of the legislative branch is far too great. The Congress must take back much of that power which was either given away or eroded away over the years.

Mr. BAYH. Mr. President, will the Senator from Oklahoma yield?

Mr. HARRIS. I yield.

Mr. BAYH. I could not help observing that the Senator from Oklahoma, in his usual perceptive manner, has gone straight to the heart of one of the matters of deep concern to me about the qualifications of the nominee. I, too, have been concerned about the position Mr. Rehnquist has taken and urged upon the President so far as the President's warmaking power is concerned.

Earlier in colloquy with the distinguished Senator from Massachusetts (Mr. KENNEDY), we discussed the general philosophical bent of the nominee when apportioning the power among the various branches of Government. At almost every turn of the road there has been the Rehnquist argument supporting the President, the Attorney General, and, indeed, helping to formulate policy that, when it comes to competition among the executive branch, the Federal Government, and others, the Federal Government should be given the benefit of the doubt and should be permitted to move unchecked and unrestrained.

A moment ago the Senator from Oklahoma aptly described the argument about the warmaking power, that the President should not be restrained by a Cambodian border, a Laotian border, or, indeed, a North Vietnamese border.

This shows the same philosophical bent that has caused concern in my mind in other areas. As to the right of privacy, the executive branch should not be restrained by law, the Federal Government has the constitutional right to move in and take pictures and to provide surveillance and, thus, to erode away the individual's right to privacy, to chill—in the famous words of the Griswold case—the right to free spech.

The same way with bugging. It is the Federal Government again—Big Brother. It is such an unusual argument to be espoused by one presented to the Senate as being of conservative bent, because

historically it has been the great conservative Justices who have stood up and said, "Thou shalt not encroach upon the right of the individual." Thus, we have a clear and steady pattern that is not only inconsistent with past conservative philosophy but which, in my judgment, is dangerous if we feel that the individual still has important rights that should not be transgressed upon.

I will say to my friend from Oklahoma that the nominee departs from the rights of the individual theory in the letter to the editor over the equal accommodations ordinance, when he argued that black people should not be prohibited—allowed to use drugstores. When the rights of minorities needed protecting, he said that the Government should not intervene. There, he said that individual rights of the store owners were important. But, interestingly enough, there he said that individual property rights should be given precedence over individual human rights. It is this philosophical bent and what that might mean on the Court if Mr. Rehnquist becomes Mr. Justice Rehnquist, that has led the Senator from Indiana to express his concern and his opposition to the nominee.

I appreciate the tack the Senator from Oklahoma is taking. I also appreciate his patience in letting me interrupt him.

Mr. HARRIS. Mr. President, I appreciate very much that intervention by the distinguished Senator from Indiana. He has made the important points that should require a vote against this nomination.

I want to say, too, that I appreciate the vallant fight he has led in this regard against this nomination, as he has in regard to others.

As did I, he voted for the confirmation of Justice Blackmun. He led the fight against Mr. Haynsworth and Mr. Carswell. He voted for the nomination of Lewis F. Powell. I think that indicates a selectivity on his part and not blind opposition. Even some of those are close cases, in my opinion, when we are talking about the Supreme Court, which is what I thought in regard to the Powell nomination, for example. But the Senator from Indiana has been selective. It is only when the President goes outside the bounds of the kind of qualifications that a man should have to go on the Court that he has risen on this floor in opposition to this nomination. I honor him for that.

I want to ask the Senator from Indiana if he would respond to the statement in an editorial, published in the Washington Evening Star today, which I ask unanimous consent to have printed in the RECORD at this point.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

[From the Evening Star, Dec. 8, 1971]

ONE APPROVED, ONE TO GO

The Senate's overwhelming confirmation of Lewis F. Powell Jr.'s nomination to the Supreme Court by a vote of 89–1 was entirely expected, most welcome and a tribute to the Virginia nominee's stature and qualifications. Moreover, it says something refreshing about the American system of selecting and confirming members of the nation's highest court.

In sharp contrast to the heated Senate struggles that led to the defeat of President Nixon's first two Southern nominees, Clement F. Haynsworth Jr. and G. Harrold Carswell, next to no opposition was voiced to Powell in this week's debate. The Senate's action thus puts the lie to the notion that a Southern conservative cannot get confirmation to fill a Supreme Court vacancy. A Southern conservative can, and has, just as a Negro has, and Jews and Catholics have, and a woman undoubtedly will, before too long.

In all probability, Powell would have met more opposition than he did had his nomination been the only one under consideration. But the President had two vacancies to fill, and it is upon his second nominee, William H. Rehnquist, that a number of Senate liberals, together with an assortment of civil rights organizations, have chosen to focus their fire. We'll be hearing a lot more about that as the Senate debate on Rehnquist unfolds.

Rehnquist's opponents have depicted him throughout as an enemy of minority rights and civil liberties. As evidence, they have cited a number of statements he made and stands he took over the years. The latest revelation goes back to 1952, when Rehnquist was 28 and a clerk to Supreme Court Justice Robert H. Jackson. In a memo entitled "A Random Thought on the Segregation Cases," he is said to have argued that the separate-but-equal doctrine of public schools should be reaffirmed.

The memo says no more, no less about Rehnquist's probity or competence than the earlier disclosure that in 1964 he opposed a Phoenix open accommodations ordinance. In the light of subsequent court decisions, he was off the mark. In the context of the times, his views were consistent with a defensible and honorable—albeit thoroughly conservative—constitutional philosophy.

In all likelihood, as a member of the court, Rehnquist will not be among those eager to expand the constitutional frontiers of civil rights and individual liberties. But neither, in all probability, will Powell. The point is that this is not the prime criterion, nor is it a very tenable criterion, for the Senate to use in passing judgment on a President's nominee to the court. What the Senate should be looking for are integrity, intellectual strength and legal qualifications. On these counts, Rehnquist merits speedy and decisive approval.

Mr. HARRIS. Let me quote the last paragraph, in part:

In all likelihood, as a member of the court, Rehnquist will not be among those eager to expand the constitutional frontiers of civil rights and individual liberties. But neither, in all probabilities, will Powell. The point is that this is not the prime criterion, nor is it a very tenable criterion, for the Senate to use in passing judgment on a President's nominee to the court. What the Senate should be looking for are integrity, intellectual strength and legal qualifications.

I want to ask the Senator, is there anything in the constitutional history of this country, or in the traditions of the Senate, that restrict a Senator just to those considerations, or if the President chooses a person to be a Justice because of his legal ideology, does not a Senator have as much power to reject him for that ideology?

I know that the Senator has gone into this in the past, and I would appreciate any comments he might have to make about that.

Mr. BAYH. Mr. President, I think that is an important point the Senator raises because that, indeed, is the foundation for our being here. If, indeed, there is no responsibility or right, as the case may be, just to go beyond the intellect or the integrity of the man, then I think the time spent in debating is wasted.

I hope that those who wrote this editorial down at the Star will ask someone to look a little bit further and do some research, because they will find that historically the Senate has considered almost everything relative to a Supreme Court nominee's background as cause to vote against him. There have been about 25 percent of all Supreme Court nominees in the history of this country who have been nominated by the President who never reached the bench.

If we look back in history, there have been some moments when the reasoning of the Senate has not been good. Nominations have been rejected not on philosophical grounds, but on political grounds. Really, if there are those in this body who were to argue that the Senate should not consider philosophy, they would find themselves in a somewhat inconsistent position, because some Senators who now argue this point are the ones who led the opposition to the nomination of Justice Fortas to be elevated to Chief Justice and to Judge Thornberry being made a Justice. Theirs was not a philosophical argument; it was purely a political argument. "There is to be an election in a few months," it was said, "so let us put these nominations off." No effort was made to cloak that position.

So we do not have to go back to Civil War days or to earlier days, such as the days of President Jackson, when there really were some disputes about Court nominees. President Ulysses Grant had three consecutive Supreme Court nominations turned down.

I think the Senator from Oklahoma is right in suggesting that the Senate has a broader responsibility.

Indeed, the nominee himself thinks that we have. Nobody really has argued more persuasively that a nominee's philosophy should be considered than William H. Rehnquist himself. Let me quote one paragraph from an article published in the Harvard Law Record of October 8, 1959. Lawyer Rehnquist said:

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

So the man whose nomination is now before us was writing then as one of the chief proponents of the Senate's considering philosophy.

I am sure the Senator from Oklahoma is also aware of one of the most bitter controversies that the Senate has experienced in considering Supreme Court nominations—the nomination in the 1930's, I think, of Judge Parker, of the Fourth Circuit, to the Supreme Court. There was a great outpouring of opposition from civil rights leaders and labor leaders. One of the major sins for which he was held accountable was his position on the "yellow dog" contracts. The forces got so strong that they kept Judge Park-

er off the Supreme Court. But in the debate of that hour some of the real—I say this respectfully—old tigers of the Senate spoke rather eloquently of the need to look at philosophy.

Senator Borah, for example, said:

Upon some judicial tribunals it is enough perhaps that there be men of integrity and of great learning in the law, but upon this tribunal—

The Supreme Court—

something more is needed; something more is called for. Here the widest, broadest, deepest questions of government and governmental politics are involved.

Another distinguished Senator of that time, Senator George Norris, of Nebraska, spoke eloquently to the question raised by the Senator from Oklahoma when he said:

When we are passing on a judge, we not only ought to know whether he is a good lawyer, not only whether he is honest—and I admit that the nominee possesses both of these qualifications—but we ought to know how he approaches the great questions of human liberty.

It is these questions, the questions of human liberty, that concern the Senator from Indiana, and I can tell by the perceptive argument of the Senator from Oklahoma that he is equally concerned about putting someone on the Supreme Court of the United States who does not realize the delicate balance that exists today—as it always has—between the rights of government, on the one hand, and the rights of the individual citizens of the country, on the other.

Mr. HARRIS. I thank the distinguished Senator from Indiana very much. I was intrigued, too, by what he said about how it seemingly is inconsistent for this nominee, or anyone else, to call himself a conservative in terms of the rights of individual citizens as against big government, and then consistently to support wiretapping for rather broad purposes, preventive detention, and no-knock legislation.

I am particularly reminded of the work done in the Senate and in committee by the distinguished Senator from North Carolina (Mr. ERVIN). He and I do not agree on many governmental programs and policies, and I suppose most people—at least many people—would call the Senator from North Carolina a conservative. One of the things that distinguishes him in that regard is that he has made it a very important Senate work of his to oppose the awful increase in surveillance—the Army going out, following people around, taking pictures of and reporting about demonstrators, and even following political figures—things that have nothing to do with the security or insecurity of the country. That is the kind of regard for individual rights as against powers of big government that one would expect from a true conservative. But, as the Senator from Indiana has pointed out quite well, that kind of conservatism is not the kind of conservatism which the nominee's actions and philosophy exemplify.

Mr. BAYH. I have been impressed with this inconsistency. I must say, having a few scars from past disagreements with our President, about Supreme Court nominees, that I have not been totally insensitive to the politics of the matter. As I said earlier to my friend the Senator from Oklahoma, this is not the first time that politics have been injected into the choice of nominees; but to my knowledge this is the first time in modern history when during a presidential campaign the candidate declared as one of his major thrusts and major reasons for which he should be chosen that he was going to revamp and reorient and redirect the Supreme Court of the United States, and that he was going to appoint men like Brandeis and Holmes and Frankfurter.

That, it seems to me, is a bit different from the qualifications and the great record of those three giants. I think maybe he even included former Judge Cardozo at one time in his list of examples.

Then we went through the strict constructionist syndrome when we considered the nominations of Judge Haynsworth and former Judge Carswell. These men were presented as strict constructionists. I do not know what a strict constructionist is. I went to some pains, as the Senator can imagine, when we first got hit by that word, to try to find out what a strict constructionist is. If we read what Webster says about a strict constructionist, we will find that he is one who would construe narrowly and strictly the law as interpreted in past cases by precedent, and apply it to present cases or future cases.

We did not have this problem with Judge Carswell. He was a man who was going off, as we learned in freshman law "on a toot." He was making law irrespective of what the high courts said. Yet this is a strict constructionist. When the President came on television the other evening, we were told that his two nominees are judicial conservatives. I do not know what judicial conservatives are. Certainly a judicial conservative is one who establishes his thoughts and follows the clear tradition of the great Justices, such as the Justice whose seat is now vacant. Justice Harlan could be called a great conservative, and other Justices could be called great conservatives.

These men certainly were the ones who stood up and said, "Thou shall not transgress on the individual." Indeed, I think it is important. I am not an alarmist, but regardless of who the President is, and regardless of the day in which we live, we need to have someone on the Court who realizes there are necessary restraints that must be placed on the executive branch.

We are looking now, as the Senator knows, at a long period of time. He and I are relatively young Members of this body. We are being asked to place on the Supreme Court a man who is only slightly older than we are. The operative life of a Supreme Court Justice is slightly longer than that of a typical United States Senator. So it is fair to say that that Justice will be there for a longer period of time than most of us who have the good fortune to serve in this body. We do not know who will be there. Maybe it will be someone of our political beliefs, someone of our views; or maybe someone who wants to use the machinery of government in the way to transgress on individual freedom.

I say we need a Justice for the next 20 to 30 years who will say, "We have to examine this carefully and put the individual and his or her rights in proper perspective and not subordinate them to the Executive."

Mr. HARRIS. I thank the Senator again for that statement, which is very helpful. I think it is very persuasive with respect to the decision which is now before the Senate.

I recall that in the 1968 presidential campaign, which has been mentioned by the Senator from Indiana, the successful candidate, President Nixon, made as a major issue the kinds of nominees he would send to the Senate for the Supreme Court. That was a campaign in which George Wallace, the candidate of the American Party, was saying that, "There is not a dime's worth of difference between the nominee of the Republican Party and the nominee of the Democratic Party." There were some disappointed Democrats on the left who were also at that time saying there is not really any difference between HUMPHREY and Nixon and that there was not really much choice.

I recall a speech that then Vice President HUMPHREY made during the campaign to an AFL–CIO convention in Sacramento in the last days of the campaign. What he said was not the most popular thing to say to them, but he said that the President of the United States would probably wind up appointing a majority of the Court, he discussed the age of the justices, and we all knew there would be vacancies.

He said that the path this country decides to travel—and this is not a quote but, in effect, what he said—with respect to civil rights and civil liberties would be determined for a generation by who was selected President.

Unfortunately, many people did not perceive that to be a critical issue; or if they did, they did not say so. So he was elected and that prediction has now come true.

With the approval of Mr. Rehnquist—and I hope we will not do so—we would place on that Court a majority of men who are strict constructionists, as President Nixon views that term, or judicial conservatives, as he uses that term. Whatever those terms mean, they do not mean we are going to continue to have a Court which will stand up to the Executive and the Congress and the country in the field of civil rights and civil liberties. I find that to be a very distressing prospective that will not occur with my vote, if I can help it.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. HARRIS. I yield.

Mr. BAYH. If I may take the statement the Senator made in paraphrasing then Vice President HUMPHREY, I think that is a statement that is broader when it transcends the political connotations of the campaign.

This is the thing that has been burning at the very entrails of the Senator from Indiana. Is it an exaggeration, and

are we being overly concerned to say that the nominees that go on that Court will determine the course the entire country goes in the area of human rights and civil rights?

For example, if we have a nominee on the Court who in the midsixties was still opposed to letting black people in the drugstores of his hometown, what does this portend about future legislative efforts with respect to discrimination? What does that portend about the standards we are establishing in the future?

Mr. HARRIS. It does not portend well, in my view. I must say I believe that a nominee for the Supreme Court should not be someone forced to fight off attacks on his relatively negative record on civil rights and civil liberties. I think that a nominee should instead have an exemplary record in the field of civil rights and civil liberties. So my test would be far stronger, but at the very least it seems to me even by the most mild kind of test, the background and beliefs, very recent ones, as the Senator pointed out, of this nominee do not stand the test.

Mr. BAYH. If the Senator will permit me to proceed further, I think he has struck a very relevant point here. I wish we had the chance to get this statement before all of our colleagues, an astute group of individuals, and let them listen to this line of reasoning presented by the Senator from Oklahoma.

One of the problems that confronts us today is the fact that there are far too many of our citizens who are out of the opportunity scale, or out of the opportunity section of our society. Whether we call them below the poverty line or welfare recipients, for one reason or another they have not been able to harness the resources, the capacity, to make it on their own.

The Senator from Oklahoma has been one of the most articulate advocates to get these people on their feet so they may become producing members of society, so that there may be a restoration of pride in themselves.

As I have discussed this on platforms over the last year or two, I have found that the generally accepted reason or goal—goal is much better—that seems to be accepted by most of our people as being at the foundation of whatever program one might want to put on to get these people to be better-producing members of society, was for better educational opportunity, whether elementary school, secondary school, vocational programs, higher education, or advanced education.

Even the most conservative citizens of this country will say, "If you can get them a good education that is the place to put the emphasis." But if we are to accept this as one basic tool in order to open the door of opportunity for all of our citizens, does the Senator from Oklahoma have concern when he looks at the objections that this nominee had to the efforts of the school system in Phoenix in 1967? This was not back at the time of Brown against Board of Education. In 1967 he even opposed a voluntary free choice busing system.

Mr. HARRIS. I find that to be absolutely unacceptable. It is terribly objectionable to me that the President of the United States would send down here the name of a man like that, particularly when we think of the traditional civil rights, the right to eat, or live, or work where one wants to live. I think we have to go beyond those rights.

I believe that most people think that there are other kinds of rights—rights to enough income, to decent health, to a decent education, to a decent house and a decent neighborhood; that these are American rights. To say the very least, it seems to me we ought not to be going backward on traditional civil rights; we ought to be going forward in regard to rights in a much broader context.

The late Senator Robert Taft, who served in this body 25 or 30 years ago, was talking about the rights of a child who grows up in America to a decent standard of life. We ought to be talking about rights, and not charity. People are not going to let charity be inflicted on them any more.

Yet we have a nominee who does not subscribe to the philosophy even of traditional rights that we have in terms of American citizens.

Mr. BAYH. We are talking about the right of quality education. In the State of Indiana it is a constitutional right, guaranteed by the State constitution, and it is in most other States today. But if that is the right we want to see protected—the individual's opportunity and right—what about a nominee who says what he said in debating the question of an open school system in Phoenix? Again I want to emphasize that this was not court-ordered integration. This was completely voluntary. There was no long-range busing involved. There was no arbitrary placing of pupils involved. Given that situation, nevertheless, the nominee said as follows in 1967:

Mr. Seymour—

the School Superintendent of Phoenix—

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

Given 150 years of slavery, given discrimination which had been a part of a law of the land for all too long, and then to place that type of philosophic interpretation on the need to open our school system and provide educational opportunities, what does that bode for the educational opportunity of children if Mr. Rehnquist is confirmed.

Mr. HARRIS. It bodes us ill. I think it is appalling that so many people in this country, who have for so very long denied quality education to black people and other minorities and deprived them of their real chance in life, then turn around and say, "Why don't you pull yourself up by your own bootstraps?" You either believe in individual efforts and people's responsibilities to make the best of themselves or you do not, and if you do, as I do and as this country does, you have to give people an equal chance at the starting line.

It is just because of men like Mr. Rehnquist that so many generations of little black children and other minority children in this country and poor children in America have had no chance and have had their lives destroyed. It is not enough to say we are not any longer affirmatively discriminating. The Supreme Court said in a recent case in Mississippi that we violate the constitutional rights of peoples unless we show the Government is taking affirmative, positive steps to redress the wrongs of the past. I do not see that kind of philosophy evidenced by this nominee. In fact, as the Senator from Indiana knows, in his very recent record he does not have that philosophy. I think that bodes ill for the country.

Mr. BAYH. I thank the Senator for permitting me to interrupt.

Mr. HARRIS. I appreciate the Senator's contribution, and particularly what he said about nominees and the lack of restriction on the Senate in making up its mind, just as there is no restriction on the part of the President in making up his mind on Supreme Court nominations.

I want to read further from the article to which I referred earlier from the Ripon Society.

In nearly all of his public statements and in a number of private comments, Rehnquist has revealed himself as a brilliant authoritarian idealogue who sees the law or the Constitution as mere instruments for imposing his beliefs on the body politics. It may in fact be questioned whether a man who, like Rehnquist, defines a conservative judicial philosophy as an approach "that consistently applied reaches a conservative (political) result" can be correctly said to have a judicial philosophy at all.

For this reason the Ripon Society believes that his elevation to the nation's highest court would be a dangerous mistake. If one is to have excessive judicial activism it is far safer to have it at the expense of the executive rather than in concert with an already exorbitant Presidency.

This concern is greater than ever today, when the expanding technology of personal surveillance evokes with renewed menace the Orwellian vision of 1984 (when Rehnquist will be 59).

The article in the Ripon Forum further notes:

The Senate is especially bound to consider the philosophies of Supreme Court appointees when a President publicly enunciates a policy of choosing nominees largely because of their political leanings.

I call attention to that sentence. The Ripon Forum believes, as pointed out in this article, that it is not just within the power of the Senate to look into the philosophies of nominees for the Supreme Court, but that the Senate is bound to consider the philosophies of nominees to the Supreme Court when the President has said he has chosen those nominees for precisely their philosophic leanings.

The article continues:

Unlike most other Presidents of the twentieth century, President Nixon has made it clear that the principal qualification for his nominees is concurrence with his Administration's policies, especially in civil liberties. The Senate should exercise close scrutiny over nominees of such a politicized Presidential selection process.

I agree with the philosophy expressed in that sentence. I think that where a President has politicized the selection of Supreme Court nominees and has decided not to make balanced appointments, but to make appointments or nominations all from one political conservative cast, for that reason he seeks out nominees having conservative ideological leanings just like his own. Thus it is clear that the Senate must give special care to the confirmation process.

The Senate has a special kind of burden in cases like the present to give the closest possible scrutiny to those nominees.

The Ripon Society concludes:

And if we really must have extremists on the Court, may they be in the defense of liberty.

To which, Mr. President, I say "Amen."

Mr. President, I rise today not only to oppose the appointment of a man to the Court, but also to support the Senate's reaffirmation of its constitutional powers of advice and consent.

There are two ways to view the Senate's role in confirming Presidential nominees. The first holds that the Senate is little more than an independent investigative agency, whose role is simply to weed out those blatantly unfit to serve on America's highest court for the most basic and fundamental of reasons.

I take it that this is the view of the Washington Evening Star, as expressed in its editorial of Wednesday, December 8, 1971, to which I have previously referred. In that editorial, the operative sentence is:

What the Senate should be looking for are integrity, intellectual strength, and legal qualifications.

In other words, that is all that ought to come within the scrutiny of the Senate's confirmation process. I disagree with the Star.

The second view recognizes that the Senate's authority of advice and consent is an essential part of the network of checks and balances which protects our representative form of government.

I think, Mr. President, I have made it abundantly clear that it is that view with which I agree, and which causes me to stand here now in opposition to this very ill-advised nomination.

Mr. President, if the Chief Executive places before this body for consideration a man or woman who is unfit to serve, it is our universally recognized duty to reject the nomination. But it would be extremely dangerous for us to consider our role to be limited to this sort of determination.

Our role is far more important than that in the view of those who wrote the Constitution, and in the view of a majority of this body, now and in the past. Our burden is far heavier than that rather easy burden; our responsibility is far broader.

We have seen, in the past few decades, a significant and alarming shift of power to the executive branch of government since 1933, when President Roosevelt was granted emergency powers by a hastily assembled Congress to deal with an extraordinary economic situation. The Senator from Maryland (Mr. MATHIAS), in an article entitled "The Optional Congress," has described in great detail the subsequent history of so-called emergency powers through a succession of six Presidents. The Senator says, and rightly so, that these six Presidents:

Have been as one on the question of when the country is in a state of national emergency and when the Congress, on a wide range of issues, is optional. Their answer, quite simply put—in a word—is always. In the last 37 years, the country has passed through many vicissitudes of war and peace, but Presidential powers have been continuously "at war."

A lower court did judicially acknowledge—in 1962—that the depression had ended. But no authority has yet recognized the end of the Korean emergency, proclaimed by President Truman on December 16, 1950, and still in effect today. (Ripon *Forum* Guest editorial, Vol. VII, No. 13, at 3.)

Mr. President, I ask unanimous consent that that article, entitled "The Optional Congress," which appeared as a guest editorial in the Ripon Forum, volume III, No. 13, be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HARRIS. In more recent times, Mr. President, an unchecked exercise of authority on the part of the Executive has led to our tragic involvement in Indochina; an involvement undertaken by a series of Presidents with a minimum of congressional knowledge or approval. More recently, this administration has asked us to approve unaltered its phase II economic program—a program which gives broad and virtually unchecked authority to the President.

I spoke earlier about the unrestricted powers that we have given to the President. The distinguished Senator from Wisconsin and I, and others, stood on this floor and attempted to prevent that act from being passed as recommended by the President, or at the very least, to cut back the extension of time from April 1973, when the act will now end, to June 30, 1972, because we thought that those unprecedented powers should not be granted to the President for that long a period of time, if they were to be granted at all.

Mr. President, as a U.S. Senator I feel it is my constitutional duty to question not only the legal and moral qualifications of any nominee to the Supreme Court; but also the impact of the nomination upon the Court itself. I am convinced that the addition of William Rehnquist to the Court would extend to dangerous proportions a trend of disregard for the rights of the individual. For that reason, I feel that it is my responsibility to vote against the appointment of Mr. Rehnquist.

Mr. President, as I have traveled about this country, I find a rising tide of cynicism and hopelessness, and a despair about whether or not the political process is going to deliver on people's legitimate complaints about their lives and their society. One reason why that is so is that the Government is so big and all pervasive, and is so much involved in the lives of so many of our people, is often so remote, impersonal, and faceless. Consequently, people do not really feel that through the political process they have control over the decisions that are made.

I think it is terribly important, Mr. President, that we try to respond to that cynicism and feeling of despair and hopelessness. Therefore, as I say, even if Mr. Rehnquist's record was not as bad in the field of civil rights and civil liberties as it is, I would be very careful to scrutinize his record and his beliefs, because I believe that anyone who goes on that Court ought to have an exemplary record. It ought to be an outstandingly affirmative and positive record in the field of civil rights and civil liberties. It is not even enough, any more, just to say that one is not doing anything any more against the rights and liberties of others, or that he has refrained from doing anything against the rights and liberties of others. I believe it is required, in these days particularly, of a man who would go on the Supreme Court of the United States that he be able to show that he is acting in an affirmative and positive way to preserve and promote the civil rights and civil liberties of others.

That is one reason, Mr. President, why I think it is terribly unfortunate that instead of this nominee, Mr. Rehnquist, the President did not send to the Senate the nomination of a woman to be on the Supreme Court of the United States. There are nine places on that Court, not a single one of which is now or ever has been occupied by a woman. There are plenty of well-qualified women lawyers and judges, the names of many of whom several Senators, I, and others brought to the attention of the President of the United States.

For a time before this nomination President Nixon floated the names of several candidates for the Court position and finally a whole list of candidates was published. There were names of women who were said to be under consideration, and there was a widespread feeling among women throughout the country that the President, at long last, did really intend to send to the Senate the nomination of at least one woman to be on the Supreme Court of the United States.

If a qualified woman had been nominated, Mr. President, I think it would help to make the Court more representative of the judicial and legal profession as it exists in this country, and furthermore I think it would help to humanize the law a great deal.

More than that, I think it would give a great number of people in this country who presently feel that their interests are not properly represented on the Court or in Government a better reason to believe that they are, indeed, represented or better represented than has been true in the past. The President did not do that; and with the nomination of Mr.

Rehnquist, he did not do it with regard to black people or other minorities; he did not do that in regard to poor people. Instead, we did not make it better; we made it worse by this nomination. And the Senate will be a part of that if it agrees with this nomination and joins in the appointment. I do not think the Senate ought to do that; and I hope that the Senate, therefore, will not advise and consent to the nomination of Mr. William H. Rehnquist to be a member of the Supreme Court of the United States.

EXHIBIT 1

THE OPTIONAL CONGRESS

(By Senator CHARLES McC. MATHIAS)

The President's New Economic Policies represent a bold and necessary response to a serious crisis and they have my support. At the same time, the emergency powers he was able to invoke dramatize anew the scope of constitutional authority which Congress has over the years relinquished to the office of the President.

This process has a long history, that unfortunately continues to transpire in the headlines of today. But perhaps the crucial moment in establishing these emergency powers came in the midst of the Depression almost 40 years ago.

On May 9, 1933, in a moment of genuine crisis, President Franklin D. Roosevelt convened the Congress and demanded, in effect, that it revamp the Constitution before midnight. The purpose of his proposed reforms was, in effect, to make Congress, and consequently the Constitution, optional at the discretion of the President, as the national interest required.

The demand came as part of the Emergency Banking Act, an omnibus bill reorganizing the Nation's then collapsing banking system and retroactively legitimizing the President's Bank Holiday proclamation of 3 days before.

It was referred to the Committee on Banking and Currency with instructions that it be reported in an hour. The bill was never printed and it was not available for Senators to read prior to action on the floor of the Senate. The then Senator from Louisiana, Mr. Huey Long, complained that he did not know what was in it until it was read by the clerk. Most Senators indicated that they had grave reservations about what they understood to be the bill's provisions and Senator Long protested the extraordinary powers it granted to the President. But in the extremity of the crisis at hand, Congress felt it had to act immediately as the President demanded. The bill was passed by both Houses before midnight and the American constitutional Republic has been in its Damoclean shadow ever since.

The key provision, not much remarked by the Congress at the time, came in an amendment to section 5b of the Trading With the Enemy Act of 1917. As enacted in 1917, section 5b shifted from Congress to the President the power to regulate trade and financial transactions between Americans and foreigners in wartime. The 1933 amendment to 5b authorized the President—by the simple expedient of declaring a national emergency—to assume in peacetime the extensive wartime emergency powers associated with the Office of President as Commander-in-Chief.

In this little noticed enactment, Congress established a principle with reverberations going far beyond the legislation at hand. For the courts have interpreted the amendment as creating a virtually unlimited Executive prerogative that now applies to some 200 laws granting special powers to the President during national emergencies. But neither Congress nor the courts have set criteria for invocation of these multifarious powers.

In accord with President Roosevelt's approach, the President alone decides when a national emergency exists and when it ends, when he should share power with Congress as the Constitution prescribes, and when Congress can be made optional by proclamation.

This assignment of emergency powers has worked very smoothly over the years. Since that dire extremity of 1933, there have been six Presidents—four Democrats and two Republicans. But they have been as one on the question of when the country is in a state of national emergency and when the Congress, on a wide range of issues, is optional. Their answer, quite simply put—in a word—is always. In the last 37 years, the country has passed through many vicissitudes of war and peace, but Presidential powers have been continuously "at war." The result, described by Jeffrey G. Miller and John R. Garson in an excellent article in the February 1970 issue of the Boston College Industrial and Commercial Law Review, is that "some 60 percent of the nation's population have lived their entire lives under a continuous unbroken chain of national emergencies."

A lower court did judicially acknowledge—in 1962—that the depression had ended. But no authority has yet recognized the end of the Korean emergency, proclaimed by President Truman on December 16, 1950, and still in effect today. Since the President declared with reference to Korea that "world conquest by Communist imperialism is the goal of the forces of aggression," the State Department has interpreted the emergency to mean the duration of the cold war, whatever definition they may apply.

This interpretation, however, has not limited the emergency powers to military matters affecting the protracted conflict with the Communists. Before the recent Nixon monetary actions, the Korean authority, in fact, was most recently invoked in 1968 in relation to our economic competition with our European allies.

President Johnson felt he would have difficulty securing from Congress the broad powers he needed to deal with the deficit which had been emerging for several years in the nation's balance of payments. Yet the Constitution clearly reserves to the legislative branch all powers for regulating foreign commerce. So the President invoked the emergency powers granted in 1950 in relation to the Korean war and signed Executive Order 11387: Governing Certain Transfers Abroad. The Department of Commerce immediately issued the foreign direct investment regulations—FDIR. The Executive order and the FDIR restrict the amounts of capital that American investors may transfer to or accumulate in foreign affiliates, and compel repatriation of short-term liquid balances such as foreign bank deposits.

EXECUTVE ENCROACHMENT

Without citation of the Korean war powers, these measures clearly represent an unconstitutional encroachment on legislative authority. The courts have upheld them, however, and they remain the law of the land. It is currently the law of the land, therefore, that the state of national emergency proclaimed by President Truman in 1950 in relation to the Korean conflict can be invoked in relation to a balance-of-payments deficit 18 years later. Similarly, regulations against gold hoarding, activated by the depression emergency, are continued under the 1950 proclamation.

Other measures thus invoked under 5b include, respectively, the foreign, Egyptian, and Cuban Assets Control Regulations. The Cuban trade embargo was also based in part on the 1950 emergency, as was the recent suspension of the Davis-Bacon Act, requiring the government to pay prevailing wages on construction contracts.

Among the nearly 200 other emergency laws are several that seem immediately pertinent today as we consider the future of the draft and the Executive's latitude to act alone in Southeast Asia. The President's emergency powers seem to permit him both to detain enlisted troops beyond the terms of their contracts and to detail military men to the governments of other countries. Also pertinent are his powers to sell stocks of strategic materials, revoke leases on real and personal property, suspend rules and regulations applicable to broadcasting stations, exercise control over consumer credit, and, as we know, assume sweeping authority in the world monetary realm.

CONTINUOUS EMERGENCY

These powers infringe on so many crucial constitutional rights and principles that collectively they may be seen as placing our system of democratic government in jeopardy. Certainly the deprivation of rights and property is authorized without due process. But perhaps most important, these measures threaten the constitutional balance of powers between the executive and legislative branches. Because a state of official emergency has obtained continuously since 1933—and has been upheld by the courts to validate actions unrelated to the original crisis—the national emergency powers have accumulated and become institutionalized in the executive. The Presidency, already enhanced by modern trends, has been further aggrandized by the paradox of the continuous emergency.

Unless we accept the principle of an optional Constitution and an optional Congress we must reject the concept of national emergencies declared by the President at his discretion in peacetime without termination dates. Since this concept has been upheld in essence by the courts, it is up to the Congress to recover by legislation the constitutional role that it has allowed the executive to usurp. We must reassert the principle that emergency powers are available only for brief periods when Congress is unable to act and for purposes directly related to the emergency at hand.

ROOTED IN

This is easier said than done. We discover that the continous and cumulative and institutionalized emergency is also almost irrevocable. So many executive agencies and procedures are rooted in emergency powers that it is extremely difficult to rescind them without major administrative disruptions. With this in mind, the distinguished majority leader, Mr. Mansfield, joined with me during the last session in Senate Joint Resolution 166, a resolution which, among other things, proposed the creation of a special committee to explore with the executive the consequences of terminating the Korean emergency. In the aftermath of the Cambodia incursion, however, our proposals were not acted upon. And so I have reintroduced the proposal as a Senate concurrent resolution. It calls for the establishment of a commission to study and make recommendations terminating the state of national emergency.

It is to be expected that the commission's recommendations would at least have the effect of restoring to Congress its full constitutional authority to regulate commerce, and would clearly define a national emergency. Together with S–731, an act to regulate undeclared war, which was introduced in February by the distinguished Senator from New York, Mr. Javits, this would serve to assure that emergency powers would only be applied for the duration of genuine emergencies. The Constitution did not envision a state of national emergency to be the normal state of affairs.

Under the best of circumstances, the Congress will not find it easy to maintain its

historical constitutional role in the modern age. Modern communications, national interdependence, and international involvement converge to enhance the Presidency; real emergencies continually arise requiring the kind of decisive response the Executive is best equipped to give. But if the Congress allows these National Executive advantages to be expanded by special emergency powers responding to unspecified emergencies without termination or limit, the balance of powers between the branches of our Government may be irreparably broken.

I believe that we do face today a national emergency—even a paradoxically continuous one. It emerged during the depression and has been with us for several decades. It is a crisis that throws our whole system of constitutional government into jeopardy. This emergency—if I may use the term so loosely—is the atrophy of Congress. It is not an emergency which calls for the decisive exercise of executive powers. It calls for the decisive recovery of legislative powers. Only Congress can redeem itself; but in serving itself, it can also save the Constitution.

Mr. FANNIN. Mr. President, on Monday just before we confirmed the nomination of Lewis F. Powell, Jr. to the Supreme Court, I noted that it took an awful lot of repetition to carry that discussion for 2 days.

We now are in the third day of discussion on the nomination of William H. Rehnquist to the Supreme Court. Again, I would observe, we are hearing nothing more than repetition.

We are hearing the same arguments—arguments that already have been disproven—from the opponents of Mr. Rehnquist. Those of us who support this nomination repeatedly have cited the excellent qualifications of Mr. Rehnquist. We have patiently answered the questions raised about the nomination.

Mr. President, I would like to call to the attention of my colleagues an editorial in today's editions of the Evening Star. Considering the Rehnquist nomination, the Star says:

What the Senate should be looking for are integrity, intellectual strength and legal qualifications.

Mr. Rehnquist certainly meets the test of having "integrity, intellectual strength, and legal qualifications."

Mr. President, I ask unanimous consent to insert in the RECORD at this point the Star editorial urging "speedy and decisive approval" of the Rehnquist nomination.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

[From the Evening Star, Dec. 8, 1971]

ONE APPROVED, ONE TO GO

The Senate's overwhelming confirmation of Lewis F. Powell Jr., nomination to the Supreme Court by a vote of 89–1 was entirely expected, most welcome and a tribute to the Virginia nominee's stature and qualifications. Moreover, it says something refreshing about the American system of selecting and confirming members of the nation's highest court.

In sharp contrast to the heated Senate struggles that led to the defeat of President Nixon's first two Southern nominees, Clement F. Haynsworth Jr. and G. Harrold Carswell, next to no opposition was voiced to Powell in this week's debate. The Senate's action thus puts the lie to the notion that a Southern conservative cannot get confirmation to fill a Supreme Court vacancy. A Southern conservative can, and has, just as a Negro has, and Jews and Catholics have, and a woman undoubtedly will, before too long.

In all probability, Powell would have met more opposition than he did had his nomination been the only one under consideration. But the President had two vacancies to fill, and it is upon his second nominee, William H. Rehnquist, that a number of Senate liberals, together with an assortment of civil rights organizations, have chosen to focus their fire. We'll be hearing a lot more about that as the Senate debate on Rehnquist unfolds.

Rehnquist's opponents have depicted him throughout as an enemy of minority rights and civil liberties. As evidence, they have cited a number of statements he made and stands he took over the years. The latest revelation goes back to 1952, when Rehnquist was 28 and a clerk to Supreme Court Justice Robert H. Jackson. In a memo entitled "A Random Thought on the Segregation Cases," he is said to have argued that the separate-but-equal doctrine of public schools should be reaffirmed.

The memo says no more, no less about Rehnquist's probity or competence than the earlier disclosure that in 1964 he opposed a Phoenix open accommodations ordinance. In the light of subsequent court decisions, he was off the mark. In the context of the times, his views were consistent with a defensible and honorable—albeit thoroughly conservative—constitutional philosophy.

In all likelihood, as a member of the court, Rehnquist will not be among those eager to expand the constitutional frontiers of civil rights and individual liberties. But neither, in all probability, will Powell. The point is that this is not the prime criterion, nor is it a very tenable criterion, for the Senate to use in passing judgment on a President's nominee to the court. What the Senate should be looking for are integrity, intellectual strength and legal qualifications. On these counts, Rehnquist merits speedy and decisive approval.

ORDER FOR RECOGNITION OF SENATOR BYRD OF WEST VIRGINIA TOMORROW

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senator from West Virginia (Mr. BYRD) be recognized for not to exceed 15 minutes tomorrow morning after the joint leadership has been recognized.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR RECOGNITION OF SENATOR WILLIAMS ON FRIDAY, DECEMBER 10

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senator from New Jersey (Mr. WILLIAMS) be recognized for not to exceed 15 minutes Friday morning after the joint leadership has been recognized.

The PRESIDING OFFICER. Without objection, it is so ordered.

RETIREMENT SECURITY—REFERRAL OF MESSAGE FROM THE PRESIDENT (H. DOC. NO. 92–182)

Mr. MANSFIELD. Mr. President, I ask unanimous consent that a message received from the President today on private pension plans be jointly referred to the Committee on Finance and the Committee on Labor and Public Welfare, since this message involves subject matter falling within both committees.

The PRESIDING OFFICER. Without objection, it is so ordered.

The message is as follows:

To the Congress of the United States:

Self-reliance, prudence and independence are qualities which our Government should work to encourage among our people. These are also the qualities which are involved when a person chooses to invest in a retirement savings plan, setting aside money today so that he will have greater security tomorrow. In this respect, pension plans are a direct expression of some of the finest elements in the American character. Public policy should be designed to reward and reinforce these qualities.

The achievements of our private pension plans are a tribute to the cooperation and creativeness of American labor and management. Over 4 million retired workers are now receiving benefits from private plans and these benefits total about $7 billion annually. More than $140 billion has been accumulated by these plans to pay retirement benefits in the future. But there is still much room for expanding and strengthening our private pension system.

Three groups in our society have a tremendous direct stake in the growth and improvement of private pensions. The first is made up of that 50 percent of American wage earners who are *not* in private group plans at the present time and who have no tax incentive for investing in retirement savings as individuals. The second group includes those who are enrolled in group plans which provide benefits for their retirement needs which they regard as insufficient or which do not ensure that the benefits which are accumulating while they work will actually be made available when they retire. If we meet the problems of these two groups today, we will also be taking a giant stride toward improving the quality of life tomorrow for an important third segment of our population to which they will eventually belong: the retired Americans whose independence and dignity depend in large measure on an adequate post-retirement income.

Older persons have spoken eloquently about the need for pension reform, especially at the White House Conference on Aging, which was recently held in Washington. It is clear that our efforts to reform and expand our income maintenance systems must now be complemented by an effort to reform and expand private retirement programs.

The five-point program I present today includes three new legislative proposals, a renewed endorsement of an earlier proposal, and a major study project which could lead to further legislation.

1. *Employees who wish to save independently for their retirement or to supplement employer-financed pensions should be allowed to deduct on their income tax returns amounts set aside for these purposes.*

Today only 30 million employees are covered by private retirement plans. This

American worker as he works, when he is out of work, and after his working career is over." I now renew my request for action in this field—and am resubmitting this legislation in slightly revised form so that it will be even more effective. I urge that the Congress act promptly. There is no excuse for further procrastination.

5. *I have directed the Departments of Labor and the Treasury to undertake a one-year study to determine the extent of benefit losses under pension plans which are terminated.*

When a pension plan is terminated, an employee participating in it can lose all or a part of the benefits which he has long been relying on, even if his plan is fully vested. The extent to which terminations occur, the number of workers who are affected, and the degree to which they are harmed are questions about which we now have insufficient information. This information is needed in order to determine what Federal policy should be on questions such as funding, the nature of the employer's liability, and termination insurance.

Even the best data now available in this field is itself incomplete and questionable. It was gathered for the period from 1955 to 1965 and it indicates that less than one-tenth of one percent of all workers then covered by pension plans were affected by terminations in any given year. It should also be noted that some workers who are affected by terminations may not actually lose their benefits. The wrong solution to the terminations problem could do more harm than good by raising unduly the cost of pension plans for the many workers who are not adversely affected by terminations.

Nevertheless, even one worker whose retirement security is destroyed by the termination of a plan is one too many. It is important, therefore, that the nature and scope of this problem be carefully and thoroughly investigated. I have directed the Departments of Labor and the Treasury to complete their study within one year.

* * * * *

The proposals which I offer today would enhance substantially the retirement security of America's work force. These who are not members of group pension plans and those who have only limited coverage would be encouraged to obtain individual coverage on their own. The self-employed would have an incentive to arrange more adequate coverage for themselves and their employees. All participants would have greater assurance that they will actually receive the benefits which are coming to them. And they could also be far more certain that their pension funds were being administered under strict fiduciary standards.

There is sometimes a tendency for Government to neglect or take for granted the "little man" in this country, the average citizen who lives a quiet, responsible life and who constitutes the backbone of our strength as a nation. "He can take care of himself," we say, and there is a great deal of truth in that statement. The self-reliance of the average American is an extremely important national asset.

The fact that a man is self-reliant, however, does not mean that Government should ignore him. To the contrary, Government should do its part to cultivate individual responsibility, to provide incentives and rewards to those who "take care of themselves." Only in this way can we be sure that the self-rellant way of life will be a continuing and growing part of the American experience.

My pension reform program would help do this. It builds on traditional strengths which have always been at the root of our national greatness.

The private pension system has contributed much to the economic security of American workers. We can be proud of its growth and its accomplishments. The proposals I offer will strengthen and stimulate its further development.

I hope this program will receive the prompt and favorable consideration of the Congress. For it can do a great deal to protect the rights of the average American during his working years and to enhance the quality of his life when he has retired.

RICHARD NIXON.

THE WHITE HOUSE, *December 8, 1971.*

QUORUM CALL

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistance legislative clerk proceeded to call the roll.

Mr. SCOTT. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CLOTURE MOTION

Mr. SCOTT. Mr. President, I send to the desk a cloture motion, presently signed by 26 Senators. I ask unanimous consent, first, that the name of the Senator from Ohio (Mr. TAFT) may be added during the evening.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SCOTT. Second, I ask unanimous consent that the time shall begin to run on this matter at noon on Friday next, notwithstanding rule XXII.

The PRESIDING OFFICER. Is there objection?

Mr. BAYH. Mr. President, reserving the right to object, the Senator from Indiana would like to have the Parliamentarian or somebody else in this body—perhaps the Senator who has made the motion—explain the difference between the way the time would presently run and the way it would run under the request of the Senator from Pennsylvania.

Mr. SCOTT. I am glad to do that. It is intended, I understand, in view of the earlier statements made by the distinguished majority leader, that the Senate convene each morning at 9 o'clock. Under the rule, we have to proceed to vote, and that, in turn, is preceded by a quorum call 1 hour after the convening of that session of the Senate.

I have no objection to changing this to ask that the time begin to run at 11 o'clock rather than noon. That would be a further convenience to certain Senators. Otherwise, we would have to vote at 10 o'clock. It is not all that important to me. I am just trying to work out a convenient time.

Mr. BAYH. I understand. I do not object.

Mr. PASTORE. Mr. President, will the Senator yield?

Mr. SCOTT. I yield.

Mr. PASTORE. Does this mean that the vote will occur on Friday?

Mr. SCOTT. On Friday. Since I have been told that some Senators can more readily make the vote at noon, I ask unanimous consent that the time on Friday on the cloture motion begin to run at 11 a.m., notwithstanding rule XXII.

Mr. BAYH. Mr. President, I object for the time being.

I say to the Senator from Pennsylvania that I feel that inasmuch as he has had all day to canvass his side, and has some idea about what is convenient to them, at least I have a similar obligation to check the schedules of some Senators on this side who might take a contrary position on this issue, and I certainly will be glad to try to accommodate the Senator from Pennsylvania.

Mr. SCOTT. Then, I withdraw the request, and we will have to vote, as I understand it, automatically at 10 o'clock on Friday morning.

Mr. MANSFIELD. Mr. President, will the Senator yield?

Mr. SCOTT. I yield.

Mr. MANSFIELD. Ordinarily, the Senate would come in at noon, and ordinarily the vote, as the Senator knows, would occur at 1 o'clock—1 hour after the Senate convenes. We already have an agreement for the Senator from New Jersey to speak for 15 minutes. After the joint leaders have been recognized, we would like to conduct some morning business and continue the debate up to the time, and it might allow both sides a little more leeway in that respect.

So if the Senator would reconsider, I would appreciate it. If not, we would have to do it at 10 o'clock.

Mr. BAYH. I misunderstood. I thought the thrust of the previous unanimous-consent request was that the time would start running at 12 o'clock, and thus the vote would be at 1 o'clock.

Mr. SCOTT. That is right. Then I revised that request, at the request of certain Senators who were hoping that we could vote a little earlier on Friday, and suggested that the time begin at 11 o'clock and that we vote at noon. I cannot see how that is any great injustice to the Senator from Indiana, and it does act as a slight convenience to certain other Senators, some of whom may be prepared to support his position. But I would be delighted to have him block this, if he wishes, because then he will assume the responsibility, and I will tell the Senators.

Mr. BAYH. I must say that the Senator from Pennsylvania knows the Senator from Indiana well enough that that is a rather feeble threat. I only feel a responsibility to check with some of our

colleagues over here. I want to accommodate the leader.

Is there any way we can make this decision tomorrow? I am not trying to delay this. Suppose we have a Senator who will be coming back from the west coast——

The PRESIDING OFFICER. If the Senator will withhold, the rule requires that the motion when filed be stated immediately. The motion for cloture having been filed, the clerk will state the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close the debate on the confirmation of the nomination of William Rehnquist, to be an Associate Justice of the Supreme Court of the United States:

1. Hugh Scott
2. Paul Fannin
3. Clifford Hansen
4. Bill Brock
5. William Saxbe
6. Marlow Cook
7. Howard Baker
8. James Pearson
9. Roman Hruska
10. Glenn Beall
11. Robert Dole
12. Barry Goldwater
13. Henry Bellmon
14. Carl Curtis
15. Ted Stevens
16. Norris Cotton
17. Mark Hatfield
18. Robert Griffin
19. James Eastland
20. Gordon Allott
21. Ernest Hollings
22. John Tower
23. James Buckley
24. Edward J. Gurney
25. Len B. Jordan
26. Lowell Weicker

Mr. TAFT subsequently said: Mr. President, I ask unanimous consent that the permanent RECORD be corrected to show that the Senator from Ohio (Mr. TAFT) was one of the original signers of the cloture motion on the confirmation of the nomination of William Rehnquist to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Without objection, the correction will be made.

Mr. MANSFIELD. Mr. President, would the distinguished minority leader agree to withholding the time until tomorrow morning, at which time I am sure we can agree on a time certain?

Mr. SCOTT. I would be glad to withhold the request as to time. I do have some problems with 10 o'clock. I do not have problems with 12 o'clock, really, if the Senator wants to agree on that. I have no objection. We will see. We can work it out tomorrow. I will be glad to withhold that part of the request.

Mr. MANSFIELD. We will do that.

Mr. SCOTT. Without in any way interfering with the right to have a vote sometime on Friday.

Mr. MANSFIELD. Absolutely; because if nothing is done, the vote will come at 10 o'clock Friday morning, under the present situation. But we will try to work out something that will be satisfactory to both sides and I think we can do that.

Mr. SCOTT. I think so.

Mr. BAYH. Mr. President, I reiterate that I am willing to cooperate in every way I can. We will have a much better understanding tomorrow as to where everyone will be, and they will be on notice. If they have not advised us, then it is their responsibility.

Mr. SCOTT. That is perfectly all right with me.

REPAIR OF CERTAIN MEDICAL CARE FACILITIES

Mr. MANSFIELD. Mr. President, as in legislative session, I ask the Chair to lay before the Senate a message from the House of Representatives on S. 1237.

The PRESIDING OFFICER (Mr. CHILES) laid before the Senate the amendment of the House of Representatives to the bill (S. 1237) to provide Federal financial assistance for the reconstruction or repair of private nonprofit medical care facilities which are damaged or destroyed by a major disaster, which was, on page 2, line 24, strike out "625" and insert "645".

Mr. MANSFIELD. Mr. President, I move that the Senate concur in the amendment of the House.

The motion was agreed to.

QUORUM CALL

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BAYH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

Mr. BAYH. Mr. President, I have not had the good fortune to be a Member of this body as long as many other of my colleagues, but I have had the opportunity both while here and prior to my arriving to assume the honor of representing my State to study the Senate and the institutions which make it the body that it is.

I remember well, when I was in college, hearing about filibusters in the Senate and hearing for the first time that funny word "cloture." At that time, of course, I did not know its meaning.

Since coming to the Senate, however, I have learned the meaning of that term on more than one occasion. I do not recall an instance since I came to the Senate, nor do I recall reading of past instances where a cloture motion, calling for the mandatory termination of debate, has been utilized under the present circumstances.

It is impossible to see how what has gone on here today could be described as a filibuster. In fact, it was today, for the first time, that those who are supporting the nomination of Mr. Rehnquist dared to rise to defend some of the allegations the opposition has made. To suggest that a decision as important as this, placing on the Supreme Court a controversial nominee who could serve there for 25 or 30 years should be made with no more debate than we have had here so far, when the normal increments of a filibuster are totally lacking, is I think setting a sorry precedent for this body.

I think it is setting a precedent that some Members of this body will live to regret.

As one of my colleagues said to me a moment ago, "Why not? We have the votes."

Mr. President, if there is ever a better example of the tyranny of the majority, of the tyranny of numbers, of the lack of the respect for a minority, the very ingredients of which caused some of us to be concerned about this nominee, it is the fact that the Senate is about to try to impose cloture on the shakiest grounds that it has been my opportunity to observe.

QUORUM CALL

Mr. BAYH. Mr. President, I respectfully suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

ENROLLED BILLS AND JOINT RESOLUTION PRESENTED

The Secretary of the Senate reported that today, December 8, 1971, he presented to the President of the United States the following enrolled bills and joint resolution:

S. 952. An act to declare that certain public lands are held in trust by the United States for the Summit Lake Paiute Tribe, and for other purposes;

S. 2007. An act to provide for the continuation of programs authorized under the Economic Opportunity Act of 1964, and for other purposes; and

S.J. Res. 149. A joint resolution to authorize and request the President to proclaim the year 1972 as "International Book Year."

AUTHORIZATION FOR ALL COMMITTEES TO FILE REPORTS UNTIL MIDNIGHT TONIGHT

Mr. MANSFIELD. Mr. President, I ask unanimous consent that all committees may have until midnight tonight to file reports.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADJOURNMENT TO 9 A.M.

Mr. MANSFIELD. Mr. President, if there be no further business to come before the Senate, I move, in accordance with the previous order, that the Senate stand in adjournment, as in legislative session, until 9 a.m. tomorrow.

The motion was agreed to; and (at 5 o'clock and 18 minutes p.m.) the Senate adjourned until tomorrow, Thursday, December 9, 1971, at 9 a.m.

Agency or other such Federal agency which assumes the responsibility for the protection of the environment by change of law or by Executive order, unless that agency is under the administrative jurisdiction of the Secretary of the Interior.

(c) The Chairman of the committee shall be elected by the membership thereafter for a term of not to exceed two years. Any vacancy in the committee shall be filled in the same manner in which the original appointment was made.

(d) All members of the committee shall serve without compensation as such. The Secretary is authorized to pay the expenses reasonably incurred by the committee in carrying out their responsibilities under this Act on the presentation of vouchers signed by the chairman.

(e) The Secretary or his delegate shall consult regularly with the committee with respect to all matters relating to the development and administration of the riverway, and with respect to carrying out the provisions of this Act, including but not limited to matters relating to the acquisition of lands, the issuance of regulations specifying standards for zoning ordinances, and the administration of the riverway.

(f) The committee shall make available to the Secretary an annual report reviewing matters relating to the development of the riverway, including land acquisition and zoning standards policies, and shall make recommendations thereto.

CONNECTICUT RIVER VALLEY CORRIDOR

SEC. 7. (a) The Secretary, in accordance with authority contained in the Act of May 28, 1963 (77 Stat. 49), and in consultation with the New England River Basin Commission and the advisory committee established by section 6 of this Act, shall encourage coordinated planning for the conservation and development of the scenic, ecological, scientific, historic, and recreational resources of the Connecticut River Valley corridor which is defined for the purpose of this section as that part of the Connecticut River Valley corridor depicted on the map referred to in section 1 of this Act which is located within the State of Connecticut. The Secretary shall give particular attention to encouraging and coordinating the conservation and development of the outdoor recreation resources of the corridor that are outside the boundaries of the riverway, and he is authorized to provide technical assistance to State and local governments and private individuals, groups, and associations with respect to the conservation and development of such resources. The Secretary is authorized to establish a regional office of the Bureau of Outdoor Recreation within the boundaries of the Connecticut River Valley corridor in order to facilitate the planning and coordination under this section.

(b) The Secretary shall encourage State, regional, county, and municipal bodies to adopt and enforce adequate master plans and zoning ordinances which will promote the use and development of private owned lands within the corridor in a manner consistent with the purposes of this section, and he is authorized to provide technical assistance to such bodies in the development of such plans and ordinances.

(c) The Secretary shall cooperate with the appropriate State and local agencies to provide safeguards against pollution of the Connecticut River and unnecessary impairment to the scenery thereof.

(d) In order to avoid, insofar as possible, decisions or actions by any department, agency, or instrumentality of the United States which could have a direct or adverse effect on the outdoor recreation resources of the corridor, all departments, agencies, and instrumentalities of the United States shall consult with the Secretary concerning any plans, programs, projects, and grants under their jurisdiction within the corridor. Any Federal department, agency, or instrumentality before which there is pending an application for a license for any activity which could have such effect on the outdoor recreation resources of the corridor shall notify the Secretary, and, before taking final action on such application, shall allow the Secretary ninety days to present his views on the matter.

(e) The Secretary of Agriculture shall study means of preserving the agricultural, forest, and rural open space character of the corridor, and shall submit a report of his findings and recommendations to the President and Congress within one year after the date of this Act.

SHORELINE EROSION CONTROL

SEC. 8. The Secretary of the Interior and the Secretary of the Army shall cooperate in the study and formulation of plans for shoreline erosion control of the Connecticut River; and any protective works for such control undertaken by the Chief of Engineers, Department of the Army, shall be carried out in accordance with a plan that is acceptable to the Secretary of the Interior and is consistent with the purposes of this Act.

APPROPRIATIONS

SEC. 9. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act, not to exceed, however, $17,450,000 for the acquisition of land and interests therein, and not to exceed $4,569,000. (August 1971 prices) for development, plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indexes applicable to the types of construction involved herein.

EXECUTIVE SESSION

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the Senate return to the consideration of executive business.

There being no objection, the Senate proceeded to the consideration of executive business.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. BYRD of West Virginia). Without objection, it is so ordered.

NOTICE OF VOTE ON CLOTURE MOTION ON FRIDAY, DECEMBER 10, 1971

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the hour to be set aside, after the first legislative day, for consideration prior to the vote on the cloture motion, begin at the hour of 11 a.m. and that the vote occur at 12 o'clock noon.

The PRESIDING OFFICER (Mr. BYRD of West Virginia). Is there objection to the request of the Senator from Montana? The Chair hears none, and it is so ordered.

QUORUM CALL

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. BAYH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. BAYH. Mr. President, we are at present as a body operating under the mandatory requirements and time limitations provided for under rule XXII designed to deal with how the Senate as an institution can terminate debate. In language which is perhaps more apropos and more widely understood by average citizens throughout the country, we are operating under those provisions which have been historically used as a vehicle to terminate a filibuster.

The Senate's history is filled with instances of filibustering—whether we call it that or prolonged debate. The Senate RECORD is filled with instances in which some Members of this body, as is their right, have resorted to all of the parliamentary shenanigans and tactics available. Every loophole has been utilized by various Senators in the past to keep issues from being put. All-night sessions, prolonged dissertations on subjects and substances totally irrelevant to the discussion, repetitive speeches revealing no new information, as well as being totally irrelevant, the business of reading poetry and prose and documents totally unrelated or only vaguely related to the question at issue have been utilized on many occasions.

It was to try to stem this type of tactic, the arbitrary use of parliamentary rights on the part of a minority—ofttimes a very small and scant minority—that the Senate enacted in its rules the cloture provision to terminate debate.

Mr. President, I hope that between now and noon tomorrow Senators will examine the RECORD, will examine what has been said on the floor of the Senate, will examine the tactics that have been used by those of us who have deep concern and reservations about the nominee, as well as the tactics and rhetoric used by those who are supporting the nominee, and then, and only then, be prepared for the vote to determine whether the Senate is indeed in the process of being filibustered or whether the Senate is going through the common legislative process of trying to decide a very controversial issue.

I have been in public life for 17 years. Many in this body have been in public life a good deal longer. Perhaps this confession or admission is not a good one, but I have not yet reached a place where criticism does not hurt. I have learned to accept it and tolerate it. I have not yet reached the place where I do not care about being readily accepted and being on friendly terms and likable terms with my colleagues. I think it is relevant to say that, because I am not totally unaware of the pressures which exist in this body today that have absolutely nothing to do with the issues before us.

There is great pressure to adjourn. There is great pressure on all of us to be with our families, our friends, and our constituents, and to have the chance to enjoy a well-deserved rest. It is a very difficult position for those of us who are concerned over the nomination of Mr. William Rehnquist to be in. The Christmas spirit exists outside this Chamber. For this reason it is hard sometimes to keep attention on the legislative process. And some interpret the process as far from the Christmas spirit.

Be that as it may, and at the risk of offending some of my colleagues whose friendship I value highly, nevertheless, I, as one Member of the Senate, do not intend to be as much concerned about waging a popularity contest as I am about seeing that all the issues about the Rehnquist nomination are properly put.

This body in its finest moment has not avoided controversy. It has not sought the easy way and the convenient way. I intend, as much as one Senator can accomplish his own desires, to see that this is one of those moments in which the Senate rises above its own personal convenience and deals with this issue only after it has been fully discussed and some of the critical questions that are yet unanswered are put to rest.

I do not believe several of the issues have been as clearly stated as I would like, and I must admit that it is extremely difficult to get individual Senators at this time, with their minds filled with the other problems that they have individually, with the other problems that confront our country and the world, and with the pressures that they all have to terminate their legislative business, to look at the merits, pro and con, of the Rehnquist nomination. The general attitude seems to be, "Well, let's give the President his way and go home."

In my judgment, this is a very dangerous attitude, one which needs to be changed.

In light of some of the dialog that we have had on the floor of the Senate and indeed in light of some of the comments I have heard some Senators make off the floor, I fear that the Senate does not yet properly understand its role in the advise-and-consent process.

I did not have the good fortune of hearing my distinguished friend and colleague, the Senator from Kentucky—who I notice is on the floor—respond to a WTOP letter to the editor, or an editorial, but I did have it relayed to me by a member of my staff who heard him. The Senator is a persuasive advocate, and he is an honest, tenacious man who pursues his thoughts in as dedicated a manner as any other Member of this body. On many issues we find ourselves comrades in arms. I do not want to put words in his mouth, nor do I want to bring him unnecessarily into the debate, but I do not believe that it is the feeling of those of us in the Senate, nor do I believe that the WTOP editorial that I now have before me can be accurately described as opposing Mr. Rehnquist because he is an ultraconservative. We are concerned not about the general judicial conservative philosophy attributed to him by the press, but we are concerned about how Mr. Rehnquist would vote, what he has said, and thus what he appears to believe in two general areas that go far beyond the general philosophy of liberal and conservative, or strict constructionist or judicial conservative.

The concerns that the WTOP editorial expresses, after talking in terms of Lewis Powell, Harry Blackmun, and Warren Burger, when it says, "In our judgment, all three of these men have what Mr. Rehnquist lacks, a sense of the unique and perishable character of the American experiment," over Mr. Rehnquist's views on civil liberties and on human rights, are concerns about matters which characteristically are not divided into little packages marked conservative and liberal. In fact, as was brought out during the debate yesterday, the main proponents of individual liberties, the main protectors of those liberties from incursions and encroachments by the Federal Government or the State governments, have been the stalwart conservative judges who have sat on the Supreme Court of the United States.

I suggest that it is fully within the role of the Senate to look at the legal qualifications, to look at the integrity, to look at the intellect, and to look at the views of any nominee, particularly the basic fundamental views in the area of human rights, civil rights, and civil liberties.

Mr. President, there is no stronger advocate for the rule that the basic philosophy of a nominee should be considered than the nominee himself. In the Harvard Law Record, he wrote persuasively that the Senate was not fulfilling its responsibility unless it looked at the general philosophy of a nominee.

But the general philosophy of the nominee does not concern the Senator from Indiana. I have said previously that that battle was lost in the 1968 election, and those who are now concerned about the Rehnquist nomination perhaps wish they had been a bit more concerned about the outcome of the 1968 election. But that is past history. When Richard Nixon was elected President, anyone with a nickel's worth of sense should have recognized that it was only reasonable to expect that nominees would be forthcoming whose views would be closer to the Richard Nixon philosophy than to the philosophies of some of the Members of this body.

But in the specific area of civil liberties, the great fundamental principles of the Bill of Rights, and in the area of basic human rights, civil rights, if the nominee is wrong there, then in my judgment he is wrong for the Court.

There have been several issues raised that I hope Senators will direct their attention to between now and the vote on cloture. It seems only reasonable to expect that until each Senator in his own mind has resolved the issues on the merits and has had the questions which have been raised laid to rest to his own satisfaction, he can hardly suggest that the Senate is involved in a filibuster.

Our distinguished minority leader yesterday talked about a lonely vigil, and I suppose by inference suggested that the Senator from Indiana alone was concerned about this nomination. It is rather ironic that shortly after that, for about a 2- or 3-hour period, we had the most vigorous debate of the entire period of time in which we have been going into the matter; and for the first time, those who supported the nomination attempted—I say attempted because I do not think they succeeded—to deal with the questions some of us have raised that have caused our concern about the qualifications of the nominee.

There are a number of Senators who wish to speak and will speak between now and the cloture vote tomorrow, and hopefully if the issue is not laid to rest then, will have the opportunity to continue speaking, and continue to articulate the issue. The questions that have been raised have not yet been sufficiently answered in the minds of several of our colleagues. In fact, I doubt if many of our colleagues have had the opportunity even to study some of these issues. I say this not as criticism, but out of recognition of the fact that there are many competing interests for the minds and concerns of each Senator right now. There could be no more disadvantageous time to have a critical, controversial, complicated issue before the Senate than at this particular moment.

I want to, for the sake of the RECORD—with the hope that now that this issue has been perhaps more clearly joined, because there are those who are suggesting that we should no longer have the chance to debate it—touch on some of these questions, and hopefully my colleagues will take the opportunity of looking at this RECORD before the rollcall vote tomorrow, and then they can decide in their own minds and their own consciences, as each Senator must do, whether these particular questions have been laid to rest in the mind of the individual Senator involved.

Do Senators realize the position of the nominee as far as the basic guarantees of the Bill of Rights are concerned?

Are they aware that both in his speeches and in his testimony before the Judiciary Committee at his nomination hearings, he said, in response to questioning, that he saw no constitutional issue involved in the right to privacy where surveillance was involved?

It is all well and good for us to say, "Well, now, this really does not mean anything"; but every Senator had better be prepared to know what it means. It does not mean that we are not going to make new law. It means we are going to change present law; because the Supreme Court, in the Griswold against Connecticut case, has held that there is a constitutional right to privacy, and if we put on that Court a man who says there is not a constitutional right to privacy, I suggest we are in the process of changing the law—not just staying where we are; not just preventing legislation on the Court, but increasing the chance of it; not just preventing positive movement ahead by the Court, but in danger of regressing and going backward.

Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. CRANSTON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. CRANSTON. Mr. President, I rise to speak in opposition to Senate confirmation of the nomination of William H. Rehnquist to be an Associate Justice of the Supreme Court of the United States. Although the Senate has already voted 89 to 1 to advise and consent to the nomination of Lewis F. Powell, Jr., to be an Associate Justice of the Supreme Court, I will also in this statement explain my reasons for my vote for confirmation of Mr. Powell's nomination.

Mr. President, at the outset I think we can all agree that the overwhelming vote of confirmation of Mr. Powell's nomination, to borrow a phrase, "makes one thing perfectly clear"—that the Senate will indeed give its advice and consent to the Supreme Court nomination of a qualified southerner. This was my contention at the time that the Senate withheld confirmation of the Haynsworth and Carswell nominations, and I am delighted my prophesy has become reality in such an overwhelming way.

A DUAL NOMINATION PLAY

Before going further, Mr. President, I wish to comment on the way in which these nominations came to us in the Senate. I most strongly object to the attempt which has been made to compel the Senate to make a judgment on two such vital nominations concurrently. It may have seemed cagey strategy to the President to confront the Senate with a pair of nominations so as, seemingly, to dilute the focus of critical judgment with respect to each nomination. But, to me, presenting "an entry" of nominees is an attempt to manipulate the Senate in its exercise of the constitutional responsibility to advise and consent in Supreme Court nominations.

Mr. President, I understand from press reports that the President of the United States is an ardent football fan. Indeed, I share with him a keen interest, both as participant and spectator, in sports and physical fitness. But I do not believe it appropriate to make decisions of state by borrowing from a chalkboard diagram of a football play, and, thus, it seems to me particularly regrettable that the President has seen fit to devise and execute a dual nominee play, in which one nominee is assigned the role of running interference for the other. Which nominee is to be the running back and which the blocking back in this play is to be determined later based on whom the other team—the Senate—wishes most to tackle.

This kind of "tie in" has long been declared illegal under the antitrust laws and, in my judgment, serves to demean the nomination of each man by casting an inference that the nomination of neither is sufficiently secure to stand separate and independent scrutiny if the gordian knot binding them together should be severed.

It is, therefore, extremely fortunate that the distinguished majority leader (Mr. MANSFIELD) decided to put an end to this misbegotten strategy by scheduling Senate consideration of the noncontroversial nomination before we turned to consideration of the pending one.

I congratulate the leader for this excellent decision.

Mr. President, since the two nominations came before us during the same week, it is instructive, in evaluating Mr. Rehnquist's qualifications in certain respects, to indicate how Mr. Powell's differ, and I will do so during the course of this statement where appropriate.

STANDARDS GOVERNING SENATORIAL ADVICE AND CONSENT RESPONSIBILITY

In preface to discussion of the individual qualifications of the two nominees, it is first necessary to discuss both the standards for evaluation of Supreme Court nominations and the singular importance of such nominations under our Constitution.

First, I would like to suggest what standards should not be applied.

It has been suggested by some that perhaps it would be the better part of discretion for a Senator to swallow his concerns and principles and accept a nomination because it appears far less outrageous by comparison with a nomination that might have been made.

Similarly, some also suggest that if acquiescence is not secured by relief at being spared a worse fate, toleration of a questionable nomination should be prompted by fear of the kind of nominee which might be put forward if the present nomination should be rejected. This latter postulate draws both support and nonsupport from the parade of nominees for the last vacancy which was ultimately filled by Mr. Justice Blackmun. Many felt that the nomination of then Judge Carswell was considerably more intolerable than the nominee rejected before him for that position. But the Senate, despite expressions of concern as to who might be a third nominee should Mr. Carswell be defeated, performed its constitutional responsibility, regardless of such fears or concerns.

Mr. President, I find these two apologist standards totally unacceptable. The only end they serve is to encourage a President to follow a pattern of sending mediocre or worse nominations to the Senate and to adopt a strategy of compiling smokescreen lists of mythical nominations which might be seen as placing his actual nominations in a more favorable light by contrast.

Rather, in my view it is the responsibility of each Senator to judge each nomination on its own individual merits and to reach an independent decision without regard to the qualifications or lack thereof of any other nominee, past, present, or potential. That is what I have attempted to do with respect to the four Supreme Court nominations which I have been called upon to consider prior to these and what I have attempted to do with respect to the two present nominations.

SINGULAR IMPORTANCE OF SUPREME COURT NOMINATIONS

Mr. President, a nomination to the Supreme Court of the United States and the coordinate action of the Senate in giving or withholding its advice and consent is a more important appointment than any other within Presidential and senatorial prerogative. Whereas Presidential appointments of Cabinet or sub-Cabinet rank usually serve no longer than 4 years and would be most unlikely to serve more than 8 years, it is not uncommon for Supreme Court Justices to sit for two or sometimes three decades on the High Court. A Supreme Court Justice is in a virtually unparalleled position in our society of laws to have impact on the most pressing legal, social, ethical, and political questions facing several generations of Americans.

I should point out that this opportunity for decades of influence on the future course of Supreme Court decisions is singularly available to Mr. Rehnquist, who at 47 years old, promises to serve far longer, if confirmed, than Lewis Powell, Jr., who is 17 years his senior.

Unlike a Cabinet Secretary or a President, unlike a Senator or a Congressman, a Federal judge has lifetime tenure and can be removed from office only upon impeachment and conviction of the most severe of high crimes. Presidential appointees in the executive branch, by contrast, serve at the pleasure of the President, and we elected officials are directly accountable to the electorate every 2, 4, or 6 years.

Thus, once appointed after Senate confirmation, a Supreme Court Justice is accountable only to himself for the judgments which his high office calls upon him to make. For all practical purposes he is removed from control or sanction by the people. In contrast, these other appointed and elected officials are able to make their decisions on the merits at best only imperfectly, given the vicissitudes of public life and the various pressures and interests which permeate the political, democratic processes in our country.

It thus becomes startingly important, based upon the available information, for each individual Senator to make a sound judgment as to how a Supreme Court nominee would perform this enormous responsibility of decisionmaking free, virtually entirely, from any dictates other than those of his own sense of justice and conscience.

The framers of our Constitution, in the exercise of their characteristically extraordinary wisdom, refused to entrust the selection to fill such a mighty office to any one official. And they chose also not to entrust the appointment separately to either of the other two coequal branches of Government. Rather, the appointment of Federal judges with lifetime tenure was made a shared responsibility between the President and the Senate of the United States.

Thus, whereas the benefit of the doubt should, I believe, be afforded nominations by the President of appointees to serve him in the executive branch, where they are subject to the scope and continuation of his popular mandate—and I have tried to give the President's executive branch nominations such a presumption—no such presumption should properly govern the exercise of senatorial advice and

consent in the case of lifetime judicial appointments. This is particularly so in the case of the highest of all such appointments, nominations to the Supreme Court of the United States.

At the same time, however, I do not mean to suggest that it is the province of the Senate or an individual Senator to attempt to substitute his judgment for that of the President when deciding upon advice and consent to a Federal judicial nomination. Clearly, the question for a Senator is not whether or not this is a nominee whom he would have chosen had he been President, but whether the nominee meets minimum standards of qualification for the judicial position to which he has been nominated.

MINIMUM QUALIFICATIONS FOR SUPREME COURT NOMINATIONS

This brings me, then, to a description of the criteria I believe should govern a Senator's determination of the qualifications of a Supreme Court nominee.

As stated in the individual views of Messrs. BAYH, HART, KENNEDY, and TUNNEY (exec. rept. No. 92–16), the very minimum qualifications are intellectual and legal excellence and personal integrity. No nominee who does not possess at least these qualifications should even be submitted to Senate consideration. To be confirmed, a nominee should possess more.

Surely, a third qualification is judicial temperament. Judicial temperament, it seems to me, can comprehend more than merely the ability to present a dignified and dispassionate demeanor on the bench.

In the broadest sense, judicial temperament includes the capacity to perform the essential functions of a judge; that is, to be dispassionate—in the sense of being personally "disinterested," although not uninterested, in the result of a case, to be impartial, to be balanced in approaching a judicial question, and to be able to maintain the appearance, as well as the reality, of those qualities. Webster's new collegiate dictionary—1961—defines the word "temperament" as "internal constitution with respect to balance or mixture of qualities or parts."

To a considerable extent, this notion of the capacity for judicial balance may involve the question of "judicial philosophy" which, itself, can also be considered a fourth qualification for Supreme Court appointment.

Regarding the appropriateness of such a judicial philosophy qualification, I find no valid argument, in either senatorial practice or tradition, or in commonsense, for holding that a judicial nominee's prospective judicial philosophy is no business of the Senate.

In fact, the history of Senate action in advising and consenting to Supreme Court nominations presents a compelling brief that judicial philosophy is, and has always been, a legitimate matter for Senate scrutiny. According to the excellent memorandum prepared for the Senator from Indiana (Mr. BAYH) by Professors Brest, Grey, and Paul—which appears in the CONGRESSIONAL RECORD of November 5, page 34591, during the 19th century the Senate refused to confirm 21 nominees to the Supreme Court. And the grounds for Senate rejection were by and large based upon the political views of the nominees.

In the 20th century, prior to this administration, this memorandum indicates, there were at least seven instances in which significant concern was expressed by Senators and nominations were opposed, because of a nominee's prospective judicial philosophy. Of course, the nominees substantive views on the fundamental question of racial justice were deeply involved in the Carswell and Haynsworth confirmation battles.

Thus, it is clear that many, many Senators in the past, as well as very recently, have voted against Supreme Court nominations, because these Senators strongly objected to the judicial philosophy of a particular nominee. I might add that quite often those applying this qualification to a judicial nominee have been Senators who themselves have held a politically conservative philosophy.

Second, regarding evaluation of judicial philosophy, given all that has recently been said and written with regard to the Senate's coequal role in appointments to the Supreme Court, when the President himself in the most explicit way—in a clearly calculated attempt to arouse public opinion in support of his nominee—states publicly that probably the overriding qualification sought by him in making the nomination was consistency with his own judicial philosophy, how can it possibly be contended that a Senator should not concern himself with that same qualification when he makes his decision on confirmation?

In this particular instance, on October 21, 1971, the day before the President sent these two nominations to the Senate, he appeared on nationwide radio and television and stated:

> You will recall, I am sure, that during my campaign for the presidency, I pledged to nominate to the Supreme Court individuals who shared my judicial philosophy which is basically a conservative philosophy.

He said quite openly that he had this in mind when he nominated Mr. Rehnquist and Mr. Powell. It is pure sophistry to suggest that we should not employ the same criterion in evaluating these nominations.

THE REHNQUIST AND POWELL NOMINATIONS

Mr. President, since I do not serve on the Judiciary Committee, I have reserved judgment on these nominations until I have had a full opportunity to review the record of their nomination hearings, the committee reports and individual views on their respective nominations, and other respective nominations, and other materials relevant to their qualifications, as well as to discuss the nomination with fellow Senators who have had a similar opportunity to brief themselves. Yesterday, during debate on the nomination, I asked a number of questions of the Senator from Indiana (Mr. BAYH) and the Senator from North Carolina (Mr. ERVIN), both outstanding lawyers and members of the Judiciary Committee. Their answers were most helpful and I thank them.

INTELLECTUAL AND LEGAL EXCELLENCE AND PERSONAL INTEGRITY

There is no real question raised with respect to either nominee in terms of their satisfying standards of intellectual and legal excellence or personal integrity. All members of the Judiciary Committee were in agreement of this score as were the members of the American Bar Associations Standing Committee on Federal Judiciary. Nor have I seen any contrary indication on these accounts in what I have read regarding these two nominees.

JUDICIAL TEMPERAMENT

With regard to judicial temperament in terms of such matters as demeanor, there would seem no question that each nominee passes muster. But, regarding the broader and more significant characteristics also involved in judicial temperament, I find Mr. Rehnquist not qualified and Mr. Powell qualified. To explain the reasons for my conclusions requires some discussion of the judicial philosophy question as well.

I find nothing in what I have learned of Mr. Powell's activities, viewpoints and statements to lead me to conclude that he is not capable of making dispassionate, impartial and balanced judicial judgments. Indeed, the evidence is to the contrary. His balanced approach to highly sensitive and controversial problems is nowhere more critically evidenced than in his statements and actions as chairman of the Richmond City School Board following the historic Supreme Court decision in Brown against Board of Education. Whatever may have been Mr. Powell's personal views, predilections or preferences in that highly complex emotion-charged situation, his posture was at all times measured, judicious and firm in promoting clear movement toward compliance with the supreme law of the land as laid down in the Brown case. In addition to this clearly balanced behavior, Mr. Powell's actions were also most courageous in terms of the tide of opinion in his community.

The same temperament was evidenced in Mr. Powell's work as president of the American Bar Association in 1964–65 in pressing for and beginning a comprehensive and scholarly study to formulate minimum standards for the administration of criminal justice, and urging strong support from the organized bar for the legal services program.

The judicious way in which he dealt with these highly emotion-charged issues convinces me of his capacity for appropriate judicial temperament.

I might add, Mr. President, that the directions in which he was moving were also directions which accord with my personal policy views in these particular instances. But that is hardly the case with respect to some of his views on other matters particularly, questions of criminal law.

With respect to Mr. Rehnquist, on the other hand, I find his record almost totally lacking evidence of a balanced, dispassionate, impartial approach to legal and policy questions. From an extensive review of his writings and his testimony before the judiciary commit-

tee, I find him to be an extraordinarily committed idealog who first forms conclusions according to the dictates of his ideology and then afterwards reasons backwards to justify those conclusions. Mr. Rehnquist uses his considerable intellect to examine microscopically arguments opposed to his conclusion, but often applies this same intellect only superficially to probe the merits of the arguments supporting his position.

I am convinced that he uses this backward reasoning process with respect to his position regarding racial equality, civil disobedience, the 18-year-old vote, and equal rights for women amendments, the President's war powers, rights of arrested persons, privacy, political association, Government surveillance, and other first amendment issues.

The evidence supporting my conclusion in these areas has been clearly laid on the public record in the Judiciary Committee hearings, the individual views of Messrs. BAYH, HART, KENNEDY, and TUNNEY, and in the CONGRESSIONAL RECORD.

It has been argued that Mr. Rehnquist's expressions of views and legal analysis while he was Assistant Attorney General were often made in the posture of an advocate and do not necessarily represent his personal views. There is no way we can find out if that is the case. For Mr. Rehnquist refused to clarify this issue for the Judiciary Committee. The burden of proof is, therefore, on those who would conclude that his official statements as Attorney General do not represent his personal views.

On this question Mr. Rehnquist was uncooperative with the Judiciary Committee members who tried to determine and explore his personal viewpoints. His invocation of an attorney-client relationship with the Attorney General and the President is unique. Based on advice I have received, it is also insupportable. I might add, parenthetically, that Mr. Rehnquist's capacity in this instance for innovative theorization in the face of the doctrine of stare decisis is not without appeal, but, again, he uses this new theory only to support his end result. Moreover, on several occasions on which he might also have refused to answer based on this new found privilege, he chose not to invoke the privilege.

I am not suggesting that Mr. Rehnquist at his confirmation hearing should have engaged in discussions of specific fact situations that might later form the basis for actual cases that might come before him on the Supreme Court should he be confirmed. Nor did any member of the Judiciary Committee quarrel with his altogether commendable desire to avoid such prejudgments. But he carried this reluctance to a point where he was not forthcoming in many of his responses.

There are four more points that should be made regarding his failure to discuss his personal views.

First, his attitude on civil rights is expressed largely in statements and actions prior to his tenure as Assistant Attorney General.

Second, at no time during his confirmation hearing did he suggest that his official expressions of views were hostile to his own personal views. He did admit he would have resigned had he felt he was being called upon to defend indefensible or unconscionable Government policies.

Third, Mr. Rehnquist, himself, has stated in a 1970 Arizona Law Review article that he was chosen Assistant Attorney General on the basis of his intellectual compatibility with the views he subsequently advocated in that position. His selection for that position was recommended by Deputy Attorney General Kleindeinst whose views he knew well and shared during their political collaboration in Arizona. So he had every reason to know what he was undertaking as John Mitchell's advocate.

Fourth, even if one should disregard the ultimate positions he was called upon to defend as Assistant Attorney General, the thought processes and legal analysis underlying his defense are undeniably his own. And on that score, in my judgment, his work evidences a clear lack of balance and essential fairness in evaluating competing contentions. He displays none of the characteristics of judiciousness one would hope to find in an intellect of his stature.

Thus, I conclude that Mr. Rehnquist by refusing to answer specific questions at the Judiciary Committee hearings regarding which of the views he espoused were as an advocate and which were his own, left us no alternative but to judge his capacity for a balanced approach and his judicial philosophy on the basis of what he has said and done, including his activities as Assistant Attorney General for legal counsel.

Essentially, I find that Mr. Rehnquist consistently accords the most narrow interpretation to Supreme Court decisions and constitutional concepts that protect individual rights and liberties. At the same time, he accords the broadest possible interpretation to opinions and concepts that sanction Government restrictions on individual rights and liberties.

For example, he places great weight on the need to avoid constraints which might "dampen the ardor" of government investigators. But he generally gives no weight to the danger that such investigations can have a "chilling effect" on the exercise of free speech or association by those being investigated or placed under surveillance. For him there is no real effort to balance the scales of justice with the interests of the individual. His scales of justice are those of the horserace handicapper with the Government's interest already weighted before the ostensible balance is made.

His result-oriented approach is perhaps most clearly evidenced by his failing completely to recognize the very substantial societal and governmental interest in our democracy in the widest official sanctioning and encouraging of the exercise of freedom of speech, association, and belief. He seems to consider the first amendment as something designed only in the interests of particular individuals—a few "radicals," pornographers, or Communist sympathizers—and not in the interest of all of us and the Government that serves us all.

Another example of his lack of dispassionate approach is in his calculated use of McCarthyite innuendo to characterize the authors of Supreme Court first amendment cases with which he disagrees. I say "calculated" because Mr. Rehnquist is too able a lawyer and verbal stylist to use words carelessly.

In characterizing two decisions handed down by Mr. Justice Black in 1957 which dealt with the permissible scope of inquiry by State bar examiners about previous political beliefs, Mr. Rehnquist impugned the motives of Mr. Justice Black and the majority of the Court. In describing these decisions which happened to deal with an admitted former Communist and an alleged former Communist, he stated in a Bar Journal article that these decisions were "based on a combination of charity and ideological sympathy." This is a highly inflammatory piece of not very subtle rhetoric straight from the red-baiters school of politics.

Mr. Rehnquist began this same Bar Journal article with the lead sentence:

> Communists, former Communists, and others of like political philosophy scored significant victories during the October, 1956, term of the Supreme Court of the United States.

This hardly ranks as a piece of scholarly, measured legal analysis and judicious evaluation of the decisions of the highest judicial body in our Nation.

Mr. President, this is hardly the kind of reverence for the rule of law that is expected of an attorney—an officer of the court.

JUDICIAL PHILOSOPHY

With respect to the judicial philosophy of Mr. Powell, I am willing to accept the conclusion of Messrs. BAYH, HART, KENNEDY, and TUNNEY in their individual views—Executive report No. 92-17—that—

> He does, indeed, possess the strong dedication to preserving our basic civil liberties which we believe any nominee to the Supreme Court must have.
>
> We believe he is committed to guaranteeing for every citizen all of the protections of the Bill of Rights.

I have already cited Mr. Powell's record of work to bring peaceful desegregation of schools to Richmond, Va., and his devotion to the OEO legal services program I am also deeply impressed by the testimony in support of his nomination by a number of blacks. Including particularly that of Mrs. Jean Camper Cahn, a black attorney known for telling it straight from her shoulder.

She says, based upon her close working relationship with Mr. Powell in setting up the legal services program:

> My support is based upon the fact that I am drawn inescapably to the sense that Lewis Powell is, above all, humane, that he has a capacity to empathize, respond to the plight of a single human being to a degree that transcends ideologies of fixed position. And it is that ultimate capacity to respond with humanity to the individual instances of injustice and hurt that is the best and only guarantee I would take that his conscience and his very soul will wrestle with every case until he can live in peace with a decision that embodies a sense of decency and fair play and common sense.

Would that such a credible witness had attributed the same characteristics to Mr. Rehnquist.

My conclusion that Mr. Powell is qualified in terms of judicial philosophy does not mean that I am in accord with all of his views on public policy, but rather that I believe that in the crucial area of respect for individual rights and liberties he has the basic commitment which I believe is a minimum qualification for a Supreme Court Justice.

With respect to Mr. Rehnquist's judicial philosophy, first it should be noted that he, himself, in a 1959 Harvard Law Review article called on the Senate when considering Supreme Court nominations, to "restore its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him." He expanded on this by saying:

> The only way for the Senate to learn of these sympathies of nominees on great legal issues is to inquire of men on their way to the Supreme Court something of their views on these questions.

As I pointed out earlier, under questioning Mr. Rehnquist was extremely reluctant to discuss his personal views on the basic questions of human rights and individual liberties.

I find virtually no indication in his record of statements or actions which do other than raise the most significant doubts in my mind about his commitment to civil rights. His grudging statement at his confirmation hearing that he now no longer opposes a public accommodations law is too self-serving, and too lacking in an essential understanding of equal justice, to be accorded any weight.

At his confirmation hearing, he described his change of heart—to the view that it is now acceptable for the Government to insure that a black man can receive service at a lunch counter in public accommodations facility—as being motivated by his present greater realization in 1971 than he had in 1964 of "the strong concern that minorities have for the recognition of these rights." I am totally unimpressed with this new vision of light which on its stated justification misses the essential of fundamental justice and dignity involved in human rights matters.

The same callous insensitivity to human rights is displayed in Mr. Rehnquist's 1967 letter to the Arizona Republic in which he stated strong opposition to a series of prior articles discussing the need to take moderate steps to achieve integration of the Phoenix schools. Mr. Rehnquist first seemed to indicate that issues of minority group individual rights were somehow under our system appropriate for resolution by the majority based on their personal convenience. He put forth for serious consideration—13 years after the Supreme Court in Brown against Board of Education had held that separate educational facilities are "inherently unequal"—the proposition that—

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

Mr. Rehnquist's nomination is a shattering blow to all minority Americans and all Americans aspiring for equal justice and opportunity in this country and who, in the last analysis, must look to and rely upon the Supreme Court to vindicate the human rights they are guaranteed under our Constitution.

With respect to civil liberties, I have already cited a number of areas in which Mr. Rehnquist comes down on the side of less liberty rather than more. This is no coincidence. I find his record devoid of evidence of any basic commitment to the individual liberties which are inherent in the fabric of the Bill of Rights and serve as the last bulwark between the overwhelming force of the Government and the individual citizens' privacy, person, and interests.

In the area of wiretap and government surveillance of persons, I find Mr. Rehnquist's statements to be so extreme as to raise grave questions about his fundamental grasp of the system of checks and balances under our Constitution. The distrust of the unfettered exercise of the power of the sovereign, particularly in the area of belief, association, and speech, led directly to the founding of our Nation and permeates the philosophy underlying and explicit in the Bill of Rights.

In a March 19, 1971, speech, Mr. Rehnquist stated:

> I do not believe, therefore, that there should be any judicially enforceable limitations on the gathering of this kind of public information—[through surveillance by government agents]—by the executive branch of the government.

Eight days before, he made this remarkable statement, Mr. Rehnquist explained this view in testimony before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary as follows:

> I think it quite likely that self-discipline on the part of the executive branch will provide an answer to virtually all of the legitimate complaints against excesses of information-gathering.

Could our individual freedoms and our constitutional democracy survive if this totalitarian doctrine became the doctrine of the Supreme Court? Why have a Constitution? Why have three branches of Government? Why have checks and balances?

Mr. Rehnquist's extraordinary trust in the good faith of the executive branch of the Federal establishment is frighteningly naive to me. He says there is no serious constitutional question in the Government placing people under surveillance for exercising their first amendment rights.

I say such a procedure arrogates to what should be a democratic government the tools of the dictator. In my view, Mr. Rehnquist is sadly and totally out of step with our basic constitutional protections against unwarranted invasions of personal privacy.

In the same way, Mr. Rehnquist contends that the Attorney General has power to authorize wiretaps when he concludes there is a domestic threat to national security even though the Supreme Court in Katz against United States in 1967 held that wiretapping falls within the protection against unreasonable searches and seizures under the fourth amendment. Mr. Rehnquist's position on this score manifests a basic insensitivity to the historic framework leading up to the adoption of the fourth amendment: The abusive searches and seizures directed against the colonists under the sovereign and inherent powers of King George III. He also ignores the reasons why three coordinate branches of Government were created to share governmental power under the Constitution.

Consistently, in the area of individual liberties, Mr. Rehnquist disregards the fact that the Government represents each of us and all of us collectively in keeping us secure in our persons, beliefs and associations and treating each of us with maximum recognition of and respect for our privacy. He thus disregards the most basic principle of our constitutional democracy—that the Government itself and all of us collectively have a fundamental stake in not invading or denying individual liberties.

I, unlike Mr. Rehnquist, do not believe that it is even a tenable position simply to rely upon the good faith of the executive branch to vindicate the privacy of each individual citizen.

Finally, a somewhat novel but to me, very signficant argument was made to me in a recent letter from assistant professor of law Loftis Becker, Jr., of the University of Minnesota Law School.

Professor Becker alluded to the current conflicts between the powers of the Congress and the powers of the President, for example, in the area for foreign and military affairs. He points out that the Senate must take into consideration a nominee's opinion of the balance between congressional and executive branch powers.

The Senate, Professor Becker said, would be "arranging in advance to lose its own battles" if it sent to the Court a man who has evidenced his belief that in virtually all conflicts between Congress and the President, the Court should strike the balance on the side of the executive branch.

Mr. Rehnquist has indicated on a number of occasions a very clear disregard for the prerogatives of the Congress when they come into conflict with those of the executive branch. Two notable examples are his enormously broad reading of the President's so-called war powers with respect to the Cambodian invasion—he says that the Government of Cambodia's protest at this violation of its sovereignty was only perfunctory and thus not deserving of respect—and his creation of an attorney-client privliege under which he refused to provide information to the Senate Judiciary Committee exercising its constitutional function of evaluating presidential Supreme Court nominations.

Mr. President, I ask unanimous consent that Professor Becker's November 22 letter to me be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

NOVEMBER 22, 1971.

Senator ALAN CRANSTON,
Washington, D.C.

DEAR SENATOR CRANSTON: May I presume upon a brief meeting for a few minutes of your time? It seems to me that discussion of the Senate's role in confirmation of William Rehnquist's nomination to the Supreme Court has ignored one important point. Even if it be assumed that as a general matter the Senate should not deny confirmation to a nominee because of his political and legal views, I question whether this proposition has any force when the views in question relate to the relative powers of Congress and the President. Such conflicts these days are coming increasingly to the fore. Some of them, doubtless, will not result in any justiciable questions; *but some of them will.* In these cases, the Supreme Court must be the ultimate arbiter of the relative powers of the two branches. Yet unless the Senate takes into consideration a nominee's opinions on congressional and executive power, these cases will finally be decided by judges chosen entirely by one of the two parties to the dispute. It seems to me nonsensical to suggest that the Constitution was intended to so bias decisions against the Congress.

With regard specifically to Mr. Rehnquist, it is apparent to me that he would give little weight indeed to the prerogatives of Congress when it comes into conflict with the executive branch. To give merely a single example, he has argued that to disclose his personal views with regard to matters about which he counselled the Justice Department would be to violate the attorney-client privilege. Of course, if he is serious in this claim it would of itself disqualify him from service on the Supreme Court, since the privilege protects against all forms of public disclosure, and disclosure in the form of judicial opinions is hardly less public than disclosure to the Senate. If Mr. Rehnquist's claim makes any sense at all, it must be simply a claim that the executive branch is entitled to withhold information from Congress whenever it desires to do so. Such a broad claim of executive privilege is startling, to say the least; it is frightening when made by one who, if confirmed, may be deciding precisely this question if the issue should ever come to litigation. If the Senate refuses to take such views into consideration in deciding whether it wants Mr. Rehnquist on the Supreme Court, it is arranging in advance to lose its own battles. If the Congress is ever to reasert its power vis-a-vis the executive branch, it cannot afford to allow the President to guarantee the outcome of a struggle.

Sincerely yours,

LOFTUS E. BECKER, Jr.,
Assistant Professor of Law.

Mr. CRANSTON. It is thus my conclusion that on a broad range of questions involving human rights, individual liberties, and the prerogatives of the Congress, Mr. Rehnquist's judicial philosophy is so extreme as to raise grave questions about his qualifications to serve on the Supreme Court.

CONCLUSION

Mr. President, because I find Mr. Rehnquist lacks requisite judicial temperament and because I find that he embraces an extreme and unbalanced judicial philosophy, I shall vote against the confirmation of his nomination as Associate Justice of the Supreme Court.

Because I find that Mr. Powell possesses not only intellectual and legal excellence and personal integrity, but also requisite judicial temperament and a judicial philosophy which is not extreme, I have already voted to confirm his nomination as Associate Justice of the Supreme Court.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. EAGLETON). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. EASTLAND. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. EASTLAND. Mr. President, I ask unanimous consent to have printed in the RECORD an editorial broadcast on radio station WTOP against the nomination of William H. Rehnquist, and a very fine reply to the editorial by the distinguished junior Senator from Kentucky (Mr. COOK).

There being no objection, the material was ordered to be printed in the RECORD, as follows:

WTOP EDITORIAL REGARDING REHNQUIST

WTOP urges the Senate to vote no on the nomination to the Supreme Court of William Rehnquist. The Senate is confronted with the difficult and distinctive prospect of refusing to confirm a man on what amounts to ideological ground. But a seat on the Supreme Court is too powerful, the condition of individual freedom on this planet is too perilous and the nominee's record is too extreme for the Senate to do otherwise. The issue is not one of liberalism versus conservatism, nor is it one of being pro-Nixon or anti-Nixon. Lewis F. Powell, Jr., who was endorsed by the Senate almost unanimously this week for a seat on the Supreme Court is by common understanding a judicial conservative. The same can be said of Chief Justice Warren Burger and Justice Harry Blackmun, both of whom also were Nixon appointees. In our judgment all three of these men have what Mr. Rehnquist lacks—a sense of unique and inperishable character of the American experiment in government. The civil liberties of American citizens, those principles enshrined in the Bill of Rights distinguish this nation from every other nation which has ever existed in the history of the world. Yet they are the most fragile part of our contract with our government. The nub of the case against Mr. Rehnquist that he has consistently displayed in his writings and his speeches insensitivity toward our basic freedoms which approaches blindness. If he sits on the Court he can be counted on in our view to assist and promote the erosion of our liberties and the enhancement of the already chilling powers of the government. After very long and very careful deliberation we have concluded that William Rehnquist would be a distinct liability for the Supreme Court and for the nation. The Senate we hope will deny him the seat.

STATEMENT BY SENATOR MARLOW W. COOK

A WTOP editorial urged that William H. Rehnquist's nomination be denied. In essence, the editorial said that the nominee's ideology or political philosophy disqualified him for a position on the Supreme Court.

I do not believe this to be the proper criteria for either rejection or confirmation. The legislative branch is the correct arena for bloody battles in politics and ideology; the Supreme Court is not.

The High Court has often rejected legislative acts passed by an emotionally charged or overly politicized Congress. Would WTOP have our future Supreme Court act in a manner similar to these past Congresses? I think not.

I believe WTOP is opting for a political Court, not a judicial Court.

Tom Wicker of the New York Times, a writer of impeccable liberal credentials, said that to reject Rehnquist solely on his political views "would tend to politicize the court, would punish some people for their ideas, while frightening others out of having any, and would lead inevitably to political retaliation."

As Senator Kennedy so aptly stated during the Senate's consideration of Thurgood Marshall,

I believe it is recognized by most Senators that we are not charged with the responsibilities of approving a man to be associate justice of the Supreme Court only if his views always coincide with our own. We are not seeking a nominee for the Supreme Court who will express the majority view of the Senate on every given issue, or on a given issue of fundamental importance; we are interested really in knowing whether the nominee has the background, experience, qualifications, temperament and integrity to handle this most sensitive, important, responsible job.

Even taking into full account Mr. Rehnquist's alleged anti-libertarian views on the first ten amendments, I believe if conservative or even arch conservative views can disqualify a person, then what prevents future Senates from rejecting a nominee for his liberal or "new left" views?

WTOP should know that this is not a one-way street.

Supreme Court nominees should be considered on the basis of intellectual and legal ability, temperament and ethical and personal conduct. They should not be considered on the basis that they will stand in my stead and adjudicate as I would.

On these grounds there is little dispute; Mr. William Rehnquist should be confirmed.

Mr. FANNIN. Mr. President, a column in today's Washington Post carries the headline "Rehnquist: Top Mind."

Joseph Kraft is the writer who points out that William H. Rehnquist has the intellect that can in fact help expand the capacity of the Supreme Court to deal with the issues of today.

Let me make clear that I do not subscribe 100 percent to Mr. Kraft's column, but I do think that he makes some very worthwhile observations concerning the excellent qualifications of Mr. Rehnquist.

Mr. President, I ask unanimous consent to insert the Kraft column in the RECORD at this point.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Washington Post, Dec. 9, 1971]

REHNQUIST: TOP MIND

(By Joseph Kraft)

Justice Holmes, on being asked what he thought of the intellectual abilities of another judge, once replied: "I never thought of him in that connection." And there lies the nub of the powerful, positive case that can be made for Senate confirmation of President Nixon's latest nominee for the Supreme Court, William Rehnquist.

For years now hardly anybody has thought of the Supreme Court as performing an intellectual function. Mr. Rehnquist, far more than any other recent nominee, has the calibre to restore intellectual distinction to the Court.

To understand why, it is necessary to say a word about the role of the Court in the country. The country is dominated by the million and one daily actions of an energetic population largely unconstrained in its capacity to buy and sell, move and dream, educate and obscure, build and tear down.

Given the nearly universal disposition toward almost constant action, it is ludicrous to think of tyranny being imposed on this country from above by some establishment eager to freeze the status quo or turn back the clock.

The central political problem of a populist country is to preserve some modicum of elite values—respect for achievement; toleration for difference of outlook; regularity of procedure. Partly by original design, but even more by the chance accretions of history, the Supreme Court has come to be the defender of those values—the elitist institution in a populist country.

Unfortunately for the Court, certain political decisions were thrust upon it by the deadlock that developed between Executive and Legislature during the post-war period. In the fields of civil rights and legislative reapportionment, the Court felt obliged—understandably considering that all other avenues seemed closed—to make rulings that might much more appropriately have been the work of the President and the Congress.

In the heady atmosphere engendered by those decisions, the Court headed by Chief Justice Earl Warren became result-oriented. In case after case, it was increasingly hard to discover the inner logic of decision-making. Blacks seemed to be favored because they were blacks, baseball because it was a good clean American sport, anti-trust plaintiffs because they were against economic monsters.

President Nixon's efforts to correct the imbalance have been fumbling to the point of casting doubt on the sincerity of his claim to want "strict constructionists." His preferred candidates have been right-wingers, so little distinguished that the Senate and the American Bar Association have constrained him to throw them back in the pond.

Mr. Rehnquist is something else. He has not shown sensitivity to the needs of people in trouble, and he has said some hardline—and to me silly-sounding—things about the influence of Supreme Court clerks and the softness of judges towards communism. Some of these comments may be what ambitious juniors are required to say in order to get ahead in the Republican Party of Barry Goldwater and the Justice Department of John Mitchell. Still, I suppose they represent a genuine right-wing conviction.

But Mr. Rehnquist also has a mind of the highest candle-power. His comments in the Judiciary Committee hearings have been unfailingly lucid and discriminating. He has been "hesitant"—a favorite word—when unsure of the fine details of a problem.

Even one of his staunchest opponents, Sen. Edward Kennedy, described him as "a man with a quick, sharp intellect, who quotes Byron, Burke, and Tennyson, who never splits an infinitive, who uses the subjunctive at least once in every speech, who cringes when he sees an English word created from a Greek prefix and a Latin suffix."

Only it happens that the qualities that Senator Kennedy is pleased to dismiss so crudely express a critical aspect of the Court's present work. The Court does not now need more liberals, more conservatives, or more middle-of-the-roaders. There are enough of those to assure that nothing drastic is going to happen in civil rights or criminal law.

What the Court needs is more brains. Mr. Rehnquist has them—more abundantly perhaps than any present member. And by uplifting the quality of the Court in general, he will do far more than any particular decision in any particular case can do to advance the values thoughtful men hold dear.

Mr. FANNIN. Mr. President, Mr. Rehnquist has a keen legal mind, a great ability to understand issues and the human qualities we all want to see in those concerned with justice in America.

It is significant that the opposition to Mr. Rehnquist comes exclusively from people who never have really known the man. Those who have worked with him, or against him, and have personal knowledge of his character, have come out strongly in favor of confirmation. These supporters include men who are quick to say that they have been in disagreement with Mr. Rehnquist concerning political philosophy in general or some issue in particular.

In this morning's Washington Post there was another example of this.

Mr. President, I ask unanimous consent to include in the RECORD a letter to the editor which appeared in the newspaper.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

REHNQUIST'S APPROACH

Since the public discussion of the nomination of William Rehnquist to the Supreme Court has turned to a considerable extent on his civil rights record, I believe that some comments of mine may be pertinent.

I served as an attorney in the Office of Legal Counsel of the Department of Justice for eight years (1961–65, 1967–71). In the latter period, which included two years under Mr. Rehnquist, I worked on most of the civil rights problems handled by the Office, including the question of the legality of the Philadelphia Plan.

Mr. Rehnquist's approach to these problems, like his approach to all other matters on which we worked together, was objective and lawyerlike in the highest degree. He never expressed or showed, to my knowledge, any reluctance or disinclination to interpret or enforce the laws against discrimination in accordance with a sympathetic reading of their terms. Indeed, the legal opinions and memoranda on civil rights matters issued by the Office during Mr. Rehnquist's tenure differed little, if at all, in general philosophy from those issued by his predecessors.

It was suggested, however, in Professor Arthur Miller's article of some weeks ago that Mr. Rehnquist's legal conclusions as head of the Office of Legal Counsel were shaped by a desire to please his superiors. No lawyer can be oblivious to the needs of his client, and the President's lawyer's lawyer is no exception. For any head of the Office of Legal Counsel there is an obvious tension between his role as advisor to and advocate for the Executive Branch and his role as the foremost interpreter and expounder of the law to the Executive Branch. I served in the office under four assistant attorneys general, all lawyers of uncommon ability and integrity. Of the four, Mr. Rehnquist was, in my opinion, the most objective, and the most rigorous in excluding noniegal considerations from the process of resolving a legal problem.

In his tenure as head of the Office of Legal Counsel Mr. Rehnquist has won the respect and high regard of his colleagues, including many, like myself, whose views on political and social issues differ considerably from his. I believe that Mr. Rehnquist is highly qualified for service on the Supreme Court and that the Senate should confirm his nomination.

RICHARD K. BERG.

ARLINGTON.

Mr. EASTLAND. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. HARTKE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MESSAGE FROM THE PRESIDENT

A message in writing from the President of the United States was communicated to the Senate by Mr. Leonard, one of his secretaries.

REPORTS OF THE SECRETARY OF DEFENSE AND THE SECRETARY OF TRANSPORTATION ON AWARDS FOR SUGGESTIONS

The ACTING PRESIDENT pro tempore (Mr. CHILES) laid before the Senate the following message from the President of the United States, which was referred to the Committee on Armed Services:

To the Congress of the United States:

In accordance with the provisions of 10 U.S.C. 1124, I am pleased to forward the reports of the Secretary of Defense and the Secretary of Transportation on awards made during fiscal year 1971 to members of the Armed Forces for suggestions, inventions and scientific achievements.

Participation by military personnel in the cash awards program was authorized by the Congress in September 1965. There could be no better demonstration of the program's success than the fact that tangible first-year benefits in excess of $555 million have been realized from the suggestions of military personnel since the program began.

The tangible first-year benefits resulting from adopted suggestions submitted by Department of Defense and Coast Guard military personnel during fiscal year 1971 totaled $117,676,188, the second highest annual amount in the history of the program. Cash awards presented to military personnel for their adopted suggestions during fiscal year 1971 totaled $1,919,121.

RICHARD NIXON.

THE WHITE HOUSE, *December 9, 1971.*

NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

Mr. HARTKE. Mr. President, the Senate has been called upon to give advice and consent to the nomination of William Rehnquist to the Supreme Court of the United States. The role of the U.S. Senate in giving advice and consent on executive nominations is a serious matter. This is a function that can only be carried out after due deliberation and consideration. Although the President has and continues to show the highest disregard for the advice of the Senate, I hope my colleagues will remain strongly committed to their constitutional obligation to make a susbtantive analysis of the President's nominees for the Supreme Court. This penchant for failing to take cognizance of the sense of the Senate has been the subject of recent action I have taken. On Monday, July 26 of this year, I introduced a Senate resolution affirming the constitutional prerogatives of the Senate with respect to the foreign rela-

tions of the United States. It is my contention that consideration of Supreme Court nominees are similar to negotiation of treaties in that both of these functions are to be shared by the Senate and the President. The Senate resolution that I offered was designed to restore the Senate to its rightful constitutional place in the treatymaking process of the United States and thereby, facilitate a speedy end to our involvement in the Indochina war.

Writing in 1969 in a book entitled "You and Your Senator," I pointed out that:

The Senate—may—be posed against the President in dramatic confrontation because of the treaty-making power of the constitution—jealous of its responsibility as a partner in treaty-making the Senate has insisted on its right to deliberate a treaty with due regard for all the considerations attached to it, relying on the executives advice and information, but feeling free to accept or refute provisions as its independent authority deems wise. From the start, the Senate has made it clear that it prefers to deliberate freely—and without pressure presence of the President or his representatives.

Mr. President, today the Senate is facing a similar situation. The Senate is called upon to exercise its responsibility as a partner in the political process. Although it relies on the Executive's advice and information regarding nominees to the Supreme Court, the Senate must be able to deliberate freely and without pressure presence of the President or his representative.

The role of the Senate in considering nominations to the Supreme Court is an integral part of separations of power principle that has embodied the governmental development of this nation. This position has been well developed in a number of Federalist papers.

At this time, I feel it would be appropriate to reflect on selections of those documents central to this discussion. In Federalist No. 48, James Madison stated:

It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next, and most difficult task, is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.

Madison realized that this was by no means an easy task. He continues:

Will it be sufficient to mark, with precision, the boundaries of these departments, in the Constitution of the Government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the composers of most of the American Constitution. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful members of the Government.

A most important point made in this section is that:

Power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.

In No. 51, James Madison continues to discuss the need for limiting the encroachment of one branch of government over the other. He says:

To what expedient then shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the Government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives to resist encroachments of the others.

Mr. President, Mr. Madison has stated a precept that has become part of the underlying theory of our constitutional framework which is being constantly eroded. I ask where have we seen the erosion of the role of the Senate? We have seen the erosion of the role of the Senate in numerous activities that I will discuss later.

Madison recognized that there must be vigilance to control the abuses of government. He stated:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.

Therefore, to maintain the necessary control, the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite to the distribution of the supreme powers of the state.

Mr. President, a section of this fine work captures the essence of all attempts to develop workable and viable governments. I will repeat it:

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.

I ask: Have we seen self-imposed restraint on the part of this administration? I say we have seen example after example of attempts to aggrandize rather than to limit power.

One example with which I am very familiar is the attempt to aggrandize executive power in the area of treatymaking. The treatymaking power is a matter of great concern to the Senate, and has been the subject of considerable discussion in this body.

During the course of the debate on the Indochina war, the Senate questioned the extent of the President's power to make war. It has examined scholarly writings on the constitutional limitations of the war power and it has examined the history of the exercise of that power. The result of this study and this debate, caused the Senate to pass the national commitments resolution, which attempts to limit the warmaking powers to the proper constitutional boundaries. It was in the same spirit that I offered a resolution to attempt to restore the Senate to its proper role in treatymaking.

One of the arguments made against the resolution that I offered was that senatorial involvement in delicate and necessarily confidential international negotiations, can only be dangerously counterproductive. It asserted that had the authors of the Constitution been able to foresee the perilous world political conditions in which we are obliged to operate, they would surely have posed no obstacles to the exclusive conduct of foreign affairs by the Executive.

We have seen this argument offered time and again by this administration. They want to participate alone because they are afraid of a "leak." This is important because the nominee we are considering today has been the architect of much of the administration action. This attitude has been reflected on numerous occasions, and has been directed against the judicial branch as well as the Senate.

One example is in the area of wiretapping. Even though the case of *McDonald v. United States*, 335 U.S. 451, raised serious doubts as to the unilateral action by law enforcement authorities in conducting surveillance activities, the administration failed to perceive that grave constitutional questions are involved. The Government brief's basic inference was that by requiring court action prior to surveillance activities, there was too strong a possibility of a "leak."

We have seen this type of attitude in other administration activity; that is, the Pentagon papers, Cambodian invasion, and even secrecy shrouds the nomination process, most recent examples being the Supreme Court nominees, and the nomination of Mr. Butz as Secretary of Agriculture.

Surprisingly, the minority leader, who is attempting at this time to do everything he can to insure that Mr. Rehnquist's nomination is confirmed, has been a complainant against this procedure. After all, not only is he a Member of the Senate, entitled to be advising the President in that capacity; he is a member of the political party of the President, entitled, under courtesy, to be an adviser to the President. My distinguished colleague from Pennsylvania, Mr. SCOTT, has made public disclosure of the fact that, rather than being in a position of advice, he was merely notified of the nomination of Mr. Butz. The minority leader has stated that much difficulty can have been avoided, if the advice of the minority party is sought, or at least consulted on Executive nominations.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. HARTKE. I am glad to yield.

Mr. BAYH. I think my colleague hit on a very important matter here on which I would like to get his further views, if

I may, before he goes on to the substance of his argument.

The way in which the President has consulted with his leaders in the Senate and the great speed with which we are now urged to rush through this nomination indicate almost a fear that the Senate might reject the nominee if it had adequate time to explore all the ramifications of the nomination. We were only in the second full day of debate—almost 48 hours to the moment when the debate had started—over the critical nomination to the Supreme Court, when the first cloture motion was filed.

Does the Senator from Indiana feel that it is the obligation of the Senate to jump when the Executive feels that a nomination such as this should be confirmed, or does the Senator from Indiana feel that the history of the Senate would show a number of instances in which long deliberation has resulted both in the turning down and the seating of nominees, but that the decision was not made until the questions had been fully discussed and laid to rest in the minds of the Senators?

Mr. HARTKE. I think the Senator is correct in his assumption which comes from the first part of his question, which is simply that there is haste here. Every attempt is being made to bring this nomination to a close quickly. Of course, I will have to say that there are Members of the Senate who are interested in having a termination of this debate for reasons other than merely pushing through the nomination of Mr. Rehnquist and putting him on the bench of the Supreme Court. The Christmas vacation is held up as a sort of carrot in front of everyone's eyes, and they are saying, very simply, "If you really want to adjourn, why don't you cut off the debate on Mr. Rehnquist and go home?"

If they are really interested in simply assuring a Christmas holiday, we can adjourn after making an agreement to return at a date certain and vote on the nomination. I think my colleague from Indiana has agreed to such a procedure, as long as the debate is permitted to be of the type and nature which would permit each Senator to fully discuss this nomination. This would also permit an opportunity for the public to analyze this appointment.

This takes time, and it cannot be done in 48 hours.

I agree with my distinguished colleague from Indiana that it is not in the best interests of the Nation to push this nomination through in a hurry.

The difference between this nomination and that of a Cabinet officer is substantial.

If the Supreme Court is to maintain its role as a coordinate body of our Government, we cannot limit the period of time for debate of the qualifications of the nominee.

Mr. BAYH. The Senator has expressed another good point in mentioning the time reference. The Senator from Massachusetts (Mr. KENNEDY) pointed out yesterday that a few years ago, when one of the truly great Justices of the Supreme Court in history, Justice Cardozo, was before the Senate for confirmation, there was a very heated, harried, and lengthy debate. In fact, the hearings were reopened a time or two. That was done not by a minority of the opposition that was dragging the Senate into it, but by the proponents of Cardozo who wanted to see that all the questions were appropriately laid to rest. After they had gone through the series of hearings, and had had extended and sufficient floor debate, Cardozo was put on the Court, but not until all the questions had been laid to rest.

I am not suggesting that we need the kind of time that was utilized by the Senate when it was discussing the Cardozo nomination. Nor do I believe that we need the same long time used by some of the opponents of Justice Fortas and the nominee Thornberry, but I do believe that it is premature to suggest that the debate should be cut off after only 2, 3, or 4 days of debate, particularly in light of the new information brought to the attention of the Senate, in the Brown against Board of Education memorandum and now the letter of yesterday afternoon. What are Jackson's views? I do not know. I have three staff members in the process now of trying to find out, so that it will be easy to see whether the memorandum comes close to what Justice Jackson said in the Koramatsu case, in the Jehovah Witnesses' flag case, the Pledge of Allegiance flag case.

I must say, from what I know of the cases, that Justice Jackson always defended the right of individuals, and did not suggest that property rights should take equal or greater priority precedence in the eyes of the law. We have to have some time to investigate these matters in order to make an intelligent decision. The Senator from Indiana intends to make such an investigation and such a decision.

I am very glad that my colleague from Indiana has brought out the strange shortness of in this case.

Mr. HARTKE. Mr. President, I notice the chairman of the National Republican Party (Mr. DOLE) the Senator from Kansas, is in the Chamber. He may wish to comment on the degree to which the administration has sought advice on executive nominations requiring Senate approval.

Under the rules, the cloture motion will have to be acted on. Nonetheless, I think that it is in order that this matter be temporarily laid aside, to permit Senate consultation with the President upon this nomination. The President has not done what the Constitution requires in that regard, which is that advice be transmitted to the President other than through debate on the floor of the Senate. This might be a question of procedure subject to a point of order, and I do not know that a point of order would be sustained, but the fact remains that the President has not sought the advice of the Senate.

There is an argument made, for example, that Senators should not be consulted. I think that argument has little reason and no precedent. In the case of this nomination it is evident that everyone was caught by surprise. That may be good politics for 1972 but I do not think it is a very good way to select a Supreme Court Justice. We are not talking about the politics of the future, we are talking about the people of the future. They are the ones ultimately who are going to have their rights and privileges adjudicated by the Supreme Court.

Mr. DOLE. Mr. President, will the Senator from Indiana yield for a unanimous-consent request which has nothing to do with the nominee?

Mr. HARTKE. Perhaps the Senator, who is chairman of the Republican National Party, would like to advise the Senate as to when he was notified of the choice of this nominee. I am glad to yield to the Senator from Kansas.

Mr. DOLE. That has been so long ago that I cannot remember when I first knew about it.

Mr. BAYH. Mr. President, let me make one last reference and then I will stop interrupting my distinguished colleague. He mentioned a moment ago that the Christmas vacation was being held as a carrot in front of our colleagues. That is accurate, but I must say that it is also being held as a stick over the backs of some of us who are desirous of getting full debate.

I want to say for the record now, and I will document it in further detail later on during the day, that the Senator from Indiana has not and will not refuse to accept a date certain after a reasonable amount of debate. I do not suggest the type of lengthy, protracted debate that some of the proponents of Mr. Rehnquist had in trying to keep Mr. Fortas off the Court or in keeping him from being the Chief Justice.

I have not totally resolved what that reasonable time length is. However, I am opposed, if we should be successful in voting down the cloture motion, to trying to defeat Mr. Rehnquist by a one-third vote. I want the Senate to work its will but only after there has been sufficient time for this body to do so under circumstances in which it can give some attention to the nominee and not just what has been before the Senate in the last few hours.

Mr. HARTKE. I hope that my colleague from Indiana would make that intention known to Senators immediately prior to the time of the vote on the cloture motion. I think it is very important for Senators to understand that there is no intention of any protracted debate being envisioned by my colleague from Indiana.

Now, Mr. President, I would like to return to my prepared remarks.

I have raised the issue of executive aggrandizement of power because Mr. Rehnquist has been inextricably intertwined in this activity of the administration. He has written the legal defense of the Cambodian invasion. He played an integral part in the preparation of activity to stop the publication of the Pentagon Papers and he has appeared before the Senate to justify the administration's policies on numerous occasions.

In March of this year, Mr. Rehnquist appeared before the Senate Judiciary Subcommittee on Constitutional Rights. At that time, he said:

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

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

He was then questioned by my distinguished colleague from North Carolina, Senator ERVIN:

Doesn't surveillance tend to stifle the exercise of first amendment rights?

And Mr. Rehnquist responded by saying:

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

In effect what Mr. Rehnquist has done is to say that the Government is entitled not only to be a "Peeping Tom," but also to look over shoulders. It is certainly that type of activity which creates apprehension in the minds of everyone. I do not mind telling the Senate that I was the only one who spoke in Washington on April 24. It is hard to say how many people were there. All I do know is that there was a massive crowd. I do know there was apprehension by many citizens, citizens who were afraid to come for fear they might be incarcerated for exercising their constitutional rights.

Mr. Rehnquist has stated that surveillance does not raise a serious constitutional question. The point is made that if someone is under surveillance and is aware of the fact that he is under surveillance, this somehow justifies such surveillance. Nothing could be further from the truth.

This is the argument to be expected from one who is committed to the proposition that surveillance of any type is not only permissible, but desirable. The Senator from Arkansas (Mr. FULBRIGHT) has recognized the constitutional issues inherent in surveillance activities and has pondered the effect such conduct may have on the country. Surveillance activities can contribute to a gradual erosion of the democratic spirit of our Nation. Unfortunately in some quarters the feeling that this country is dependent on individual rights has little currency.

We have recently seen the erosion of individual rights in other nations of the world. That creates anguish for us all. For example, we have all witnessed the distortion of human rights in Greece.

I have heard defense of that Government from many quarters. Yet, I might point out that the Council of Europe, a great protector of human rights was ready to expel Greece because of the fact that country failed to respond to the necessary prerequisite of human dignity and human rights. Knowing that this action was going to occur, Greece withdrew from the Council of Europe.

I later had a conversation regarding that matter with the Prime Minister of Sweden. He pointed out that if democracy was going to be defended by the United States and its NATO allies, as was done in Greece, that Sweden could do without that type of defense.

Lady Flemming, the widow of the discoverer of penicillin came to the United States at my request, after her release from a Greek jail.

She told me that after her arrest in Greece, the Greek Government offered to make her the minister of education of Greece if she would endorse the dictatorship in Greece. She told them that she would not.

She told me that that offer was made to her three separate times and that on three separate times the alternative was explained to her. The alternative was that she would suffer physical punishment. I suppose perhaps some people would have yielded at that point. She did not.

This is just one example of the infringement of human rights. This type of activity is contrary to every precept of American constitutionalism. It is contrary to the reasons that brought our ancestors to this country.

In an earlier appearance before the Senate Judiciary Subcommittee on constitutional rights, Mr. Rehnquist conceded that some improper surveillance and investigation may occur—that is, in the absence of statutory authority, constitutional authority, or need. He stated:

I think it quite likely that self-discipline on the part of the executive branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering.

That is one of the statements which we frequently hear. It is a statement which is based on an assertion rather than fact. It is a statement used by those who have nothing else on which to rely.

Again, we see the attitude that the executive branch can carry on the function of Government quite well, alone. In his testimony, Mr. Rehnquist failed to recognize that the legislative and judicial branches are coequal with the executive branch in our governmental framework.

Unfortunately this attitude of executive supremacy is a malaise sweeping the entire administration.

Mr. President, the administration must realize that the Senate and judiciary are intended to help the President in a common enterprise: they are not hostile institutions. The President must realize that the Senate is his constitutional and only responsible counselor; that the Senate and the courts are jointly responsible for the function of Government.

Section 2 of article II of the Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint Judges of the Supreme Court and all other officers of the United States," including Federal judges. There can be no question from the language of the Constitution, or the history of article II, that the power of the President to nominate is absolute and unfettered. Nor can there be any question that the appointment is subject to the advice and consent of the Senate.

History shows that originally it was suggested that Supreme Court appointments be exclusively under the control of the Senate.

Subsequently, the decision was made that the nominations would be made by the President, with the advice and consent of the Senate.

Alexander Hamilton stated in the Federalist Papers—numbers 76 and 77:

It will be the Office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another: But they cannot themselves *choose*—they can only ratify or reject the choice of the President.

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

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

It will readily be comprehended, that a man who had himself the sole disposition of offices, woud be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State, to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to

render them the obsequious instruments of his pleasure.

Hamilton further stated:

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

Mr. President, it is clear that Mr. Hamilton believed the confirmation process to be a serious one. I call upon my colleagues to reflect on the thoughts of Mr. Hamilton as we consider this nomination.

Mr. Rehnquist himself has recognized that the confirmation process is a serious constitutional function. Writing in 1959 he stated:

The Supreme Court of the United States is now in the midst of one of the storms of criticism which have periodically assailed it. Bills have been introduced in Congress to limit the jurisdiction of the High Court, to overrule some of its controversial non-constitutional decisions, and to declare the sentiment of the Senate as to the necessity of judicial background on the part of a nominee to the court. It has been urged that the "advice" of Senate be sought by the President before any nomination to the court is made.

Criticism of the Supreme Court can easily become frustrating to the critics, because the individual justices are not accountable in any formal sense to even the strongest current of public opinion. Nonetheless, it ill behooves the critics of the present Court to seek imposition of new curbs on it until such controls as now exist are fully tested and found wanting. Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

The Supreme Court, in interpreting the Constitution, is the highest authority in the land. Nor is the law of the Constitution just "there," waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the Constitution which have been most productive of judicial law-making—the "due process of law" and "equal protection of the laws" clauses—are about the vaguest and most general of any in the instrument. The Court in *Brown* v. *Board of Education*, supra, held in effect that the framers of the fourteenth amendment left it to the Court to decide what "due process" and "equal protection" meant. Whether or not the framers thought this, it is sufficient for this discussion that the present Court thinks the framers thought it.

Given this state of things in March, 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the Constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws", then men sympathetic to such desires must sit upon the High Court. The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

Although Mr. Rehnquist has recognized the need for inquiry by the Senate into the fitness of one to serve on the Supreme Court, it has been suggested by my colleagues that he has failed to candidly discuss his judicial philosophy with the Senate.

In essence he has failed to follow his own advice. This action would rebut his own admission that the Senate has not only the right but the obligation to obtain an incisive view into a nominee's views on constitutional issues.

I have heard that this action has been taken under the cloak of privileged communication. Unfortunately, Mr. Rehnquist has approached the Senate hearings as an adversary proceeding. He may have followed this role as the "President's lawyer" but a nominee to the Supreme Court of the United States has an obligation to more than the President. The Supreme Court nominee must be able to transcend his political affiliations and recognize that he may become part of an institution that owes an obligation to the Nation and not to one man. The country is not only entitled to know, but demands to know how William Rehnquist, the Supreme Court nominee, views the Constitution. So far we have seen only the view of William Rehnquist the "President's lawyer."

In considering this nomination, there are still many unanswered questions that must be considered.

First, will the Senate perform its proper constitutional function in giving advice and consent on the Supreme Court nominee? I have outlined how the President has been allowed to pre-empt the role of the Senate in foreign affairs. The question is, will the Senate stand up to its constitutional role in the confirmation process?

Secondly, this issue of Presidential aggrandizement of power is of particular importance in this nomination because William Rehnquist has played a significant role in the President's action to restrict the role of, not only the Senate, but the judicial branch as well. I am sure many of my colleagues can cite examples of this conduct.

Third, as a result of the failure of the nominee to develop his constitutional views before the judiciary committee, many questions have been raised that should be answered before the nominee is confirmed.

Some of these serious charges have appeared in a recent New York Times editorial and articles. One article states that Mr. Rehnquist:

Has repeatedly shown himself opposed to judicial or legislative efforts to eliminate racial discrimination. There was a time decades ago when a nominee with Mr. Rehnquist's opinions would have been confirmed for the court with hardly a ripple of controversy. But twenty-five years of Supreme Court rulings, congressional legislation and social upheaval have made him an anachronism. Commitment to equality of treatment and opportunity for all races has become one of the indisputable standards of modern constitutional democracy. Since Mr. Rehnquist is lacking in such a commitment, the Senate, if it confirmed him, would be voting to turn back the clock.

Mr. Rehnquist's evident lack of sympathy for individual liberties also disqualifies him. The Constitution is a libertarian document. The first ten amendments and many other provisions are prohibitions against the exercise of certain kinds of power by the Federal Government and against the arbitrary, excessive, or unreviewed exercise of other powers.

As a political activist and as an Assistant Attorney General, Mr. Rehnquist has relentlessly argued in favor of abridging and diminishing the liberties of the citizen and enhancing the powers of government—to tap the citizen's phone and "bug" his home and office, to enter his premises without knocking, to use tainted evidence against him, to arrest him in dragnet sweeps, to compel him to testify against himself, to deprive him of his right to practice his profession if he is a radical lawyer.

It is easy and comfortable for the ordinary, law-abiding citizen to assume that these intrusions of governmental authority will never touch his life, but the whole history of human liberty shows that the unpopular dissenter is the first—but rarely the only—victim of arbitrary power.

In voting for the first time in fifty years to oppose a nominee for public office, the national board of directors of the American Civil Liberties Union stated: "We know Mr. Rehnquist as a person committed to the notion that in every clash between civil liberty and state power, it is civil liberty that should be sacrificed."

Free societies are judged by how they treat their racial minorities and by the extent of the liberty they allow the individual citizen. On both counts, Mr. Rehnquist fails to qualify as one of the guardians of a Constitution of free men.

This article raises important questions of the nominees sensitivity to the crucial issues of our times. It may be that he has lived a sheltered life unexposed to the human side of the masses of people. When a man has failed to have that experience, or at least to have the time to understand that part of life, it is frequent that he takes a viewpoint that is similar to that which Mr. Rehnquist has followed.

Oftentimes this is the view of those who have never seen an unemployment line, or never visited a ghetto, or seen the anguish and deep suffering that is the daily fare of many of our citizens.

Mr. President, the Members of the Senate must bring these questions out into the open. This must be done to ensure that the public can continue to feel that the Supreme Court is truly an impartial body. Under our constitutional theory the Supreme Court is to be an umpire. The questions that have been raised about Mr. Rehnquist's actions, both as a lawyer and a public official, threaten the feeling of confidence the public has in the impartiality of the Supreme Court. We must determine whether we are confirming a man committed to the preservation of that institution as a viable force in our Government or

whether we are adding a member of the executive branch to the Supreme Court, and in essence "turning the blade inward."

I yield the floor.

Mr. FULBRIGHT. Mr. President, even though I agree with George Washington when he said:

As the President has a right to nominate without giving his reasons, so has the Senate a right to dissent without giving theirs.

Nevertheless, I wish to give some of my reasons for opposing the nomination of Mr. Rehnquist as a Justice of the Supreme Court.

In this age of Executive predominance in so many areas of our Nation's affairs, it is suggested that it is improper for the Senate to withhold confirmation on any but the most narrow grounds of personal dishonesty or intellectual deficiency. We in the Senate have no right, it is said, to take into account the nominee's constitutional philosophy in making our decision, although the right of the President to nominate an individual because of his political, or constitutional or judicial philosophy is unchallenged.

President Nixon himself asserted this viewpoint in a letter dated March 31, 1970, in support of an earlier nomination.

The President said:

What is centrally at issue in this nomination is the constitutional responsibility of the President to appoint members of the Court—and whether this responsibility can be frustrated by those who wish to substitute their own philosophy or their own subjective judgment for that of the one person entrusted by the Constitution with the power of appointment.

President Nixon went on to say that—

If the Senate attempts to substitute its judgment as to who should be appointed, the traditional constitutional balance is in jeopardy and the duty of the President under the Constitution impaired.

This letter, with its extraordinary claims of Executive supremacy, was reportedly drafted for President Nixon by the nominee now under consideration, Assistant Attorney General William Rehnquist. It demanded that the Senate voluntarily abstain from exercising a power explicitly vested in it by the Constitution in order to allow the President the privilege of absolute appointment power for which there is no constitutional sanction whatever.

As the individual views accompanying the Judiciary Committee's report on this nomination point out, the Constitution intended the Senate to play a positive role in determining whether to give its advice and consent to a judicial nomination. During the Constitutional Convention of 1787 it was at first anticipated that Congress or the Senate alone would have the power to appoint Supreme Court Justices. Only near the end of the Convention was the existing system adopted under which the President has the power to appoint judges but only with the advice and consent of the Senate.

The notion that the Senate is somehow acting illegitimately when it weighs the qualifications of a judicial nominee in more than a superficial and perfunctory way appears to me to be one more manifestation of the prevailing and undemocratic "cult of the Presidency." The President's insistence upon his exclusive right to appoint members of the Court, as expressed in his letter of March 1970, contains disturbing echoes of something like royal prerogative. Living as we do in a time in which independent legislative bodies are in decline all over the world, it seems to me imperative that we assert once again the right and indeed the responsibility of the Senate to make an independent judgment on a matter entrusted to it by the Constitution. I contend, therefore, that the social, and, above all, constitutional philosophy of William Rehnquist is of the greatest relevance and importance to the Senate's deliberations on whether to grant or withhold its consent to his nomination.

It should also be recalled that President Nixon, in his televised address of October 21, placed great emphasis on "philosophy" as a basis for his selection of his nominee.

By all available evidence—and there is a great deal of it—Mr. Rehnquist's constitutional philosophy is one of executive supremacy in virtually all areas of public policy. A great deal has been said and written in recent weeks on Mr. Rehnquist's views on the Bill of Rights and on past Supreme Court decisions in the area of civil rights. Relatively little, however, has been called to public attention regarding Mr. Rehnquist's advocacy of sweeping Presidential authority in relation to the Congress, particularly in the field of foreign relations. Far from adhering to the strict constitutional constructionism which many of us in the Senate support, and which Mr. Nixon says that he supports, the nominee has shown in his writings and public statements that he favors an exceedingly liberal construction of the Constitution, that indeed he is a judicial activist, at least to the extent of advocating an expansive view of the powers of the Executive as against the constitutional role of the Congress and the rights of individuals.

The nominee has demonstrated his lack of understanding of the proper role of the Congress in our constitutional system on at least two recent occasions. As the individual views accompanying the report of the Judiciary Committee pointed out, Mr. Rehnquist declined to express his opinions on such topical matters as national security, wire tapping, preventive detention, no-knock, the legality of the Executive order granting certain powers to the Subversive Activities Control Board, the scope and extent of executive privilege, Government surveillance practices, and other matters. Mr. Rehnquist invoked the "privilege" of an attorney in relation to his client as an excuse for withholding this information, although the "clients" in question were not individuals whose rights were at stake but the President and the Attorney General who had nothing at stake but the risk of political embarrassment. Mr. Rehnquist himself has on previous occasions acknowledged the right and duty of the Senate to inquire into a nominee's judicial philosophy in considering confirmation. Nonetheless, he invoked a dubious form of "privilege" to escape such accountability himself.

The other recent demonstration of Mr. Rehnquist's disdain for the authority of Congress occurred last July when he argued before Senator ERVIN's Subcommittee on Separation of Powers in support of a sweeping doctrine of executive privilege. He based his argument not on the Constitution but on an accumulation of historical precedents—and approach which is the classic resort of "loose" constructionists. The essence of the doctrine of executive privilege is the claim of executive branch officials to a freedom from accountablity to Congress. Both by argument and by example, Mr. Rehnquist has demonstrated his strong commitment to that claim.

There have been other noteworthy instances of the nominee's support of arbitrary Executive authority. During the May Day demonstrations last spring, Mr. Rehnquist espoused a doctrine of "qualified martial law," a doctrine totally inconsistent with the guarantees enumerated in the Bill of Rights, and one which fortunately was dismissed summarily in a recent decision by the U.S. Court of Appeals, which invalidated most of the mass arrests made at the time by the Washington police. Another striking instance of this attitude occurred during testimony before Senator ERVIN's Subcommittee on Constitutional Rights when Mr. Rehnquist stated that even Senators ought to be put under surveillance if the Executive thought it necessary. Asked by the Senator from North Carolina whether he as a Senator could legitimately be spied upon, Mr. Rehnquist replied in part:

I don't think it raises a First Amendment violation.

Finally, to turn to a matter which has received less attention than it warrants, Mr. Rehnquist has been an active and articulate supporter of the Executive's claim to an unrestrained and unlimited power to make war. In a speech in New York in May 1970, subsequently reproduced in the New York Law Journal on June 8 and 9, 1970, Mr. Rehnquist defended President Nixon's invasion of neutral Cambodia. Raising the question whether the United States may lawfully engage in armed conflict with a foreign power in the absence of a congressional declaration of war, Mr. Rehnquist said:

I believe that the only supportable answer to this question is "yes".

Going on to consider the limits—if any—of the President's power as Commander in Chief, Mr. Rehnquist asserted that—

One need not approach anything like the outer limits of his power, as defined by judicial decision and historical practice, in order to conclude that it supports the action that he took in Cambodia.

In the manner of the loose constructionist, Mr. Rehnquist went on to cite previous instances of unauthorized Presidential action as if these precedents gave constitutional sanctity to patently unconstitutional actions. "Our history," said Mr. Rehnquist, "is replete with instances of 'undeclared wars.' It simply will not do, then," he asserted, "either

as a matter of constitutional law or as a matter of historical practice, to say that armed hostilities engaged in by the United States in the absence of a declaration of war by Congress are unlawful."

It is pertinent to contrast Mr. Rehnquist's claim of an unchecked Presidential power to make war with the view of the late Justice Jackson for whom Mr. Rehnquist once served as a law clerk. In this opinion in Youngstown against Sawyer in 1952, Mr. Justice Jackson stated:

> Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

On December 7, the Foreign Relations Committee gave its unanimous support to a war powers bill which purports to implement the philosophy expressed by Mr. Justice Jackson, which is also a philosophy that has gained increasing support in the Congress in recent years, most notably with the adoption of the National Commitments Resolution in 1969.

Mr. Rehnquist has shown himself to hold a philosophy strikingly at variance with the strict constructionist view of the Constitution, not only in matters of individual liberties but also in matters relating to the constitutional authority of the Congress, particularly the authority to initiate war.

To summarize my views, during the past 30 years, three wars and a succession of major crises have caused serious domestic turmoil and disunity, and have induced an atmosphere of apprehension and insecurity which in turn has resulted in a serious distortion in our constitutional system.

The legislative branch, under these circumstances, has acquiesced in the usurpation of power by the Executive to such an extent that some spokesmen for the Executive have asserted that the Constitution is obsolete in such fundamental provisions as the power to initiate war against a foreign nation, the rights of individuals under the fourth amendment and the freedom of the press of the first amendment.

My opposition, therefore, is not based upon Mr. Rehnquist's views about current social or political issues about which there are legitimate differences of opinion among reasonable and honorable men.

My opposition is based upon his attitude toward the constitutional system of government under which our Nation grew and flourished for nearly 200 years. The essential virtue of that system is a balance among the three branches, the legislative, the executive, and the judicial.

From his record, it seems to me that Mr. Rehnquist is committed to the supremacy of the Executive power to such an extent that his influence on the Court would undermine that essential virtue of our Constitution, and, therefore, I shall vote against his confirmation.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield.

Mr. BAYH. Mr. President, I listened with great care to the concern expressed by my colleague from Arkansas. As one who has not had the opportunity to study the foreign policy issues that have come before the Senate as thoroughly as the chairman of the Committee on Foreign Relations has, I was very impressed with the way in which the Senator from Arkansas brought into this debate the feelings of the nominee relative to the expansion that he feels is appropriate in Executive authority.

This has been a matter of grave concern to the Senator from Indiana, whether it is the invasion of our individual privacy—by stating that surveillance presents no constitutional question—or by suggesting that voluntary restraint would appropriately curb executive excesses in the domestic field, which are the matters stressed by the Senator from Arkansas.

I think the issue here is much broader than most of our colleagues have described it. It is not a conservative versus liberal situation. It is not a matter of how a person might believe philosophically. It is a matter of how a man believes and will vote on the court. It concerns some of the very basic assignments of power that will determine the direction this court will go in the future. I appreciate the comments of the Senator from Arkansas. I think this will make a great contribution to the RECORD.

Mr. FULBRIGHT. I appreciate the comments of the Senator from Indiana. I have read that the nominee has written a long letter to the Senator from Mississippi stating that he now affirms his commitment to the doctrine of the Brown decision. This is a matter on which men of good will can have legitimate differences.

I think people can differ on this, and I certainly would not vote against Mr. Rehnquist, because he and I did not agree upon the Brown decision.

My concern is that the press and those who have commented on this nominee have neglected this fundamental problem of our constitutional system itself. I do not think there is really anyone in this body who would say that he does not believe in our constitutional system. In fact, when Senators enter this body everyone of them takes the oath, just as the President does, to support the Constitution, and we thereby assert that we believe in it.

Here is a man who, it seems to me, on several occasions has evidenced a lack of acceptance of the Constitution, as I read it, especially in the field of foreign relations. This is the area that currently is causing most of our trouble. I firmly believe that much of our internal domestic turmoil and trouble flows from the disregard of the Constitution by previous Executives—particularly the preceding one.

I think that our major troubles—the worst troubles we have had since the Civil War—have arisen from the disregard of our constitutional system, and from the disregard of the provision that the Congress, including the Senate, should be consulted, and must exercise the war power granted to it by the Constitution.

From that disregard have come so many of the troubles that afflict us. They have given rise to circumstances which have caused these further usurpations by the Executive mentioned by the Senator from Indiana, such as the mass arrests, the invasion of privacy, and wiretapping.

The Executive felt, I think erroneously, the necessity of infringing upon other parts of the Constitution, because of these conditions arising out of this serious and fundamental disregard of our Constitution.

What bothers me in considering the nominee as a future Justice of the Supreme Court is that these issues will continue to plague us, because our country is in trouble. Everybody knows that. Matters of major importance—involving the constitutional rights of the Congress are dealt with by the Court—such as the declaration of war, which has already been before the Court, or such issues as the publication of the Pentagon papers, which relates to this question of declaration of war, and power of the Executive to conceal what they are doing from everybody, Congress as well as the public. This nominee's attitude would seem to me to be in the direction of saying "Anything the Executive says goes," and I think that would undermine our constitutional system.

Mr. BAYH. The Senator has been one of the leaders in this body who has tried to reverse the trend over the years in which the Senate has really forfeited some of its prerogatives. He is one who has said, "Let us turn it around. Let us restore this balance of power."

Is the Senator concerned, now that we have realized our role in foreign policy as well as national policy and that we have begun to move in that direction, and more and more Senators are aware of what has been happening, that if, indeed, we put a man on the Supreme Court who feels differently about it, that could reverse the process once again?

Mr. FULBRIGHT. It certainly would be an influence in that direction insofar as the Supreme Court might become involved. These issues have a way of getting to the Supreme Court. Therefore, I am concerned that, while the Senate has, since 1969, at least, begun moving in the direction of reestablishing a better balance between the executive and the legislative, there could be this possibility that the process would be reversed. The war powers bill that has just been reported on this subject has sponsorship from various elements in the Senate—the Senator from New York (Mr. JAVITS), the Senator from Missouri (Mr. EAGLETON), the Senator from Mississippi (Mr. STENNIS), and the Senator from Virginia (Mr. SPONG).

Mr. BAYH. I think the Senator from Indiana is on that bill. If not, I wish the Senator would make me a cosponsor.

Mr. FULBRIGHT. There were four original sponsors. I do not make it a practice of becoming a sponsor on a bill that is before the Committee on Foreign Relations, but this measure has been approved by the committee.

It is an important step on behalf of the committee, supported by other prominent Senators, in the restoration of the Senate's proper role. This, it seems to me, is quite contrary to the views of the nominee. He apparently does not think there is any necessity for this kind of action.

This is not new with the nominee. One of his predecessors, not precisely in the same position, but one of the preceding Attorneys General and Under Secretary of State, Mr. Katzenbach, absorbed this kind of philosophy in the executive branch and made statements in public sessions of the Committee on Foreign Relations very much in accord with some of the statements by Mr. Rehnquist. I took issue with him then. There were considerable objections, by Senators and others, Mr. Katzenbach's thesis that the war power provisions of the Constitution were obsolete, which was essentially what he said. That is an oversimplification, but the gist of it was that in this modern day it is no longer possible to have Congress participate in the declaration of war.

This is a tendency on the part of the executive branch, not just Mr. Rehnquist. However, he has been an outspoken and strong voice in expressing this attitude.

In today's Washington Post one of the columnists remarked upon Mr. Rehnquist's powerful intellect. However, this is no consolation at all if that intellect is going to be directed at the undermining of our constitutional system. We have seen other instances in our Government of great intellects, including some of the past and present members of the White House staff. These are very intellectual gentlemen, extremely well versed in history and literature, and, as the columnist said this morning, who never split an infinitive. But what was the result of their judgment? Was their judgment in the interest of this country? I do not mind if one splits an infinitive now and then if his judgment is correct and he does not help lead us to the destruction of this Government. That is what bothers me—the tendency to alter the basic constitutional system.

Through distortion of constitutional principles in the last 6 or 7 years, the system has not worked as it should. It has not worked, because the Executive departed from these principles. When we ignore fundamental constitutional principles, as we have in recent years, the system does not work. It is not because the system is at fault. In my opinion, it is because we have not adhered to sound constitutional doctrine. That is what bothers me about this nomination.

Mr. BAYH. The Senator is doubly concerned, as I understand his remarks this morning, that the system has not been working as the Constitution and as our forefathers intended to have it work, and the nominee has supported such a malfunction.

Mr. FULBRIGHT. He apparently does assert and support the supremacy of the executive, but I think the legislative has a proper role to play. I do not mean that the Senate is infallible. I have never thought that Members of Congress were infallible and that we do not make mistakes, but I believe in the collective judgment of the Congress. It is the best way to prevent mistakes that destroy a country. If we do not assert our prerogatives or are not allowed to function, if we are not allowed to participate in basic decisions, I think our country is in serious trouble. I think one of the reasons the Nation is in as serious trouble as it is today is because we have departed from our constitutional provisions. I make no apologies. I believe in the Constitution, and I believe the nominee is not a strict constructionist. I believe he is a loose constructionist, especially in the very important areas that we have been discussing.

Mr. BAYH. I appreciate the contribution of the distinguished Senator from Arkansas, who is uniquely qualified because of the experience he has had on this committee——

Mr. FULBRIGHT. I am uniquely qualified only because I have been here a long time and have observed the diminution of the influence of Congress. I do not believe the Executive alone is at fault. We have acquiesced in much of it. I would not claim I have not participated in it. Nevertheless, that is no reason why we should not recognize it when it becomes clear, and certainly a number of us have recognized it for years, but not for as long as we should have. No one of us here is endowed with as much foresight as we should have. That does not mean we should not move in the right direction. We ought to take whatever measures are necessary to reverse that trend and to reestablish the primacy of the constitutional provisions themselves. Among them is the importance of the legislative branch. I do not know why people make a cult of the Presidency. It is not just in this country; it is worldwide. We are not immune to it. Look all over the world. We played court just yesterday to the President of Brazil. Brazil is a great country, larger than we are in geography, although with not as many people, that formerly had a legislature and a parliamentary system. They became impatient with it and they abolished it, so that country now has a dictatorship.

I do not necessarily mean this as criticism of Brazil, but simply as an observation. They were unable to make a parliamentary system function, I assume. I do not want my remarks to be interpreted as meaning that I am trying to criticize Brazil or any other country. It is simply that I do not wish to promote a different form of government here or anywhere else. I do not wish to intervene or cause trouble to Brazil. However, I do not think we ought to give our substance to support them.

If they wish that kind of a system, that is their business. But this is true all around the world. Very few people are left in this world community who are governed by a system in which a legislature such as ours participates. I would doubt if it is a fourth of the human race today. I have not calculated it on that basis, but I would doubt whether a fourth are under systems comparable to ours.

So it is a trend. The complexity of modern life may make our system unworkable. I do not think it is unworkable. I think it will work if we abide by our fundamental constitutional principles. If Congress has a fair chance, even though it has acquiesced in the past in the erosion of its own powers, I think we can prevent some of the grave mistakes that threaten the future of our country and our world.

I do not necessarily take issue with the nominee's views about current events and current issues, with which, in some cases, my own views have been in accord. I accept the idea that just because one's views about current political issues are different, that is not a basis for rejection.

But on the question of whether or not our Constitution should be supported, I do not see much room for difference of opinion. Especially, it seems to me, when Senators have taken an oath to support the Constitution, it is odd that they would approve of a man whose views and actions seem to be contrary to the popular construction of what our Constitution means.

That is the sum and substance of my argument.

Mr. BAYH. I certainly thank the Senator.

WILLIAM H. REHNQUIST A JUDICIAL CONSERVATIVE

Mr. DOLE. Mr. President, in his television address to the Nation announcing the Supreme Court nominations of William H. Rehnquist and Lewis F. Powell, Jr., President Nixon described his nominees as judicial conservatives. The meaning of this term has since been the subject of some debate and considerable misunderstanding, particularly with regard to Mr. Rehnquist. Indeed, in some quarters there seems to have been an effort to put the nominee on the defensive about his philosophy, as if there were something sinister or at least out of date in being a judicial conservative.

As a lawyer and citizen who has looked with apprehension and concern on some of the Supreme Court's decisions over the past 10 to 20 years I have been hopeful that the Court's activist-interventionist phase would be ended some day by the seating of Justices who would swing the Court away from the role of a super-legislative, policymaking body and back to its proper function as an arbiter of cases and controversies in line with the intent of the Constitution's framers.

As a Senator who supports the President in his efforts to provide the Supreme Court with a new philosophical orientation and a shifted emphasis in the trend of its decisions, I have never felt the need to defend, excuse or apologize for a conservative judicial approach.

VALUABLE HEARINGS

Thus, I welcomed the nominations of Mr. Powell and Mr. Rehnquist, because these men promise to become important influences for change within the Court and because the hearings on their nominations offered an exceptional opportunity to explore and illuminate the meaning of the term judicial conservative.

To my view, those hearings demonstrate convincingly that the Senate, far from being defensive or reluctant about

confirming persons with this philosophy, should welcome their appointment and the opportunity to join in placing them on the Court. As I understand Mr. Rehnquist's views, confirmation of his nomination—like that of Mr. Powell earlier—will serve the best interests of all three branches of the Federal Government and thereby the best interests of the American people.

It will serve the interests of the Court by giving it another extremely able and vigorous Justice. It will benefit the executive branch by providing a Justice who will view the enforcement and execution of the laws fairly, impartially, and with an effective understanding of the executive branch's operation. The best interests of the legislative branch will be served by putting on the Court a Justice whose belief in the principle of judicial restraint and whose recognition of the Court's strictly adjudicative character will enhance the prestige and powers of the Congress as the proper source of the laws the Court is bound to interpret.

PRINCIPLES OF JUDICIAL CONSERVATISM

To call one person a judicial conservative and another a judicial activist or liberal in the context of Supreme Court decisions on constitutional law is to attempt a distinction between general attitudes or approaches that those who sit on the Court may take in deciding issues before them. Of course, these terms are not precise, and Justices can fall anywhere along the broad spectrum between extremes of conservative and liberal judicial behavior. Generally, however, a judicially conservative Justice observes two primary principles. First, he refuses to make decisions on the basis of his personal views of what he believes the law should be. Second, he believes the proper judicial function lies solely in interpreting the law and that public policy decisions on the formulation and execution of the law should be left entirely to the political branches of Government.

Mr. Rehnquist's testimony amply demonstrates that he subscribes to both of these principles. In response to a question from the Senator from Maryland (Mr. MATHIAS) concerning the liberal-conservative distinction, the nominee stated:

> It is so difficult to pin down the terms "Liberal" and "Conservative," and I suspect they may mean something different when one is talking about a political alignment as opposed to a judicial philosophy on the Supreme Court.
>
> I think to an extent, in discussion about the Court, there has been a tendency to equate conservatism of judicial philosophy not with a conservative bias, but with a tendency to want to assure one's self that the constitution does indeed require a particular result before saying so, and to equate liberalism with a feeling that, at least on the part of the person making the observation, that the person tends to read his own views into the constitution.

These views comport with those of a long line of judicially conservative judges, including, notably, Justices Holmes, Frankfurter and, in recent years, Mr. Justice Black. I think we might better understand judicial conservatism and its importance to the good functioning of our Government by looking at some decisions by those Justices.

NOT A POLITICAL CONSERVATIVE OR LOWER COURT JUDGE

At the outset, however, I think we need to understand what a judicial conservative is not. First of all, as Mr. Rehnquist indicated in his response to Senator MATHIAS, a judicial conservative is not the same thing as a political conservative. His political philosophy may be conservative or it may be liberal, experience showing a wide variation on this score, but there is no real correlation. The pre-Roosevelt Court of the nine old men, it will be recalled, was politically conservative, but from the standpoint of economic regulation it can fairly be termed judicially liberal and active. That Court sought to read its own notions of public policy into the Constitution with the result that freedom of contract was given constitutional sanctity to the detriment of executive and legislative views on economic policy.

On the other hand the liberal-activist Warren Court did demonstrate a fairly close relationship between political and judicial philosophies.

It also seems to me that judicial conservatism as observed in Supreme Court Justices does not relate to methods employed by lower court judges to interpret decisions of higher courts. Judges in trial and midlevel appellate courts are in the position of applying a decision of a higher court to a situation that is distinguishable from the one that gave rise to the original case. The judge must determine how to construe the earlier decision; he may do so either narrowly, to make it inapplicable to the case under consideration, or broadly, to cover the new situation. The role of the judge in this instance is not to state or define the law but to predict what the higher court would do in the situation at hand. Thus, a judge might be liberal in construing decisions of higher courts, yet, were he promoted to a higher bench, he might be conservative in his statements of legal principles to be followed by lower courts. On the Supreme Court, the Justices do not predict the law; rather, they determine what it is in an absolute sense. There is a significant difference in these judicial roles.

I would like to focus now on the sort of Supreme Court jurist I believe the President had in mind when he chose to term William Rehnquist a judicial conservative. As I indicated earlier we may be able to get a better understanding of what a judicial conservative is by examining the statements of past Justices who exemplified this philosophy. Several individuals fit this mold, although I suspect that Oliver Wendell Holmes, Felix Frankfurter, and Hugo Black are the best examples.

JUSTICE HOLMES REJECTED PERSONAL VIEWS

Mr. Justice Holmes sat on the Court at a time when its political conservatives had adopted a policy of judicial activism with respect to economic matters. A majority of the Court had used the doctrine of substantive due process to read into the Constitution its own notion of freedom of contract. Consequently, for many years, they prevented the States and the Federal Government from regulating property rights to any significant extent.

One of the more significant cases, in this area was *Lochner* v. *New York*, 198 U.S. 45 (1903), a case involving a New York State statute which provided that no bakery employee be required to work more than 60 hours a week or 10 hours a day. The Court held that the statute was an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract and thus void as a matter of constitutional law. Holmes viewed the case as an attempt by the Court to decide public policy and impose its desires on the political branches of Government under the guise of constitutional interpretation. His dissent is a classic statement of judicial conservatism:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinion in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract . . . The fourteenth amendment does not enact Mr. Herbert Spencer's social statics . . . [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *Laissez Faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the constitution of the United States.

It seems to me, that it is difficult for any student of government or the Constitution who sits in the Senate to quarrel with this position. In fact, we should be enthusiastic in our reception of nominees sent to us for confirmation who embrace it and, regardless of their personal feelings, believe that the Supreme Court ought not substitute its judgment on the formulation of the laws for that of the Congress.

JUSTICE FRANKFURTER ADVOCATED JUDICIAL RESTRAINT

Felix Frankfurter is a second outstanding example of a judicial conservative, and in the record of the hearings it can be seen that Mr. Rehnquist believes his philosophy to the Judiciary Committee as Frankfurter's.

The nominee described Frankfurter's philosophy to the judiciary committee as follows:

> [He] came on the Court at a time when I think it was clear to most observers that the old court of the nine old men of the twenties and thirties was indeed, on any objective analysis, reading its own views into the Constitution, and Justice Frankfurter, of course, prior to his ascent to the bench had been critical of this, and as a Justice he helped demolish the notion that there was some sort of freedom of contract written into the Constitution which protected businessmen from economic regulation. And yet, when other doctrines were tested later in the Court, it proved that he was not simply an exponent of the current politically liberal ideology and reading that into the Constitution. He was careful to try to read neither the

doctrine of the preceding court nor perhaps his own personal views at a later time into the Constitution, but to simply read it as he saw it.

As we all know, Frankfurter was one of the foremost advocates of judicial restraint as a principle of constitutional law. He was also by most accounts a political liberal. In speaking of Frankfurter during the hearings Mr. Rehnquist stated again and again that he approved of this philosophy. For example, he said:

I subscribe unreservedly to that philosophy, that when you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. You are there to construe as objectively as you possibly can the Constitution of the United States, the statutes of Congress and whatever relevant legal materials there may be in the case before you.

JUSTICE BLACK SAW COURT'S LIMITS

In addition to the writings of Holmes and Frankfurter, I think the later opinions of Mr. Justice Black demonstrate that he too believed the proper role of the Court was defined by the tenets of judicial conservatism. In recent years, there have been several examples of divisions on the Court between judicial conservatives and judicial activists. One example, is found in the poll tax case, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966). A split in this case developed between Justices Black and Douglas, two generally acknowledged political liberals, over the constitutionality of Virginia's poll tax. An earlier supreme court case had upheld the constitutionality of the poll tax as a prerequisite to voting, and on the strength of this earlier case a lower Federal court had refused to strike down Virginia's tax. Douglas, for a majority of the Court, said that notwithstanding the earlier precedent, the poll tax violated the equal protection clause. In the course of his opinion he sated:

Notions of what constitutes equal treatment for purposes of the equal protection clause *do* change (383 U.S. at 669).

This attempt by the majority to update the Constitution in accordance with its opinions as to the best public policy, prompted Black to write a strong dissent in which he stated:

I can only conclude that the primary controlling, predominate, if not the exclusive reason for declaring the Virginia law unconstitutional is the Court's deep-seated hostility and antagonism, which I share, to making payment of a tax a prerequisite to voting.

The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be "shackled to the political theory of a particular era," and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast of this Court's more enlightened theories of what is best for our society. It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written Constitution which is to survive through the years as originally written unless changed through the amendment process which the framers wisely provided. (383 U.S. at 6770678).

Black alternatively concluded that, since Congress had the constitutional authority to abolish the poll tax, the decision should be left to it and not be made by the Court. The important aspect of his dissent is that, although he clearly believed that as a matter of policy the poll tax should be abolished, he declined to require it on the basis of a twisted interpretation of the Constitution.

During the hearings, the Senator from Arkansas (Mr. MCCLELLAN) quoted several passages from opinions written by Black in two other cases, *Lee* v. *Florida* 392 U.S. 378 (1968) and *Katz* v. *United States* 389 U.S. 347 (1967). All were similar in import to the passage from the Harper case. One was as follows:

In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have, and which they certainly do not have in common with ordinary usage. I will not distort the words of the [fourth] amendment in order "to keep the Constitution up to date or to bring it into harmony with the times. It was never meant that this court have such power, which in effect would make us a continuously functioning Constitutional convention.

When asked if he agreed with this statement, the nominee replied:

I subscribe to the statement read unequivocally.

CLEARLY STATED BELIEFS

I have cited only a few instances in the hearings when Mr. Rehnquist illuminated his judicial philosophy. There are many other examples in the record, and they all have the same thrust. First, he believes that personal views are irrelevant to the decisionmaking role of a Supreme Court Justice. Second, he believes the Court's proper role is constitutional interpretation and that decisions of policy must be reserved to the political branches of Government, the Congress and the executive.

THE VALUE OF JUDICIAL CONSERVATIVES

I said at the outset, I believe it is in the best interests of the Senate to confirm the nomination of William Rehnquist precisely because he has embraced this philosophy. Regardless of our political philosophies, we in the Senate should appreciate that the presence on the Supreme Court of the judicial conservatives in the tradition of Holmes, Frankfurter and Black, is a firm cement for the foundation of our governmental system.

Judicial conservatives respect the boundaries and lines of demarcation established by the Constitution between the separate branches of Government. They recognize the necessity of upholding the Constitution and requiring conformity with it of legislative acts and executive undertakings, but they also seek to avoid the temptation to translate their personal opinions and preferences into fundamental law. Judicial supremacy in constitutional interpretation is one thing; judicial lawmaking and policysetting is quite another. Judicial conservatives know the distinction and observe it in the fulfillment of their offices.

REHNQUIST SHOULD BE CONFIRMED

Because William Rehnquist is a judicial conservative and unquestionably possesses other qualifications which meet the Senate's necessarily high standards for professional competence and unimpeachable integrity, he should be speedily confirmed.

ORDER FOR STAR PRINT OF A BILL

Mr. DOLE. Mr. President, as in legislative session, I ask unanimous consent that a star print be made of my bill, S. 2800, dealing with assistance to rural areas, in order to include corrections in the text of the bill and for the purpose of adding the names of additional cosponsors.

The ACTING PRESIDENT pro tempore (Mr. CHILES). Without objection, it is so ordered.

THE DEATH OF RALPH BUNCHE

Mr. BROOKE. Mr. President, it was with great personal sadness that I have learned of the death of Ralph J. Bunche.

I have known Dr. Bunche for many years. He was my professor of political science at Howard University. As a teacher he had the extraordinary capacity to inform and inspire his students.

His passing is an irreplaceable loss to the Nation and the world he served. Few men have had so great an opportunity to dedicate their lives to the attainment of peace. And even fewer men have had so many accomplishments in pursuit of that good.

Ralph Bunche was a founder of the United Nations and served that organization as its Under Secretary for Special Political Affairs.

It was Ralph Bunche who brought about the armistice between Israel and the Arab states in 1949. For this accomplishment, he received the Nobel Peace Prize in 1950.

It was Ralph Bunche who directed the U.N. operations in the Congo in 1960, which were primarily responsible for keeping the Great Powers out of an internal struggle and enabling the people of what is now the Republic of Zaire to resolve their own differences.

It was Ralph Bunche who directed the U.N. peacekeeping force on Cyprus, which prevented the outbreak of further hostilities between that island's Turkish and Greek citizens.

In his quarter century of service to the United Nations, Ralph Bunche has been personally responsible for most of the U.N.'s accomplishments in the achievement and preservation of peace. Over the last quarter century, his name has become virtually synonymous with that of the world body which he helped to found. His values and principles, and those of the United Nations, have been one: peace, human rights, justice, and social progress.

Others will follow in his footsteps, and will seek to carry out his goals. But few if any will ever be able to equal the personal and professional accomplishments of this great statesman, great scholar, great peacemaker, and great man.

To his wife, Ruth, and to his surviving children, Joan and Ralph, Jr., I extend

my heartfelt sympathy, for theirs is the greatest loss of all.

Mr. FULBRIGHT. Mr. President, will the Senator yield?

Mr. BROOKE. I yield.

Mr. FULBRIGHT. Mr. President, I wish to associate myself with the Senator's comments. I had not heard, until listening to what the Senator from Massachusetts has just stated, that Ralph Bunche had died. I have known Mr. Bunche for many years, and there is no man in public life for whom I have had a higher respect. He was extraordinarily helpful and effective in his position in the United Nations, and we were extremely lucky to have him.

I am very sad to hear the news of his death. Although I had heard he was in ill health, I did not know he had died until the Senator just stated it. So I wish to associate myself with his comments about the services of Mr. Ralph Bunche.

Mr. BROOKE. Mr. President, I thank the chairman of the Committee on Foreign Relations for his expression of sympathy. I know that the passing of Ralph Bunche, even though he had been sick, as the chairman has stated, for a long period of time, comes as a great shock to the Nation and to the world.

Mr. FULBRIGHT. He was a great man, I think, in every respect.

Mr. BROOKE. I thank the Senator. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. JAVITS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JAVITS. Mr. President, I wish to add my statement to those of other Senators in respect to the passing of Ralph Bunche, the Deputy Secretary General of the United Nations, who was a friend of mine for 25 years or more, and a man whom I considered most skillful and most authoritative in every way, and a Nobel laureate—a prize which he probably considered the greatest recognition of his life.

He was for me, Mr. President, one of the true world figures of our times, with a passion for peace, and yet, when he sought for peace, he sought it with a determination and a dedication that were a complete absorption, which, unhappily for our world, meant generally to vote for war.

In addition to all of that, of course, he was such a magnificent exemplar of the capacity of black people as to dash completely the parochial ideas of those who seek to draw a distinction between the intellectual capacities of black and white people.

I join the other Senators who have spoken in my expression of sadness and of loss personally and in behalf of my constituency, at Ralph Bunche's passing; and Mrs. Javits and I, since we both knew them well, and they had been in our home many times, extend our profound condolences and sympathy to Mrs. Bunche, and only hope that this exalted position of esteem in which the world held Ralph Bunche may be of comfort to her and to their family in such a trying hour.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Hackney, one of its reading clerks, informed the Senate that Mr. NELSEN of Minnesota had been appointed as a conferee at the conference on the bill (S. 382) to promote fair practices in the conduct of election campaigns for Federal political offices, and for other purposes, vice Mr. SPRINGER, excused.

The message announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1828) to amend the Public Health Service Act so as to establish a Conquest of Cancer Agency in order to conquer cancer at the earliest possible date.

The message also announced that the House had agreed to the amendments of the Senate to the bill (H.R. 6893) to provide for the reporting of weather modification activities to the Federal Government.

The message further announced that the House had passed the following bills, in which it requested the concurrence of the Senate:

H.R. 1163. An act to authorize the establishment and maintenance of reserve supplies of corn, grain, sorghum, barley, oats, and wheat for national security and to protect domestic consumers against an inadequate supply of such commodities; to maintain and promote foreign trade; to protect producers of such commodities against an unfair loss of income resulting from the establishment of a reserve supply; to assist in marketing such commodities; to assure the availability of commodities to promote world peace and understanding; to protect producers' incomes when rebuilding reserve stocks of wheat or feed grains; and for other purposes; and

H.R. 12067. An act making appropriations for Foreign Assistance and related programs for the fiscal year ending June 30, 1972, and for other purposes.

ENROLLED BILLS SIGNED

The message also announced that the Speaker had affixed his signature to the following enrolled bills:

S. 29. An act to establish the Capitol Reef National Park in the State of Utah; and

S. 1237. An act to provide Federal financial assistance for the reconstruction or repair of private nonprofit medical care facilities which are damaged or destroyed by a major disaster.

The PRESIDENT pro tempore subsequently signed the enrolled bills.

HOUSE BILLS REFERRED

The following bills were each read twice by their titles and referred, as indicated:

H.R. 1163. An act to authorize the establishment and maintenance of reserve supplies of corn, grain, sorghum, barley, oats, and wheat for national security and to protect domestic consumers against an inadequate supply of such commodities; to maintain and promote foreign trade; to protect producers of such commodities against an unfair loss of income resulting from the establishment of a reserve supply; to assist in marketing such commodities; to assure the availability of commodities to promote world peace and understanding; to protect producers' incomes when rebuilding reserve stocks of wheat or feed grains; and for other purposes; to the Committee on Agriculture and Forestry.

H.R. 12067. An act making appropriations for Foreign Assistance and related programs for the fiscal year ending June 30, 1972, and for other purposes; to the Committee on Appropriations.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

Mr. JAVITS. Mr. President, the time has now come for Senators who have come to a final decision on the Rehnquist nomination, which we are now debating, to state their point of view. One could just wait for the vote and cast it without comment, but it seems fairer, in a matter which is of such deep interest to the country, where Members wish to evaluate the arguments of those for and those against the nomination, where perhaps even factual replies may come forward when particular issues are raised, to declare oneself as well as one's reasons as a matter of conscience and public duty, and it is in that spirit that I speak today. I bear in mind the dignity of this appointment, and of the individual, who is a well-known member of the bar, highly respected, and I know that most of his colleagues who have made any statements in opposition to the nomination have not expressed themselves in derogation of the nominee as an individual or as a lawyer.

Probably the most important single factor affecting my own judgment in this matter—and I have concluded that I must vote against this nomination—is a speech I made in the Senate on October 20, when it was believed that the President was considering a group of individuals from which to make appointments to the Court. That compelled me to think through my own attitude on the confirmation of Supreme Court nominations and what criteria I would follow in deciding upon my vote on those subjects, in the best interests of the people of my State and of the Nation.

I came to the conclusion that I had, in the case of the nomination of a Supreme Court Justice, the same obligations that the President did, and this is the reason why I have decided to vote "no," because I am applying that standard of value to the nomination of Mr. Rehnquist.

The standards that I established for myself as to what I would seek in a Supreme Court nominee are the following:

First, an abiding love of freedom and human dignity and justice, and deep faith in and respect for the people.

Second, a high level of professional competence and technical craftsmanship as a lawyer, and personal integrity worthy of the Supreme Court.

Third, high intellectual quality, with the capacity to understand complex sociological issues, and the ability to see

those issues within the framework of broader social, economic, and Government concerns.

Fourth, objectivity on the great national questions which are before, or likely to come before, the Court, combined with a sure understanding of the governmental imperatives embodied in our Constitution and the place of the Supreme Court in a government with an independent judiciary.

Fifth, an understanding of the constitutional limits upon the powers of the executive and legislative branches and of the States, particularly with respect to the individual's rights, and importantly also with respect to the individual rights of the weak and the unpopular.

Sixth, an understanding of the constitutional limits upon the judicial power also, with respect for the authority of the other branches of Government—particularly as Supreme Court Justices are not subject to removal through the political process.

In that same speech I noted a distinction between nominees for the High Court and nominees for the President's Cabinet. For example, because the same standards do not apply to the latter, and because I believe the President should be allowed great latitude in choosing his own official family, I had no hesitation about voting to confirm the nomination of Secretary of Agriculture Butz only last week, though I may not have agreed with him in many of the things he has advocated, or is said to have advocated.

But a lifetime appointment to a judicial post of such power and importance—particularly when the nominee is of an age where he will most probably influence constitutional history for a quarter of a century or more—requires a far larger role by the Senate if it is to fulfill its constitutional duty. So, in establishing my own criteria for acting on Supreme Court nominations, I said:

I have heard it said that the Senate ought to confirm a nominee unless we find the nominee either lacking in integrity or basically incompetent, and that otherwise the choice is for the President. I thoroughly disagree, for both historical and practical reasons.

Interestingly enough, Mr. President, my staff has discovered a quotation from the nominee himself which may be illuminating on that score.

Twelve years ago, a young attorney, writing in the Harvard Law Record deplored the failure of the Senate to inquire into the judicial philosophy of nominees for the Supreme Court prior to confirmation. Arguing that those who would change the Court could best do so by exercising a coequal role with the President in filling vacancies on the Court, the author, Mr. Rehnquist, favored a broad ranging interview of the nominee. While a nominee's "integrity, his learning, his success at the bar would be the only necessary subjects of inquiry in the case of a judge appointed to a lower court" since "he is not there to apply his own judicial philosophy, willy-nilly to the litigants before him, but rather to decide the case of those litigants by application of the principles laid down by higher courts," different standards should be applied to nominees to the higher court.

Referring to the then recent—14 years ago—confirmation of Mr. Justice Whittaker, Mr. Rehnquist asked—and this is very illuminating:

Given this state of things in March 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws," then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

It is, Mr. President, precisely those criteria that I established before this nomination came to us, and it is those criteria which have led me to the conclusion that I must vote "no" on the confirmation of this nomination.

There has never been any question about Mr. Rehnquist's high intelligence, ability as a legal craftsman or his personal integrity; and none is raised now. I might say parenthetically that I heard with deepest interest the very moving statement by the Senator from Wisconsin (Mr. PROXMIRE), with whom I am very closely associated in many things, and for whom I have a very high regard, on that subject. The nominee is a man of high intelligence, great ability as a lawyer, and great personal integrity, and I raised no question about that whatever. But I believe it is my duty to oppose the nomination solely on the basis of my disagreement with Mr. Rehnquist on many questions of constitutional law, and that were I not true to my own beliefs, I would be failing in my duty to my State and to the Nation and its future.

One must be specific. So here are some specific areas in which I disagree with Mr. Rehnquist's concepts of the Constitution.

I gather that the nominee believes that the Attorney General may wiretap without judicial authority, the communication of any person he believes to pose a threat to the national security. I emphasize the word "he." I believe the extraordinary right to wiretap without a warrant granted by the 1968 act is limited to cases of subversion from abroad and not to a threat to national security known as "internal subversion." In the latter case the Attorney General should be required to get a court order. While Mr. Rehnquist has every right so to interpret the statute until the Supreme Court makes a final decision this term, I believe this distinction illustrates a deep philosophical gap between us.

I might add, in substantiation of that, that when I was attorney general of the State of New York, I also had wiretap authority with regard to every kind of crime, including very serious crime. I practiced what I preach; I got court orders, and got them under a code of practice which I initiated myself, and which contained all the requirements since recommended by bar associations and civil libertarians.

The next point upon which I disagree with the nominee is the question of Government surveillance. The nominee believes "that self restraint on the part of the executive branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering." I am far less sanguine, given recent revelations about the magnitude and scope of Army Intelligence activities, regarding the preservation of every American's right to be let alone. Courts are vital to the preservation of this right, and justices who see no danger of excesses amounting to a threat to freedom in such surveillance are unlikely to be vigilant in its protection. I thoroughly disagree, therefore, with that philosophical concept.

The nominee, in an article published just this year, makes a case for restricting the free speech rights of Government employees in terms indicating that he values efficiency in Government more highly than first amendment rights in such cases. Again, I philosophically disagree.

Another point, and this is very recent, and I do not think it has been adequately discussed in this very fine debate—I say that for both sides—is the nominee's role in the arrest and prosecution of thousands of May Day demonstrators this year—which I characterized at the time as "clearly improper," and precluding the possibility of successful prosecutions. The nominee had a significant role in those May Day arrests. According to the hearing record, he attended numerous strategy sessions in the Justice Department, in which he was an important official, when this policy was being formulated, and significantly, within days of this disaster in law enforcement, defended the Government's actions in a lengthy speech citing, in the course of that justification, the rather original and highly dubious doctrine of "qualified martial law."

To me, if there is anything outstanding about the record of the nominee which is exceedingly relevant because it is so contemporary, it is this relationship to the May Day arrests—not the demonstrations and not how they were dealt with, but with the arrests. There he was addressing himself to a legal problem which he must meet as a Justice of the U.S. Supreme Court.

In my judgment, a lawyer worthy to sit on the Court should have seen the fact that the nature of the arrests, and so forth, the manner in which they were carried out, guaranteed the shambles that resulted, characterized by strict detention without law and, in my judgment, without even color of law.

To me, this is a critically important point, because I believe that prosecutors have a duty to show people innocent as well as guilty; and they have a duty, certainly, to see that the rights of the accused are protected, even though he may not have a lawyer or an adequate lawyer. How much more is this true of so supreme a judge as a justice of the U.S. Supreme Court?

So, to me, this is a very critically important point. And it did not rest upon silence. I understand that he sat in on the strategy sessions. When my staff wrote this statement for me—or a good deal of it, in terms of the basic facts—they made the point that according to

his own testimony he did not protest decisions made at the Justice Department on the handling of demonstrators. I struck it out and paid no attention to it. If he wanted to sit silent, that was his business. But he did not continue to sit silent, a few days later when he spoke in North Carolina.

So far as I am concerned, when he expressed himself on the critical basis involved, that was very critical testimony as to his capability for being a Justice of the U.S. Supreme Court, in my eyes.

The next point is the nominee's critical role in the enactment of the District of Columbia crime bill last year included unqualified support for the repressive doctrines of preventive detention and no-knock warrants which I characterized in voting against the conference report as "a drastic overreaction to a critical problem."

Lest I leave some of those who want to be tough on crime with the idea that I am soft on crime, let me say that I have had enough experience on both sides of the issues, in highly litigated cases, to believe—and I state this not only as a Senator but also as a lawyer of very great experience—that right now, with the state of the law as it is, if a prosecutor has a case, he is not being inhibited or restricted by any of the protections which the so-called Warren court has established for the accused. On the contrary, if a citizen has no right to be pilloried or is innocent, he has an infinitely better chance, under those rules, than he had before; and it is right that he should, because that is the whole concept, philosophically, of our criminal justice system.

So, on the whole, it has been a completely net plus, and has not in any way, in my judgment, invalidated or jeopardized law enforcement by any prosecutor who had a case worthy of the name. If you are looking for shortcuts or ways in which to shut your eyes to the innocence of the accused because it is your job to get convictions—then, yes; it could embarrass you as a prosecutor. But that is not my idea of a prosecutor or a judge.

Finally, Mr. President, is what I consider to be—and this has been referred to in the debate—an almost incredible insensitivity to the critical national problem of the last decade and for perhaps decades to come, legislation to correct unconstitutional racial discrimination, which I find in the nominee.

When a private citizen with no constituency, "without a client" as Mr. Rehnquist himself put it, voluntarily works, writes and speaks against those necessary changes time and time again, his acts clearly reflect a deep personal conviction.

So I specify, Mr. President, as the ground for my opposition to confirmation, certain of the signal instances in which the nominee has shown this position.

I respectfully submit—and I have read it in detail—that a blanket statement which the nominee just made, literally the other day, about one of these incidents, in which he said:

> I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the Brown decision, does not seduce me in the face of the record.

Not that I am callous and indifferent to changes in man. It is properly in the mind of many Senators, and in my mind, that in the case of Mr. Justice Black, who turned out to be a great lawyer on the issue of equal rights in terms of racial discrimination, there was a great deal of record which went the other way. But where you have deep philosophical concepts, not just rumors about what Justice Black's connections were with the Ku Klux Klan, but where a man of ability and standing expresses profound philosophical concepts, the number of cases in which the Brown decision has to be applied practically, whether it is the pupil placement or busing or something else, are so infinite and so varied that the basic philosophical concept is infinitely more important than the generous statement of support for Brown against Board of Education, which is now the highest law of the land, anyhow, and is very unlikely, as a basic principle, to be overturned. Operating within it, you can either destroy or dismantle all those civil rights or establish and secure them. That is where I think the nominee falls short.

I say that for this reason: I took special note of his attitude toward local public accommodations statutes as recently as 1964, and the questions raised about practicality in respect to those statutes. I also took significant account of the general philosophical attitude that Mr. Rehnquist is not on the side of segregation or desegregation. If that is his attitude, then what is the Constitution all about?

Mr. President, on the issue of restraints on government under questioning by the distinguished Senator from North Carolina (Mr. ERVIN), the nominee said:

> I think it quite likely that self-restraint on the part of the Executive Branch will provide the answer to virtually all the legitimate complaints against excesses of information-gathering.

Mr. President, this, plus what I consider to be the neutrality on a firm constitutional guarantee represents, to me, profound philosophical approaches which I cannot agree with in terms of applying the criteria I have established for myself in sending a lawyer to be a Justice of the Supreme Court.

The much quoted text of the memorandum which the nominee drew for Mr. Jackson 19 years ago in which he sustained the rightness of the equal but separate doctrine of Plessy against Ferguson could properly be objected to by him. Mr. Rehnquist should have the right to explain the memorandum he wrote as a law clerk for Justice Jackson 19 years ago, and he should be permitted to explain that away, as to his present struggle, and in light of the passing of 19 years. I agree with that.

But when we have a constant succession of reiterations of the same philosophy going on through the years until the May Day arrests which are so current, there I must give weight to the previous statement because, in my judgment, this is a materially uncontradicted statement by the historical record based on the philosophical approach to the enforcement of constitutional rights.

Thus, I shall vote "no" for the reasons which I have stated.

I wish to refer also, as I think it is important, to a letter to Members of the Senate sent by 20 members of the Harvard Law School faculty who wrote as follows:

> Our opposition to Mr. Rehnquist is based on our perception that his views on the relation between government and the individual in the area of security and the relation between established power and the disadvantaged in the area of human rights are so exceedingly deferential to the former and so undervalue the latter as to place him outside that central stream.

Mr. President, I concur in that assessment and ask unanimous consent that the letter be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., November 29, 1971.

HON. JACOB K. JAVITS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR JAVITS: I enclose a statement on the subject of the pending nomination of William H. Rehnquist signed by those members of the Harvard Law School faculty whose names appear at the bottom of the attached page.

Sincerely,

LOUIS L. JAFFE,
Byrne Professor of Administrative Law.

STATEMENT

It is doubtless appropriate for the President to exercise his power of nomination to shift the Supreme Court in the direction of his constitutional philosophy. But history, from 1795 to the present, demonstrates that it is no less appropriate for the Senate to deny confirmation to a Presidential nominee, despite his personal integrity and professional competence, because the Senate believes that the addition of a man of the nominee's philosophy is, under the existing circumstances, against the best interests of the country and the effective functioning of the Court.

In deciding whether to confirm the Hon. William H. Rehnquist in this period of deep change and conflict, the Senate has a special obligation to preserve the position of the Supreme Court as an effective organ in our system of government. Recent changes have already shifted the consensus or balance of opinion in the Court. Within the central stream of contemporary constitutional thought exemplified by all present members of the Court and their predecessors for the past thirty years, there is a wide range for differences of constitutional view—and thus for Presidential and Senatorial choice. Our opposition to Mr. Rehnquist is based on our perception that his views on the relation between government and the individual in the area of security, and on the relation between established power and the disadvantaged in the area of human rights, are so exceedingly deferential to the former and so undervalue the latter as to place him outside that central stream. Twentieth century problems require Justices with a clearer sense of the ingredients of constitutional decision.

Accordingly, we urge that confirmation of William H. Rehnquist be denied.

Victor Brudney, Derrick A. Bell, Jr., Vern Countryman, Abram Chayes, Alan M. Dershowitz, Ruth B. Ginsburg, William B. Gould, Philip B. Heymann, Louis L. Jaffe, Andrew L. Kaufman, Frank I. Michelman, Arthur R. Miller, Karen S. Metzger, David Rosenberg, Henry J. Steiner, Stanley S. Surrey, Laurence H. Tribe, James Vorenberg, Robert B. Washington, Jr., Lloyd L. Weinreb.

November 29, 1971.

Mr. JAVITS. Mr. President, I conclude as follows: With all respect—and I do not in any way beg that question—for Mr. Rehnquist's intelligence, ability, and integrity—and I have had the privilege of conferring with him personally and I am grateful to him for being willing to meet Members like myself on a direct basis—and with respect to his right as a private citizen to his convictions on equal rights and equal opportunity, this is a nominee whose philosophy as a lawyer and a citizen, in my judgment, makes him unacceptable as one of the final arbiters of the rights of 200 million Americans so that I cannot, in good conscience, vote to put him on the Supreme Court.

Mr. President, I ask unanimous consent to have printed in the RECORD an editorial from the New York Post of December 8, 1971, entitled, "The Rehnquist Rush," and an editorial from the New York Times of December 8, 1971.

There being no objection, the editorials were ordered to be printed in the RECORD, as follows:

[From the New York Post, Dec. 8, 1971]

THE REHNQUIST RUSH

While all sorts of important responsibilities and obligations go with the post of U.S. Senate Majority Leader, it is nowhere specified that the incumbent must assume the meek role of a minority follower.

Nevertheless, that seemed to be the preference of Sen. Mansfield (D.-Mont.) yesterday when he was asked about the prospects for a confirmation vote on Assistant Attorney General Rehnquist's appointment to the U.S. Supreme Court.

"I would hope we wouldn't have to spend too much time on Rehnquist," the Senate leader commented. "I don't think any minds are going to be changed." He said he was hoping for a vote by tomorrow.

With that kind of opposition, perhaps ueither Rehnquist nor his allies need worry. In fact, however, there are many grounds for differentiation between Lewis F. Powell Jr., the Virginia lawyer confirmed yesterday, and Rehnquist. There is a clear case for re-examining at length on the Senate floor the discrepancies and evasions in Rehnquist's testimony. Surely the fact that the American Civil Liberties Union has reversed a 51-year-old policy of neutrality toward court nominees in rejecting Rehnquist deserves thoughtful attention from every wavering Senator.

At this moment, no agency except the U.S. Senate can hold up this obnoxious appointment and subject it to extended scrutiny—and it has the duty to do so. We urge Sen. Javits and others who have spoken out against Rehnquist's nomination to join in stopping the stampede. Rehnquist could well be serving—if confirmed—on the high court in the year 2000. What's the rush? Are his sponsors fearful that the record will not survive full debate—or new disclosure?

[From the New York Times, Dec. 8, 1971]

THE REHNQUIST NOMINATION

With only one dissenting vote, the Senate has confirmed the nomination of Lewis Powell to the Supreme Court. In this decisive manner, the Senate has shown how false was the imputation that it would not approve a Southerner or a conservative. When a nominee is a man of professional stature, wide experience, and a fundamental belief in the basic guarantees of the Constitution, no regional bias or philosophical disagreement bars his way.

It is a source of profound regret that President Nixon's other nominee for the Court is not of the same quality. Instead, by submitting the name of William Rehnquist, the President has once again provoked the turmoil of a confirmation struggle.

The grounds for rejecting Mr. Rehnquist are quite different from those on which the Senate refused to confirm two earlier Nixon nominees. His record does not show either insensitivity to potential conflicts of interest or deficient professional qualifications. Rather, his are the defects of basic insensitivity to racial equality and seriously deficient understanding of the Bill of Rights.

He has repeatedly shown himself opposed to judicial or legislative efforts to eliminate racial discrimination. There was a time decades ago when a nominee with Mr. Rehnquist's opinions would have been confirmed for the Court with hardly a ripple of controversy. But twenty-five years of Supreme Court rulings, Congressional legislation and social upheaval have made him an anachronism. Commitment to equality of treatment and opportunity for all races has become one of the indisputable standards of modern constitutional democracy. Since Mr. Rehnquist is lacking in such a commitment, the Senate if it confirmed him would be voting to turn back the clock.

Mr. Rehnquist's evident lack of sympathy for individual liberties also disqualifies him. The Constitution is a libertarian document. The first ten amendments and many other provisions are prohibitions against the exercise of certain kinds of power by the Federal Government and against the arbitrary, excessive, or unreviewed exercise of other powers.

As a political activist and as an Assistant Attorney General, Mr. Rehnquist has relentlessly argued in favor of abridging and diminishing the liberties of the citizen and enhancing the powers of Government—to tap the citizen's phone and "bug" his home and office, to enter his premises without knocking, to use tainted evidence against him, to arrest him in dragnet sweeps, to compel him to testify against himself, to deprive him of his right to practice his profession if he is a radical lawyer.

It is easy and comfortable for the ordinary, law-abiding citizen to assume that these intrusions of governmental authority will never touch his life, but the whole history of human liberty shows that the unpopular dissenter is the first—but rarely the only—victim of arbitrary power.

In voting for the first time in fifty years to oppose a nominee for public office, the national board of directors of the American Civil Liberties Union stated: "We know Mr. Rehnquist as a person committed to the notion that in every clash between civil liberty and state power, it is civil liberty that should be sacrificed."

Free societies are judged by how they treat their racial minorities and by the extent of the liberty they allow the individual citizen. On both counts, Mr. Rehnquist fails to qualify as one of tbe guardians of a Constitution of free men.

Mr. BAYH. Mr. President, will the Senator from New York yield?

Mr. JAVITS. I yield.

Mr. BAYH. I have listened with great interest to the statement of my friend and colleague from New York and I just want to add my voice in agreement to the position he has espoused.

I could not help thinking that the editorial that the Senator put in the RECORD entitled "The Rehnquist Rush" is most appropriate here, on the eve of the vote on the cloture motion, particularly when we look at the amount of time that has been utilized during past deliberations on Supreme Court nominees. It is even more relevant when we compare this situation with the way other legislation of less significance has been treated in this body, and when we consider the critical nature of the decision we are making here. It is not a transitory decision that can be changed when we come back, or with a new Congress or a new President, but this decision is one for life—not for the life of any Member of the Senate, or for any President, but for the life of the nominee.

I, for one, hope that it will be a long one. But, because of the duration as well as the philosophy of the nominee, I think that the Senate would be better advised to consider this nomination more carefully under present circumstances. We are about to be denied this opportunity and I appreciate the insistence of the Senator from New York that we study this more carefully.

Mr. JAVITS. I thank my colleague very much for his graciousness. I am not satisfied that we will be denied this opportunity. I would like to state my own judgment as to the votes on cloture. I am glad that the Senator from Indiana (Mr. BAYH) was the principal leader of the opposition, as a member of the Committee on the Judiciary and as a Senator, and has stated that he does not intend to and is not filibustering this nominee, and that he certainly will not be a party to a filibuster. That ground rule having been laid down, I believe that the opponents are entitled to full and fair debate. I believe also that Senators are fair enough, even if they will vote for Mr. Rehnquist—although I will vote against him—to assure that debate—just as I will, at a given time, if I am satisfied—and I am against the Rehnquist nomination—I am satisfied that the opponents have had full and fair debate. I shall vote for cloture and then I shall vote against the nominee.

The matter needs to be fully explored. We have a literal veneration for this body, and I have that, too, of course, and I know it is shared by every Senator. It will be further justified by the fact that Members will vote on cloture, and they should vote on cloture, whatever our feelings about our desire to go home, which we all share—and we will go home—it is not a matter of weeks or months but only a few days.

It is the feeling of all of us that we have enough self-discipline to see that everyone gets a fair chance at it, and then when we have had that fair chance, we will vote our consciences yea and nay; but it will not affect what we consider to be a fair opportunity to debate. I hope

that will be the history of the votes on successive cloture motions.

Mr. BAYH. I hope that the Senator is right. I appreciate not only his confidence but also his articulating so clearly and well what our responsibility is.

I came on the floor when my colleague from Indiana made reference to the fact that the Christmas vacation was like a carrot that was being dangled in front of our noses, urging our rapid solution to this problem. On the one hand it is a carrot being dangled in front of our noses, and on the other it is a stick on the back of those of us who feel we have not had enough time. I think the way to be the most unpopular Member of the U.S. Senate is to proceed as the Senator from Indiana has, because we all do want to go home. Unfortunately, most Senators have other specific jurisdictions within the Senate that demand their attention immediately on a day-to-day basis. They do not have the time to study this matter thoroughly, as some of us on the Committee on the Judiciary do. Perhaps they would reach contrary conclusions from the Senator from Indiana, but at least it would seem to me that, in light of everything else that has been happening over the past few days—everything that is calling the attention of almost every Senator—that we ought to have a little time to meditate upon and to deliberate upon the matter before us.

I appreciate the concurrence of the Senator from New York.

Mr. SAXBE. Will the Senator yield?

Mr. BAYH. I yield.

Mr. SAXBE. I just must point out at this time when we are talking about sufficient time, the lengthy quorum calls and the absence of many on the floor. We worked last Monday at probably the slowest pace the Senate could work. I was here this morning at 9 o'clock, and we could not find anybody to talk until after 10 o'clock. Last night the Senate quit at 4:30 or 4:45, and probably will want to do it again today.

I just think, with all the gratuitous words in the past about this, we need time to discuss this, and we need time to debate this. It seems to me that these self-serving words should not go unchallenged, when there is nobody to talk and nobody wants to talk.

Mr. JAVITS. Mr. President, I did not complain about the Senator's rights or his point of view. I have been here a long time, 15 years, and with all respect, I do not believe that it is indicated that all time should have expired and the debate ended. A debate has to incubate. I have seen it happen time and again where on the 14th, or the 15th day, or the 13th day, or the 8th day—whatever is the given situation—the debate suddenly becomes hot and things come up which have not come up before.

A new light is cast on a given situation somehow which takes months, like a baby, to just state the fundamental issues in a debate and argument. I think it is rather more our fault, I say to the Senator, that we do not have enough Senators on the floor. We are all terribly preoccupied with many, many things. I will not give an accounting for myself, although I think the Senator will agree that I work as hard as anybody does here. I do want to say—and I say it unilaterally—I have no desire to have controversy with the Senator, but I do think in putting the matter before the country in terms of the length of debate, that something must be said for the fact that it does take a certain amount of time, even if that time is consumed in quorum calls, or days on which there is an early adjournment, in order to develop that climate and understanding which represents the consummation of a complete debate. I say that unilaterally. That is my idea.

Mr. SAXBE. I would just like to say on that matter that the nomination was made October 21 and the hearings began on November 3. That is some time ago. The hearings concluded on November 10, and the committee wanted to act, and Senator BAYH and a few others did not want them to act. They met on November 11. They met on November 18. They met on November 23. The minority views were filed on November 30, and the debate began on December 6. That was not yesterday, and I would like to also point out that Mr. BAYH at the time on December 6 said, "and maybe the week after that."

They were talking about time, and Senator HRUSKA was trying to say that we will be here all week and everyone will have his day in court, but Mr. BAYH said:

> Maybe not that week; maybe the week after that. Does not the Senator from Nebraska feel that perhaps it would be more helpful to those who are trying to study this, since he has made certain charges, for the Senator from Indiana to have a chance to have a colloquy right now?

Mr. BAYH. Would the Senator put those remarks in proper perspective? Are those words out of the air, or are they from the hearings, or are they from the RECORD?

Mr. SAXBE. I am reading them from the RECORD.

Mr. BAYH. Since the Senator is using my words, I would like to know where I used them.

Mr. SAXBE. This is in the CONGRESSIONAL RECORD of the Senate of December 6, 1971.

Mr. BAYH. I thank the Senator for informing me where I was when I said that.

I would also point out to my friend, the Senator from Ohio, that he has not had the opportunity, because he had duties elsewhere, to follow this debate on a day-to-day basis or an hour-to-hour basis, as the Senator from Indiana has. That is not his responsibility, and I do not say that critically at all.

Perhaps he was unaware, when he suggested that the Senator from Indiana was holding up debate, that Senator HRUSKA and members on his side of the Committee on the Judiciary absolutely refused to let us vote on the first day the Committee on the Judiciary met on the nomination of Lewis Powell. Therefore, we sat here until the day before yesterday with one totally unnecessary vacancy. There was no opposition to Mr. Powell then. We were the ones who urged that this man, over whom there was no opposition, be sent to the Senate as soon as possible. The other side refused.

Mr. SAXBE. All I am trying to point out in my statements here today—and I felt called upon after the statement of the Senator from New York—is that a small minority of Senators who are opposed to the nomination are trying to prevent a vote on this nomination, and while saying that it is not a filibuster, at the same time they are not taking the time that is available, if they want to present their views. They are dragging their feet. It is a filibuster, and I hope that they will recognize that the majority should have the opportunty to express their will.

Mr. JAVITS. Mr. President, as I have the floor, I wish to say that this particular member of that minority—if it be a minority, which is yet to be seen—will act diligently. I have already made plain my view. Given a reasonable period for gestation of this issue, I will myself vote for cloture, and my vote will help to bring it about. So I have no trouble with my own conscience in terms of the length of the debate. I would say that debate having opened on December 6 on a matter as portentous as this—again it has been unilateral, and my friend and colleague, the Senator from Ohio is entitled to his views as much as I am to mine—this is not a totally inordinate period to close off debate by cloture tomorrow. This is still the same week in which debate opened in the Senate.

I used to be on the Committee on the Judiciary; I am not now. Most of us who had to await the action of the committee, then had to analyze a record which is very complex, and a record that one must really dig into. It took me most of a day and a half to acquaint myself with the ins and outs of this controversy until I felt I was ready to make up my mind.

I insisted to the press that I be listed as undecided because I was. It was only after giving it time and attention that the nomination deserves that I was able to announce my views today.

Mr. President, as I say, I have no desire to claim that my view is superior to that of my colleague, the Senator from Ohio, but I do not believe that has been foot dragging or a filibuster. And I hope very much that whatever may be the views, the Senators will agree to that in terms of fairness and free and open debate.

Mr. COOPER. Will the Senator yield?

Mr. JAVITS. I yield to the Senator from Kentucky.

Mr. COOPER. I agree with the Senator from New York on the question of voting on cloture.

The Senator from Ohio may be correct in stating there was delay in reporting the nomination to the Senate, a delay which need not have occurred; but nevertheless we have had a week to debate this matter.

Without regard to my position on confirmation, which I will state, because of the importance of the confirmation of a Supreme Court Justice, I will not vote for cloture this week. I will vote for cloture next week, but I think it sum-

mary to close debate tomorrow or Saturday on an issue which is of importance to the country.

Will the Senator from New York yield to me for 4 or 5 minutes?

Mr. JAVITS. Yes. Why does not the Senator get the floor himself?

Mr. COOPER. I want the Senator from New York to be here.

Mr. JAVITS. Of course.

Mr. COOPER. I am always glad to listen to my colleague and close friend from New York, and particularly on legal and constitutional matters. I consider him the greatest lawyer in this body, dispassionate, a man of judgment, restraint, and one whose conscience and mind always moves him to what he thinks is right.

He has concluded to take the position he has stated, because of a series of statements and actions by the nominee for Associate Justice of the Supreme Court.

His conclusion that the nominee has fixed philosophical and institutional views on the question of civil rights and civil liberties which would not change if he became a Justice of the Supreme Court causes me to say that there are certain matters in his record which have given me trouble and pause. But I have reached a different conclusion than that of my friend from New York and I would like to address myself to the specific issues raised by the Senator from New York.

First, I shall speak of the memorandum the nominee wrote to Justice Jackson in 1952 when he was his law clerk, dealing with the segregation of schools, supporting Plessy against Fergusen and stare decisis. I think we have to consider the memorandum in the context of the times. In 1952, the Supreme Court had not made its decision, and could not reach a decision until 2 years later. Four cases had been appealed from the lower courts. The lower courts had held in the two cases from the Southern States, and from the non-Southern States involved, Delaware and Kansas, essentially to the doctrine of Plessy against Ferguson, although they had trouble with it. As I have said, it took 2 years for the Supreme Court to reach a unanimous and proper decision Brown against Board of Education in 1954. I do not believe the memorandum can be taken out of the context of the times. Many judges and lawyers were in disagreement on that subject.

I am troubled about the nominee's statement on the public accommodations ordinance, proposed in Phoenix City in 1964. The House had passed a bill approving public accommodation and there was a continuing debate in the Congress and throughout the country upon the subject.

The Senator from New York will remember that we served together as members of an ad hoc committee, to manage on the floor certain titles of the Civil Rights Act of 1964. Senator Douglas and I were assigned to assist in the management of the title dealing with education and desegregation of schools.

I supported the act, voted for it, and had introduced bills on public accommodation and civil rights before the administration introduced its bill. So naturally I have been troubled about the statement.

But in fairness, I must bring out a fact that has not been mentioned in this debate, to my knowledge. It has been argued by my distinguished friend from Indiana that Mr. Rehnquist did not change his mind about public accommodations until he was a witness before the committee. The RECORD shows that in 1966, when he was a representative to the conference on uniform State laws, one of the subjects of that conference was public accommodations, as a part of a uniform act for adoption by the States. The nominee voted for the draft model act, which included public accommodations. That was 5 years ago. So we cannot say, as was argued in the minority views, and in speeches on the floor that he only reached support of public accomodations in 1971.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. COOPER. I yield.

Mr. BAYH. I do not wish to interrupt the Senator, but this is one of the points I was going to bring up relative to my good friend from Ohio, who asserted that we were conducting a filibuster.

One aspect that did not come to our attention when the hearings were held, and did not come to light until the final day in executive session when we voted, was this uniform commission matter.

I would like to point out to my friend from Kentucky that although he did vote as was stated, he did everything he could to lessen the impact of that effort so that it was not a uniform bill but a model act, relieving himself of the responsibility to go home and urge its adoption.

Mr. COOPER. It was a model act, hoped to be made uniform throughout the United States. I say this in all respect, but I do not agree with the Senator. The nominee, according to the RECORD, did not oppose the accommodations section and voted for it in 1966.

Mr. BAYH. With all respect, that is not what I said. I said he not only did everything he could to oppose the uniform act and public accommodations, but he led the effort to make it a model act. That commission did not adopt a uniform act; it adopted a model act.

Mr. COOPER. I understand, but I am talking about the public accommodations section.

The contrast between his position in 1964 and 1966 is much different than arguing that he waited until 1971, as a witness before the committee, to assert his support of public accommodations.

I now proceed to the next charge concerning his position on proposals for the city of Phoenix, Ariz., on schools—desegregation and other problems relating to discrimination in the schools. The minority brief does not quote his statement on integration fully. The last clause is left out, in which he said he believed in a free society where every man stands equal before the law to have the maximum liberty. It may be construed in various ways, but that is what he said. It does not appear in the minority brief, and I have not voted in reference to it in the speeches made against his confirmation.

With respect to the subject of busing, raised in connection with Phoenix and inherent in the "neighborhood school" position that also is still very much before the country. So far the Supreme Court has not passed comprehensively on the issue. There have been a number of decisions in Circuit Courts of Appeals varying decisions, some ruling against busing, some giving it large scope, some allowing it in limited circumstances, but the Supreme Court has not yet made a comprehensive decision. The debate in Congress on busing continues.

I know that some leaders of liberal beliefs—and I hope I am considered a liberal in my viewpoints—have changed their position of support of busing, and with the exception of a few brave men—the Senator from New York (Mr. JAVITS) is one, the Senator from Michigan (Mr. HART) is one, are fleeing from what they believe to be the opinion of their constituents.

So the argument about what the nominee said in 1967 is not conclusive either on the issue or on his past beliefs. The courts continue to decide the cases on "busing" and "neighborhood schools" on the facts.

Now I go to the question of wiretapping and surveillance. I wish the Senator from New York were here, because I believe that his statements on that subject do not conform wholly with the record of the Congress and the Executive. On the question of wiretapping for national security, it has been noted that not only has every President claimed this right, but has used it. The distinction between its use against external subversion or internal subversion I do not believe has been closely examined, but it has been used, and inferentially, supported by the Congress.

Also, it appears in the RECORD that the nominee, on this issue of the absolute right of the Executive to exercise the right of wiretapping in cases of national security, has questioned the theory of absolute right.

On the question of general wiretapping and surveillance, I would like to point to the attention of the Senate the fact that Congress in 1968 passed the omnibus crime bill, expanding authority for wiretapping, and the bill passed almost unanimously. It had a provision which allows officers to wiretap without a warrant if the officers make the decision that they do not have time to secure warrants in the proper manner.

Mr. President, I spoke against the bill on the floor of the Senate, upon the basis that it gave an unwarranted right and power to the Attorney General, or police officers. I voted against the bill. In that same bill, there were sections designed to weaken the famous cases of Miranda and Mallory, concerning the admission of confessions and the right of a person not to be detained after arrest and to be taken immediately before a magistrate. I make these points to indicate that the Congress seemed to have approved these provisions now used as arguments against the nominee.

In these circumstances, I find nothing

on the question of wiretapping which argues against the confirmation of the nominee.

Finally, on the question of the May Day arrests, I have some questions about the arrests. I do not know how much the nominee had to do with it. I assume he could not give an order. There is a statute which prohibits demonstrations upon the Capitol Grounds. I do not think it is constitutional. If there is any place where the people should have a right to present their petitions, it is the Capitol. The statute is on the books, however, and police authorities must carry out the law and its provisions. I am a supporter of first amendment rights; but a great many of the practices claimed by some as rights—violence, disobedience of law—are not first amendment rights.

Yet, reviewing each one of the arguments made against the nominee, I have come to the conclusion that in several cases they have been strained, and I do not see a case for voting against the nominee.

Finally, may I say this: It is said by all that he is a man of unquestioned integrity and great ability. If a man is of unquestioned integrity and great ability, it implies that he also has the quality of mind and of intellect, and character that he can look at cases upon their merits, that he can change, if necessary, any views he may have had, upon that great Court.

As my colleague, the Senator from Ohio, has said that is the record of the Supreme Court and of great Justices. There are Justices who have changed their minds. Justice Black was not a great lawyer when appointed to the Court. His practice was as a police court lawyer. I did not say police court lawyers are not good lawyers, but they do not try a great varlety of cases. He had been a member of the Ku Klux Klan. He said he had been a member of the Ku Klux Klan. But he became a great champion of civil rights and civil liberties.

There are many other examples.

A few days ago the Senator from Arizona (Mr. GOLDWATER) placed a statement in the RECORD which, honest as he is, he said, not being a lawyer, it was prepared by his legal counsel. He named eight or 10 great Justices of the Supreme Court, described their background, their early views and how—as Justice Frankfurter once said in an opinion—the law itself, the times come to bear upon them as judges.

I think, with the exception of Justice Taney, I would agree with the estimates of the Justices made by the Senator from Arizona (Mr. GOLDWATER). Two of them were natives of my State. Judge Brandeis was born in Louisville, Ky., and Justice Harlan, the grandfather of the great Justice who has just completed service on the Supreme Court, was from Kentucky. The earlier Justice Harlan was a southerner, who had served in the Confederate Army, and was a former slaveowner. He wrote the great dissenting opinion in the civil rights cases for public accommodations based on the 14th amendment.

I take no issue with any of my colleagues in this Chamber. I have the greatest respect for their positions but there are organizations that want members of the Supreme Court to be with them in all matters, whether or not justified. That is not the proper function of a Justice.

Finally, I cannot accept the position that a man of integrity, which is admitted, a man of ability, which is admitted, a man of scholarly attainments and intellectual ability, which are admitted, cannot meet the problems of this country as a member of the Supreme Court.

Recently, I read a statement of Justice Frankfurter on this very issue expressing his belief in the conscience and mind of a Justice to discharge this duty. I read a little book a few nights ago by Justice Jackson, "U.S. Supreme Court—American System of Government."

He asserted the same faith.

We remember the writings by Brandeis, Cardozo, Holmes, maintaining that a man of character, intellect, integrity, and ability deserves that same faith.

I think it illiberal to hold otherwise. I think to say that a man is frozen, because of a few statements or positions—and there are four or five, and they have been strained, not by the argument of my friend from New York, but strained in the minority report. There have been omissions from the minority report. I noted an omission upon the question of harassment at the polls. The minority report does not contain the full text of the letter by Judge Hardy.

I have faith that a man of his ability, integrity, and scholarship can meet the challenges and the great problems of the Supreme Court, which are our problems, in the future.

Mr. JAVITS. Mr. President, will the Senator yield?

Mr. COOPER. I yield.

Mr. JAVITS. Mr. President, I could say evey word the Senator from Kentucky has said about me about him, in terms of his being a lawyer, his character, and his honesty; and I do think that by an interchange between us, we might helpfully sharpen the issue for our colleagues.

But I shall not endeavor to do anything, but emphasize the two points that I think are most important when laid side by side with what my beloved friend, the Senator from Kentucky, has said.

I think the two important points are these:

First, I have based my judgment not upon the individual instances, beginning in 1952, because I said myself—the Senator may not have heard me, but that is not material—that surely I have said things myself that I would be very sorry about, and I would expect to be understood and forgiven within the context of my life.

So I based my judgment on the total 19 years from the time he was a clerk up until the May Day demonstrations, and his testimony before the committee as a whole, and I see, after considering it as a whole, rather a hardening, in his professional capacity as a lawyer, of opinions with which I could not agree. That is point one.

My second point is that there may be a basic difference between my criteria in casting my vote and those of the Senator from Kentucy or other Senators. I do not believe my criteria can be based solely on the fact that he is a man of integrity, ability, and professional standing, and a sincere man, because a man can be extremely wrong and yet extremely sincere. Some of the most inveterate opponents of civil rights in this body, in all the years I have fought for it since I have been here, since 1957, have met fully every one of those qualifications—able, sincere, and good lawyers; but they were absolutely wrong, and the Court said they were wrong time and time again.

I believe that it is my duty to determine, in my best conscience, whether this is a nascent Justice Black or whether this would be an influence on the Court which I think would be inimical to the future of our country. In this particular case, I came down on the latter side.

I might have voted against Black. I do not know what I would have done then. But then I would have been the first to throw myself at the feet of the Senate and confess my error. But I believe I would have had to judge at that time, not just on my finding of the fact that he was a man of quality, integrity, and professional skill, but that his basic constitutional philosophy gave an assurance of an approach to constitutional questions which might be for me or against me, but which I thought was consonant with the fundamental thrust of the Constitution itself.

Mr. COOPER. Let me say just one more word.

I agree with the Senator from New York that we cannot consider this nomination solely on the question of ability, integrity, and scholarship, as important as those qualities are. But I came to the conclusion, after looking into the broader questions, that the statements in question did not confine him, and that he could rule justly upon questions before the Court, not only from a sense of justice, but from a mind which, by reason of his abilities, is more likely to be enlightened than the mind of a lesser man.

A Senator's position will always be interpreted in different ways. I do not know that I have ever been more consonant with the views of another Senator on civil rights and liberties than I have been with those of the Senator from New York than with anyone else in this Chamber. I do not think we have ever differed upon the issue or the necessity for action, and we have voted together. Once or twice we have differed as to the best means to accomplish the end, I remember once on the question of voting rights and on another occasion upon public accommodations; but we have usually been together, and I am very proud to say that while in my whole life, this question has never been a problem to me, at home before I came here, as a judge, or as a Member of the Senate, I have been helped greatly by the ability, the reasoning, and my association with the Senator from New York.

Mr. JAVITS. I thank my colleague very much.

Mr. BAYH. Mr. President, I listened with a great deal of interest to the statement of my friend from Kentucky. As he knows, I have the greatest of respect and admiration for him.

I want to say just one or two words to clarify some statements that have been made on this issue, wherein our efforts have been attributed to filibustering. On occasion certain Senators who had suggested they had a speech to make were not here at the appointed hour. But I would suggest that anyone who is familiar with what most of the Senators are doing now—working on conference committees and trying to wind up the last minute legislative issues for which they are responsible—knows full well why it is extremely difficult for any Senator to be on this floor at any specific time. That reaffirms the position of the Senator from Indiana that we need more time for Senators who want to speak and who want to listen to the colloquy to be here.

Perhaps my friend was not here when the distinguished minority whip suggested we had a filibuster going on before even one word had been spoken.

I want to give one word of explanation to my friend from Kentucky relative to some items that he characterizes as omissions from the minority report: We have taken sentences and we have taken parts of letters and included them in the minority views. But certainly this is in no way designed to distort their true meaning. Nor does it result in any distortion.

Anyone who is at all familiar with the hearing proceedings knows that there is a full, detailed, word-for-word record of everything that was said, and both statements, parts of which are in the minority views, are listed fully not only in the hearing record but also in the CONGRESSIONAL RECORD. If we had listed every document to which we referred in the minority views, we would have had minority views fully as voluminous as the hearings.

I hope that any Senator who reads the minority views will not take part of a sentence or part of the letter but will look to the whole content here. Normally when a report is printed one tries to hit the high points and decrease the volume that otherwise would result.

I am concerned about cloture being invoked at this time because we still have facts that just now are being brought to our attention which have not been considered thoroughly. I have to admit that some of these facts have not even been adequately considered by the Senator from Indiana, much as I have tried to be familiar with the issue before us. There has been a great deal of discussion relative to the Brown against Board of Education memorandum written by Mr. Rehnquist. Only yesterday afternoon—not even a day ago—a letter came from the nominee trying to explain the content of that previous memorandum.

On first examination, the explanation of that earlier memorandum and the efforts to try to attribute those thoughts not to the nominee but to a former Justice of the Supreme Court, who is no longer alive and is unable to defend himself, raise rather critical questions in the mind of the Senator from Indiana. I am hard pressed to know what the man thinks. I would like to take everyone at his word, just as I would like to be taken at my word. It is only when I find contradictory remarks attributed to an individual on the issue at point that I then have cause to wonder.

Because of the critical nature of the Brown against Board of Education case, because of the controversy surrounding the Brown against Board of Education memorandum, and because of the letter yesterday, the Senator from Indiana would like to take a few minutes of the Senate's time to try to put this whole thing in perspective, with emphasis on the fact that we do not know—and probably cannot know—the answers. I do not know. I have deep concerns, but I must say that if I were called to judge beyond a reasonable doubt now on the question I am about to raise, I could not.

Last Sunday, December 5, it became known that William Rehnquist had written a memorandum to Mr. Justice Jackson during the 1952 term of the Supreme Court, while he was clerking. This memorandum urged that Plessy against Ferguson was right and should be reaffirmed. I was not out searching for this; neither was anybody on my staff. I received a phone call from a newspaper reporter who said, "Did you know this article was going to appear in Newsweek?" And there it was.

I still do not know what the source of that memorandum was. But nobody has doubted that Mr. Rehnquist did, indeed, prepare it. There is now some question as to the reason why he prepared it and whether these were his thoughts or those of Justice Jackson. But there it came Sunday night, about 6 or 7 o'clock.

The conclusion, the tone, and the language of this memorandum are strikingly close to the hostility that Mr. Rehnquist expressed to equal justice under law throughout his later life, including his opposition to a public accommodations ordinance in Phoenix in 1964, his opposition to anti-blockbusting and other key provisions of the Model State Antidiscrimination Law of 1966, and his opposition to modest efforts to deal with de facto school desegregation in 1967, coupled with his statement at that time that we are "no more dedicated to an integrated society than a segregated society."

Despite the very substantial questions presented by this memorandum, and in contrast to the Justice Department's almost instantaneous—indeed, in some cases, anticipatory—response to other questions raised by the nominee's nomination, no response was made until the afternoon of Wednesday, December 8. We learned of this on Sunday, and it was not until late in the day yesterday that somebody came forth with an explanation.

Mr. Rehnquist's letter now says unequivocally that he fully supports Brown against Board of Education. One would certainly hope this statement was the fact and is, indeed, his true feeling. But I must admit that a statement made at the crucial moment in a nominee's confirmation debate, in which we now find ourselves, must certainly be read in the light of this circumstance and the condition in which it is made, and with a view to a lifetime of prior opposition and, indeed, on occasion antagonism toward the rights of minorities. The most recent example of that antagonism occurred less than 2 years before he became an official of the Federal Government back in 1969. One has cause to wonder.

A matter of even greater concern than Mr. Rehnquist's recent statement on Brown against Board of Education is his questionable effort to attribute the ideas expressed in the memorandum to the late Justice Jackson. I do not think any of us, in fairness to the nominee, can really recall with total precision what was going on in our minds 19 years ago. I could not. I think most of us would be quick to say, "I do not know. I do not remember." The Senator from Indiana is concerned about the efforts not to say, "I do not know," or, "I do not remember." Any of us could understand that. But the attempt is made to suggest that these thoughts were not Mr. Rehnquist's although his initials appeared on the memorandum, and he has not denied preparing it. Instead he has said that these were really thoughts of the late Justice Jackson.

Mr. Rehnquist claims that his memorandum was written after an oral discussion with Justice Jackson and "as a statement of his views to be used at the conference of Justices rather than as a statement of my views." Unfortunately, as Mr. Rehnquist knows, it is impossible for Mr. Justice Jackson to deny these allegations. But a good deal can be inferred from the text of Mr. Rehnquist's 1952 memorandum.

An examination raises the gravest question of basic honesty and candor. If a man felt something in 1952, he ought to admit it and say he has changed his mind; or, if he cannot remember, he ought to say that. But I am deeply concerned when, instead of following either of these alternatives, there is an effort to shift the blame for these thoughts and attribute these thoughts to someone who is no longer alive.

In the first place, contrary to Mr. Rehnquist's explanation, the entire tone of the memorandum is one from a law clerk to his Justice, not one of a Justice's draft statement prepared by a clerk. Would a law clerk really have put such conclusory language, such sweeping statements, into the mouth of a Justice, after an oral discussion on the subject? If the views were really prepared for the purpose Mr. Rehnquist suggests, would they have been headed "A Random Thought on the Segregation Cases"? That is hardly the kind of brief a Supreme Court Justice would carry into a conference to argue with his fellow justices.

Even more damaging is the final paragraph of Mr. Rehnquist's 1952 memorandum. Even after an "oral discussion", would any law clerk have written for his justice's mouth the sentence:

> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think Plessy against Ferguson was right and should be reaffirmed?

Mr. Rehnquist now claims in this letter that this sentence "is not an accurate statement of my own views at the time." But does this sentence express the beliefs of Mr. Justice Jackson—who joined the court's unanimous decision in Brown against Board of Education—or does the memorandum instead contain the thoughts and language of William Rehnquist, the same William Rehnquist who in 1957 wrote an article for U.S. News & World Report criticizing:

The tenets of the "liberal" point of view which commanded the sympathy of a majority of the—Supreme Court—clerks I knew?

Mr. President, there is a great similarity between the feelings of Mr. Rehnquist's acknowledged piece from 1957 and the concluding paragraph of the 1952 memorandum.

Mr. BAYH. I appreciate the comments of the Senator from Kentucky. I certainly hope that will always be the case even when we are sometimes on opposite sides of an issue.

Mr. President, equally damaging is the fact that the thoughts in this memorandum are consistently at odds with the most fundamental principles of Mr. Justice Jackson, principles enunciated year after year in his writings, in his decisions, and in his opinions on the High Court, and this is something I am still trying to answer in my mind. I do not know the answer to the question. I do not know what conversation went on between Mr. Rehnquist and Justice Jackson. It is difficult for me to believe that anyone could really remember it in detail 19 years later. But we do have some positive evidence to look to. We can look to the specific wording in the memorandum under the authorship—whatever its purpose—of Mr. Rehnquist, and then we can look at some of the great decisions which were authored by Justice Jackson. Then we have to ask ourselves whose thoughts were really reflected in the 1952 memorandum.

The memorandum states:

Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which command intervention from one of any conviction.

Now those were the thoughts that Mr. Rehnquist now says he composed to represent what were Justice Jackson's views. He claims that it was Mr. Justice Jackson who did not feel that segregation was one of those extreme cases which merited intervention from one of any conviction.

Well, I ask the Senate, is this the thought of Mr. Justice Jackson, who 2 years earlier had voted with the Court in *Sweatt* v. *Painter*, 339 U.S. 629 (1950), to strike down under the Equal Protection Clause a State's refusal to admit Negro law students to the State law school? Is this the thought of Justice Jackson who voted with the Court in *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950), to prohibit a State university from treating black graduate students differently than white graduate students? Or is this the thought of William Rehnquist who still believed in 1967 that "we are no more dedicated to an 'integrated' society than a 'segregated' society"?

That is a question that the Senate has to raise or should raise and should answer.

The memorandum states further:

To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction. To the argument made by Thurgood, not John Marshall, that a majority may not deprive a minority of its constitutional rights, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are.

Now Mr. Rehnquist says these were the views of Justice Jackson. I wonder. Is this the thought of Justice Jackson who dissented in *Korematsu* v. *United States*, 323 U.S. 314 (1944), the case upholding the right to exclude American citizens of Japanese descent from the west coast of the United States? Is this the Justice Jackson who attacked the majority in Korematsu, saying they had—

Validated the principle of racial discrimination in criminal procedure and of transplanting American Citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes?

Is this the Justice Jackson who spoke out against the arbitrary treatment of Japanese American citizens or, instead, is it the thought of Mr. Rehnquist himself who, in 1964, opposed a Phoenix public accommodations ordinance that would have allowed black people into the drugstores and lunch counters of his home town, saying—

Now there have been other restrictions on private property. There have been zoning ordinances and that sort of thing but I venture to say that there has never been this sort of an assault on the institution where you are told, not what you can build on your property, but who can come on your property?

Is it the thought of a nominee who agreed at the hearings that it could fairly be said that in 1964 he felt that personal property rights were more important than individual freedoms, the individual freedom of the black to go up to a lunch counter?

Is that the thought of a nominee who agreed at the hearings that in 1964 he felt that personal property rights were more important than individual freedoms, the individual freedom of the black to go up to a lunch counter?

Finally, the memorandum says:

One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest.

Mr. President, we are told by Nominee Rehnquist that these words contained in the 1952 memorandum were not the words of William Rehnquist but were the words of Justice Jackson. I wonder. Are these the words of Mr. Justice Jackson who wrote the majority decision in the landmark case of *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), ruling that the first and 14th amendments guarantees of religious freedom prohibit the state from forcing Jehovah's Witnesses to perform a flag salute?

Some Members of the Senate may disagree with the *Barnette* opinion, but the late Justice Jackson is the man who wrote the majority opinion. Could this be the same Mr. Justice Jackson who had the insensitivity portrayed in the 1952 memorandum?

Could this be the same Mr. Justice Jackson who said in that opinion:

But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

That was what Justice Jackson wrote in the published opinion about the rights of a minority, the right of a child of a Jehovah's Witness father not to stand up and pledge allegiance to the flag if that violated his constitutional principle.

I wonder. Was that antipersonal antiminority language in the 1952 memorandum really the writing of Mr. Justice Jackson, as Mr. Rehnquist now professes, or was that the thought of William Rehnquist himself who, in 1964, wrote the editor of his local newspaper that—

If in fact discrimination against minorities in Phoenix eating-places were well nigh universal, the question would be posed as to whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all?

Mr. President, I have struggled with the inconsistencies contained in the 1952 memorandum and the great documents written by the late great Justice Jackson. They are in no way similar. I must say that, since it was only less than a full day ago that the Senate was advised for the first time that these views were not really the views of Mr. Rehnquist, but were those of Mr. Justice Jackson, I have not had the opportunity to read all of the cases that were authored by the late Justice Jackson. However, as of this moment, I cannot believe that this memorandum written in 1952 reflects the views of Justice Jackson, a man who, after suffering a heart attack in the spring of 1954, returned to the bench on May 17 of that year in order to demonstrate by his personal presence his support of the antisegregation decision that was handed down that day. He did so despite warning of the risk of a recurrence of his ailment, choosing to continue at the work to which he had dedicated his life. A second and fatal heart attack finally overtook him on October 9, 1954.

No, Mr. President, there is no similarity between the Plessy against Ferguson

views expressed in that 1952 memorandum and the dramatic personal effort that was made by the justice, who was to die before the year was out, but who was determined to be present and vote "yea" in a unanimous decision in that landmark, keystone case that for the first time in history opened the school house doors.

Mr. President, I am deeply concerned that the nominee's attempt to explain away the memorandum has only succeeded in raising a serious quesion concerning Mr. Rehnquist's candor. I for one believe this question must be answered before the Senate votes on the nominee.

This is not a charge that the Senator from Indiana makes lightly, because he realizes its critical nature. As I said earlier, I have not had a chance as yet to fully document it by reading all of the cases of Justice Jackson. However, since on tomorrow at noon we are going to be forced to vote on whether we will be given more time to explore the critical nature of this charge which, I think, can legitimately be speculated upon, I have no alternative, but to raise this question at this time for the consideration of my colleagues.

I for one believe that this question must be answered before the Senate votes on the nominee. It is a judgment which each Senator must make for himself on the basis of the evidence. But there is no argument in favor of making such a weighty judgment under the threat of cloture in the haste to get home for Christmas, when we are tired at the end of a long session.

ORDER OF BUSINESS

The PRESIDING OFFICER. The Senator from Vermont is recognized.

(The remarks of Mr. AIKEN when he introduced S. 2981 are printed in the RECORD under Statements on Introduced Bills and Joint Resolutions.)

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Hackney, one of its reading clerks, announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the concurrent resolution (S. Con. Res. 6) to express the sense of Congress relative to certain activities of Public Health Service hospitals and outpatient clinics.

The message also announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 10947) to provide a job development investment credit, to reduce individual income taxes, to reduce certain excise taxes, and for other purposes.

DISPOSITION OF CERTAIN INDIAN CLAIMS

Mr. METCALF. Mr. President, as in legislative session, I ask the Chair to lay before the Senate a message from the House of Representatives on S. 602.

The PRESIDING OFFICER (Mr. BROCK) laid before the Senate the amendment of the House of Representatives to the bill (S. 602) to provide for the disposition of judgments, when appropriated, recovered by the Confederated Salish and Kootenal Tribes of the Flathead Reservation, Mont., in paragraphs 7 and 10, docket numbered 50233, U.S. Court of Claims, and for other purposes, which was to strike out all after the enacting clause, and insert:

That the funds appropriated to the credit of the Confederated Salish and Kootenal Tribes of the Flathead Reservation, Montana, in satisfaction of judgments awarded in paragraphs 7 and 10 in docket numbered 50233, United States Court of Claims, including interest thereon, after payment of attorneys fees and other litigation expenses, shall be used as follows: 90 per centum thereof shall be distributed in equal per capita shares to each person who is enrolled or entitled to be enrolled on the date of this Act; the remainder may be advanced, expended, invested or reinvested for any purposes that are authorized by the tribal governing body and approved by the Secretary of the Interior.

SEC. 2. Any part of such funds that may be distributed to members of the Tribes shall not be subject to Federal or State income tax.

SEC. 3. Sums payable under this Act to enrollees or their heirs or legatees who are less than eighteen years of age or who are under a legal disability shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interests of such persons.

Mr. METCALF. Mr. President, I move that the Senate disagree to the amendment of the House and request a conference with the House thereon, and that the Chair be authorized to appoint conferees on the part of the Senate.

The motion was agreed to, and the Chair appointed Mr. MCGOVERN, Mr. BURDICK, Mr. METCALF, Mr. FANNIN, and Mr. HANSEN conferees on the part of the Senate.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate, in executive session, continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

Mr. GOLDWATER. Mr. President, earlier today my friend from New York (Mr. JAVITS) indicated that a critically important point relative to his own position on Mr. Rehnquist was his stand relative to the rights of persons arrested during the May Day incident in Washington.

Mr. President, it is a fact that there have been many erroneous news reports printed about Mr. Rehnquist's views on the May Day matter, and I hope that none of these exaggerated misstatements entered into my distingulshed friend's thinking about the nominee.

It is important that all Senators should be aware that the nominee took the opportunity of the recent hearings on his nomination to rebut these false reports and to explain exactly what his very limited role and his impressions were in connection with the May Day situation.

In order to set the record straight today and to show that Mr. Rehnquist took no actual part at all in the arrest procedures, I ask unanimous consent to insert the remarks which Mr. Rehnquist made on this issue during questioning at the Judiciary Committee hearings.

There being no objection, the excerpts were ordered to be printed in the RECORD, as follows:

TESTIMONY OF WILLIAM REHNQUIST AT HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, WEDNESDAY, NOVEMBER 3, 1971

Senator KENNEDY. Could I move to another area. Mr. Rehnquist, in the May Day situation, could you tell us what your role was? Did you have a role, to start off with?

Mr. REHNQUIST. This presents me with the same sort of problem, which I must resolve for myself, realizing that if I resolve it against answering anybody on the committee, or anybody in the Senate, is entitled to hold against me my refusal to answer.

I did speak publicly on the May Day matter down in North Carolina 2 or 3 days after it and I, therefore, feel that I do owe an obligation to the committee to describe at least in a general nature my role, without necessarily, without revealing, and "revealing" probably is not the right word, describing the various internal deliberations that went on in the Department. And this is a difficult line to walk.

I will try to walk it. My role, up until the time of the events that actually took place was being consulted as to the propriety of the use of the Federal troops in certain situations under the provisions of 10 U.S.C. 331 through 334. And I drafted an opinion which the Attorney General gave to the Secretary of Defense, saying that it was legally permissible to use Federal troops in order to preserve the operation of the Federal Government under the situation where a fairly large number of people had announced their intention to shut it down.

And that opinion was transmitted by the Attorney General to the Secretary of Defense. I participated in two or three meetings over the weekend, immediately prior to the demonstrations, at which a good number of people were present. I do not really think I had any significant input or contribution to make at those meetings.

During the time the events were actually happening, I was in and out of the Attorney General's office. I was at a large meeting in the Criminal Division at which a number of people from the Corporation Counsel's office, the U.S. Attorney's Office, our Criminal Division, our Internal Security Division, were present.

I do not believe I remained long, and since my own knowledge of the local practice of arraignment and arrest and that sort of thing is not very large, I found I had very little to contribute. There may have been more, but that is all that occurs to me now.

Senator KENNEDY. Well, at any time that how to handle the demonstrators was being discussed, did you raise any objections to the anticipated plans or programs?

Mr. REHNQUIST. One decision reached at a meeting that I was at over the weekend, was that the permit should be revoked for the campground down at Hains Point, I believe it was. I made no objection to that decision.

Senator KENNEDY. Well, at some time during the weekend there was a decision made to suspend the constitutional rights of the demonstrators and impose martial law, or qualified martial law were the words I think you used. And I was wondering whether, at any time during the meetings which you attended, you expressed any reservation about such a suspension or the imposition of qualified martial law?

Mr. REHNQUIST. I believe you have misread my statement, Senator.

Senator KENNEDY. This was at Boone, N.C.?

Mr. REHNQUIST. Yes.

Senator KENNEDY. Did you make a statement there defending the law enforcement actions that were taken at the May Day demonstrations?

Mr. REHNQUIST. I made a statement saying that the abandonment of the field arrest procedures and the consequent, or perhaps not necessarily consequent, delay in bringing the defendants before an arresting magistrate, or a committing magistrate, was, I thought, defensible because the requirements that a defendant be brought before a magistrate were that he brought before the magistrate within a reasonable time, and that in my opinion a reasonable time in this situation should take into consideration the necessity of the arresting officer, having made the arrest, continuing to be the field to prevent the occurrence of other violence.

I went on to say in the statement in Boone that in a situation more serious than that which prevailed in Washington on May Day, the doctrine of qualified martial law had on occasion been invoked. I made, I thought, quite clear, not only that it had not been invoked in Washington, but that it would be justified only in a more aggravated situation.

Senator KENNEDY. You are suggesting it was not imposed on May Day?

Mr. REHNQUIST. I certainly am suggesting that.

Senator KENNEDY. Well, what doctrine was imposed on May Day? It certainly was not probable cause in terms of the arrest procedures, was it?

Mr. REHNQUIST. Well, knowing the volume of arrests which were made, I simply would not be in a position to comment on whether any particular arrest was made with or without——

Senator KENNEDY. Well, do it in a general kind of way. You made a general endorsement of the procedures which were followed at May Day. You did that in North Carolina.

Mr. REHNQUIST. Well, I stand by the language I used in North Carolina, and I would call it something less than a general endorsement of everything that was done on May Day.

Senator KENNEDY. What was done on May Day that you did not think was right?

Mr. REHNQUIST. Well, I would have to know more about the facts to be satisfied that a particular thing done was not right. I did specifically say that I thought the abandonment of the field arrest forms by Chief Wilson was a legitimate and proper decision under the circumstances which he had to, I understand, confront.

Senator KENNEDY. What about the arresting without probable cause?

Mr. REHNQUIST. I do not think arresting without probable cause is ever proper, and if, in fact, it happened on May Day, I do not agree with it. I do not know enough about the facts to say that there were or were not arrests without probable cause on May Day.

Senator KENNEDY. Well, the thing I am driving at, Mr. Rehnquist, is that at some time, as you described here, you were involved in the development of the procedures which were outlined for May Day. I can understand that there may have been actions which preceded the suggested procedures which were agreed on at the meetings which you attended, and that you are not prepared to comment or describe or elaborate because you do not have those particular facts. But, nonetheless, you cannot get away from the fact that of the approximately 12,000 arrested, only really a handful ever were found guilty of any charge.

Mr. REHNQUIST. That is my understanding.

Senator KENNEDY. Which would suggest that the procedures—well, what does that suggest to you?

Mr. REHNQUIST. It suggests to me that whereas there may have been probably cause for the arrest of the great number of people, the District of Columbia police were faced with such an overwhelming situation of violation of the law that they chose to try to keep the streets free, and rather than to preserve the necessary information that would enable them to later show either that there had been probable cause for an arrest, or probable cause to bind a man over.

Senator KENNEDY. Well, if there are so many people that deserve arrests, I do not see why they followed a procedure that resulted in the arrest of a lot of people who were innocent.

Mr. REHNQUIST. I am not satisfied that they did arrest a lot of people who were innocent.

Senator KENNEDY. That were just bystanders, that were just walking to work, that were just students coming out of restaurants. The newspapers were full of these instances. I do not think there were many of us in the Congress who did not have constituents that had reports of this type of occurrence. With the cases that they had, so many that were violating the law, I find it difficult to understand why they were arresting so many others that were not.

And as well, thousands were "detained" on the basis of no evidence at all. Others were called for trial and came to trial where there was not the slightest basis for trying them. There were judicial findings for refund of bonds and recall of arrest records. You could almost say, given the results of the courts' rulings, what really went wrong with the development——

The CHAIRMAN. That is a rollcall.

Senator KENNEDY. Can he just answer this?

The CHAIRMAN. That is a rollcall vote.

Mr. REHNQUIST. Could I have the question repeated?

Could I have either the reporter read the question back or——

Senator KENNEDY. Yes. I was just saying that given the fact that there were thousands that were detained on the basis of no evidence at all, and these are court findings, others called for trial when there were no basis for trying them, and there were judicial orders for the refund of bonds and the recall of arrest records, I am just wondering what went wrong? Was it the development of the procedures to be followed on May Day or the execution of them?

Mr. REHNQUIST. I think one thing that happened was that the number of people who were to be involved in May Day was an overwhelming large number, larger than the Metropolitan Police contemplated. As a result, they were faced with a choice of either, when an individual policeman arrested a law violator, or someone he thought was a law violator, of himself taking that man to the stationhouse, booking him, and going through the usual procedures, or simply having the man taken in some other manner to the stationhouse.

And the policemen then would stay on the streets to try to arrest the next bunch who were coming along. And as I understand it, they were very deliberately trying to obstruct the movement of traffic, frequently by hazardous means. I think the District police opted in favor of the latter choice, and I cannot find it in myself to fault them for it.

The CHAIRMAN. The committee will stand in recess for a few minutes and will return right after a vote.

(Short recess.)

The CHAIRMAN. The committee will come to order, please.

Senator Kennedy.

Senator KENNEDY. If I got your final response to the question right, Mr. Rehnquist, you indicated that you were in general support of the law enforcement activities which were undertaken during the course of May Day. You had expressed earlier some reservations about particular actions and were unprepared to comment on some cases, but you were in general agreement.

Am I correct in that?

Mr. REHNQUIST. No; I would not interpret my final answer that way.

Senator KENNEDY. Would you restate it, then?

Mr. REHNQUIST. I think what I said was that the Chief of the Metropolitan Police made a decision to abandon field arrest forms and run some risk of being unable to follow up on the prosecution of arrestees in the interest of keeping his forces on the street in order to preserve order, and that I could not fault him for that decision.

Senator KENNEDY. Is there any procedure that was used during the course of that day, related to regulations, rules, or procedures which were established within the Justice Department, that you would have disagreed with?

Mr. REHNQUIST. Well, the abandonment of field arrest forms, as I understand it, there was no decision taken within the Department.

Senator KENNEDY. No; that was done in the field. But, in terms of the regulations and procedures to be followed on May Day, you were involved in these decisions at the Justice Department. As I understand from what you are saying here, you did not express any reservations about them during the course of their development, nor even in the wake of how they were implemented that particular day. In hindsight, would you have done anything differently?

Mr. REHNQUIST. I was involved in some of the decisions, Senator. I suspect there were a great many that I was not involved in. It is, of course, relatively easy to look back in hindsight and say that one would have done something differently.

And the one thing that occurs to me, and this is strictly a matter of hindsight, and I do not believe this was something that could have been fairly anticipated, was to supply more adequate facilities for those who were detained.

Senator KENNEDY. This is the only, the only point of departure?

Mr. REHNQUIST. Well, you have made the statement that there were arrests made without probable cause simply as bystanders and people who were walking to work. If that was the case I would certainly have done that differently.

Senator KENNEDY. Did you ever come to the belief that that was the case any time prior to the point where the court was throwing these cases out?

Mr. REHNQUIST. No; I did not.

Senator KENNEDY. Did you, in the course of those days, read the newspapers and hear about innocent people being arrested, put in the jails or the detentiton centers? Did you feel that there was a possibility of people being arrested without probable cause?

Mr. REHNQUIST. Well, certainly after newspaper accounts occurred one could not rule out that possibility.

Senator KENNEDY. Well, I am just trying to think back with you, Mr. Rehnquist, to that time. It appears to me that just from a general reading of the newspapers it was clear that there were hundreds of young people being detained under very trying circumstances, under very desperate conditions. I am just wondering whether you independently might have been sufficiently concerned about the possibility of false arrests or indiscriminate arrests or any of the other practices which led to the courts throwing these cases out, whether the chance that a great deal had gone wrong struck you prior to the time that the courts made these decisions?

Mr. REHNQUIST. Well, it certainly struck me after reading the stories in the newspapers, that if those accounts were true, people have been improperly arrested.

Senator KENNEDY. Did you feel you ought to do anything about it, as somebody who is in an important and responsible position in the Justice Department, and who has re-

sponsibility for insuring the protection of the rights of individuals?

I am wondering whether this aroused you so much that you felt that maybe you would walk down the corridor, so to speak, and speak to the Attorney General, and say: "If this is what is happening, Mr. Attorney General, I think we ought to do thus and so; we should not wait for the courts?"

Mr. REHNQUIST. By the time the newspaper accounts occurred, I think whatever had happened had happened and the Corporation Counsel and United States' Attorney's Office, as I understand it, were already engaged in a screening process. I did not do anything. I did not feel there was anything that would be appropriate for me to do.

Senator KENNEDY. Well, again, it was 2 days after the demonstrations you were down in North Carolina, I think, and one would have to say from your speech you were endorsing or supporting the May Day procedures. Was that a time when the Attorney General was suggesting that these procedures ought to be duplicated in cities all over the country? And this was 2 days afterwards, and it seems to be during that period of time it became eloquently apparent to many in the House and the Senate that there were many travesties of justice. Certainly that opinion was supported almost unanimously by the various court decisions that ruled on those cases. And I am just interested whether, when it became apparent to you that there had been an entrenching on basic rights——

Mr. REHNQUIST. My statement in North Carolina, Senator, as I recall it, and as I see it, glancing through it, dealt with the abandonment of field-arrest forms, and the concept of a reasonable time in which to take a person before a committing magistrate. It did not purport to sweepingly endorse everything that had been done during the May Day demonstrations.

As to what I may have done on my own, my own initiative, after becoming aware, I have already answered that I did nothing, and I did not think it was appropriate to do anything.

Senator KENNEDY. You would not deny that your statement down in North Carolina was a general endorsement of the steps that were taken by——

Mr. REHNQUIST. I have it in front of me, if you want me to read over a few pages and answer your question, I will do it or I will give you my recollection.

Senator KENNEDY. Well, why don't you give us your recollections?

Mr. REHNQUIST. I do not concede it to be a general endorsement.

Senator KENNEDY. Well, at any time did you express any dismay, either privately or publicly, about the procedures which were followed? You had a situation where you had about 12,000 arrests, practically all but a handful thrown out for a variety of different reasons, and I am just interested in whether you——

THURSDAY, NOVEMBER 4, 1971

Senator COOK. Getting back to another discussion of yesterday, I feel that great emphasis was made of how you completely and absolutely condoned, and were enthusiastic about, or words to that effect, the Government action in the May Day affair in Washington. Again, Mr. Chairman, I would like to put into the record the speech that Mr. Rehnquist made at Appalachian State University, I might say out of a speech of some 24 pages, the first five and a half pages dealt with a very general discussion of the ability of police departments to function, the ability to formulate a policy in its broadest sense under certain conditions. I find nowhere in here any endorsement of the actions of, or any mention of the police officials in the city of Washington other than the fact that you made reference to the fact that there was a metropolitan police force of approximately 5,000 men and that within the first few hours they had to make no less than 7,000 arrests.

Then you allude to what is referred to as qualified martial law. I might suggest I hope you and I both agree that this qualification is nothing new in the law.

I have before me a book entitled "A Practical Manual of Martial Law" that was written in 1940 by Frederick B. Wiener, Special Assistant to the Attorney General of the United States. It has quite a dissertation in the field of qualified martial law.

Would you tell me what you feel would be a definition of qualified martial law?

Mr. REHNQUIST. Recalling as best I can from Mr. Wiener's book, which I believe is the source of my knowledge on the subject, it is the situation where the force brought to bear against the law enforcement forces is such that the normal procedure of individual arrest and booking and admission to bail and appearance before a community magistrate simply cannot be carried out and in this situation it is my understanding that the courts, including the Supreme Court of the United States in the case of *Moyer* v. *Peabody*, have said it was lawful for the Government in that situation to resort to a situation of arrest not on the basis of criminal charge of individual wrongdoing but on a very temporary basis of simply restoring order, and that the process was not arrest in the normal sense and that release was required in a very short order as soon as the serious emergency has passed.

That is a short summary of my understanding of it, Senator.

Senator COOK. And, as a matter of fact, rather than be of the opinion as we discussed yesterday that there may have been either martial law or qualified martial law on that occasion, in your speech in North Carolina you took the position that there had been neither. I quote from page 4, "Indeed if one takes a more extreme situation than that which prevailed in Washington during the past couple of days," and then you went into a dissertation on qualified martial law. Is that not correct?

Mr. REHNQUIST. It is correct, Senator.

Senator COOK. Thank you, Mr. Rehnquist. Thank you, Mr. Chairman.

Mr. ALLEN. Mr. President, when the President announced in his speech on television that he was going to nominate Mr. Lewis Powell and Mr. William Rehnquist for positions on the Supreme Court made vacant by the retirement of Mr. Justice Black and of Mr. Justice Harlan, the junior Senator from Alabama felt that the President had made two excellent choices for these positions.

From that moment on, the junior Senator from Alabama has been ready to vote on these nominations. He has been ready to vote at all times since that time. He is ready now to vote, and he hopes that at an early date we will be allowed to vote on the nomination of Mr. Rehnquist, the Senate already having acted favorably on Mr. Powell's nomination by a vote of 89 to 1.

But tomorrow the question is not going to be whether we favor the confirmation of the nomination of Mr. Rehnquist to be a Justice on the Supreme Court; the question is going to be whether we shall cut off the debate on this question.

Since coming to the Senate almost 3 years ago, the junior Senator from Alabama never has voted to apply cloture. He has never voted to end debate on any subject under debate in the Senate. The right to engage in unlimited debate is one of the great rights that sets the U.S. Senate apart from all other legislative bodies in the world.

We have had debates on this floor on several occasions since I came to the Senate having to do with amending rule XXII to allow 60 percent of the Senators to cut off debate rather than the two-thirds that are now necessary.

The Senate never has been willing to cut off debate by a two-thirds vote on the question of reducing to 60 percent the number necessary to cut off debate.

Just recently three distinguished Senators in this body, the Senator from Idaho (Mr. CHURCH), the Senator from California (Mr. CRANSTON), and the Senator from Maryland (Mr. MATHIAS), who theretofore had supported the concept of reducing the number of Senators necessary to cut off debate from two-thirds down to 60 percent, changed their position herein the Senate Chamber and stated they were going to support the requirement of a two-thirds vote to cut off debate in the Senate.

So, much as I disagree with the Senator from Indiana on whether Mr. Rehnquist's nomination should be confirmed—he taking the position that his nomination should not be confirmed and the Senator from Alabama taking the position that his nomination should be confirmed—I will on tomorrow vote against the cloture motion seeking to cut off debate.

I want to make the record clear that my vote on this question on tomorrow does in no sense indicate that I am not a staunch supporter of Mr. Rehnquist for the position on the Supreme Court to which he has been nominated, but I believe that the question of allowing this debate to continue should be decided in the affirmative—that debate should not be cut off.

In due time debate will be cut off, and I certainly am not going to regret seeing that action taken, but it cannot be taken, certainly at this time, with the vote of the junior Senator from Alabama.

So I believe the concept of free and unlimited debate should continue. If we do not set any store by the principle of allowing free and unlimited debate in the Senate, it soon is going to be that if any question has the support of two-thirds of the Senate, then it can pass, whether or no, even though full debate has not yet been had.

If there is no validity to the concept of allowing free and unlimited debate in the Senate, then we might just as well say that if any question can get two-thirds of the votes, then debate automatically is cut off; that if that many want to vote for it, then there is no need of having the limitation of rule XXII, because the question would be: "Are you for a measure or against it?" If two-thirds are for it, then there is no need to have any debate.

Mr. TOWER. Mr. President, does the Senator conceive of any occasion in which he would vote for cloture?

Mr. ALLEN. I do not see any occasion at this time. Yes, I would feel that if the fate of the Republic were at stake, certainly to that extent I might be, but I am not allowing myself to speculate

that on this issue I would and on that I would not.

I will say to the Senator from Texas that, on the matter of the extension of the draft, while I was strongly for the extension of the draft and voted for it on every occasion, I did not vote to apply cloture, and have not since coming to the Senate voted to apply cloture. From time to time the distinguished Senator from Texas has voted on some occasions to apply cloture and on other occasions not to apply cloture, and the junior Senator from Alabama would infer from that that on those proposals that the Senator favors he would vote for cloture and on those proposals that he opposes he would not vote for cloture.

The junior Senator from Alabama is trying to be a little more consistent than that and to allow free and unlimited debate even on questions that he supports, because the principle of free and unlimited debate in the Senate is more important to the junior Senator from Alabama than whether we confirm Mr. Rehnquist on Friday, on Saturday, or next week.

I yield the floor.

A TRIBUTE TO RALPH BUNCHE

Mr. KENNEDY. Mr. President, I join in mourning the death of Ralph Bunche. His life was typified by the tremendous force of his dedication to the cause of peace and justice throughout the world. During the years of his magnificent career, Ralph Bunche symbolized the ideals of human understanding and social equality. Perhaps, more than any other single person, he represented the true spirit of self-determination for the developing era of the United Nations. Ralph Bunche was admired by peoples all over the world. Yet, here in his own country, black Americans were denied access to social justice and equality at a time when his brilliance and skill were helping to bridge the gaps of despair between nations.

It is my hope that the work of Ralph Bunche will be properly recorded in the annals of historic triumphs by great Americans. For in these times, when conflict and warfare seem to appear as normal and natural aspects of modern life, we must highlight the work of those among us who have tried to achieve peace and understanding among all men.

It is my hope that his life will be an inspiration for all who work and pray for an end to the turmoil and anguish of human conflict.

ORDER FOR RECOGNITION OF SENATOR McGOVERN AND SENATOR MAGNUSON TOMORROW

Mr. BYRD of West Virginia. Mr. President, as in legislative session, I ask unanimous consent that on tomorrow, immediately following the remarks of the distinguished Senator from New Jersey (Mr. WILLIAMS), the distinguished Senator from South Dakota (Mr. McGOVERN) be recognized for not to exceed 15 minutes, and that at the conclusion of his remarks, the distinguished senior Senator from Washington (Mr. MAGNUSON) be recognized for not to exceed 15 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

DIVISION OF THE HOUR PRECEDING THE VOTE ON CLOTURE

Mr. BYRD of West Virginia. Mr. President, has the time under the rule with respect to the 1 hour preceding the vote tomorrow on cloture been divided yet?

The PRESIDING OFFICER. No; it has not.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the 1 hour under rule XXII be equally divided tomorrow between the distinguished Senator from Indiana (Mr. BAYH) and the distinguished minority leader or his designee.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR PERIOD FOR TRANSACTION OF ROUTINE MORNING BUSINESS TOMORROW

Mr. BYRD of West Virginia. Mr. President, as in legislative session, I ask unanimous consent that, at the conclusion of the remarks by the distinguished Senator from Washington (Mr. MAGNUSON) on tomorrow, there be a period for routine morning business for not to exceed 30 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Does the Senator wish to include a limitation of 3 minutes on speeches of Senators?

Mr. BYRD of West Virginia. Yes, Mr. President, with a 3-minute limitation on statements made therein.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER TO RESUME CONSIDERATION OF NOMINATION TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that at the conclusion of routine morning business on tomorrow, the Senate return to executive session and resume the consideration of the nomination of Mr. William H. Rehnquist to the office of Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Without objection, it is so ordered.

QUORUM CALL

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. TOWER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

Mr. TOWER. Mr. President, I have always believed in the thesis advanced by William S. White that one of the vital functions performed by the Senate is to protect the minority against the precipitate and emotional tyranny of the majority. Until recent years I never voted for cloture, even when I was in disagreement with those who were filibustering, an example being the communications satellite, but I have suddenly come to realize—perhaps not so suddenly, but gradually come to realize—that rule XXII, which provides for virtually unlimited debate, is not being used in the way that it has traditionally and historically been used in this Chamber, and that is on issues of vital, profound, deep-seated social, and constitutional concern.

As a matter of fact, it appears now that a certain group of willful men have discovered unlimited debate as a means of preventing the Senate from working its will on almost anything that they want to prevent the Senate from working its will upon, and I have come to the conclusion also that some people tend to claim unlimited debate, not as a means to an end, but as an end unto itself. I have, therefore, in recent months voted for cloture.

As a matter of fact, during the debate on the loan guarantee, I filed three cloture motions myself—quite a departure from my traditional stance. Many times I participated in what we might as well call filibusters, or, in the words of the late great Everett Dirksen, attenuated educational dialog, in an attempt to prevent matters from coming to a vote; but in each instance I have participated in those extended debates in order to prevent coming to a vote on a measure I thought was being carried on the wave of popular emotion, but that was contrary to the letter and the spirit of the Constitution of the United States.

We desperately need in this country to change the complexion of the Court, and that is what this debate is all about. I intend not only to vote for cloture as many times as is necessary so that this issue can be voted upon—the confirmation of Mr. Rehnquist—because I think everybody is pretty adequately informed, and I think arguments against Mr. Rehnquist are without substance and are so recognized by most commentators, but, Mr. President, I will go beyond that. I believe that the next time the issue of rule XXII comes up, I will abandon my traditional position of favoring a two-thirds majority to cut off debate and will accept the motion that 60 percent should be adequate to cut off debate, because I think too many matters of great public import have been postponed beyond a reasonable time by virtue of the fact that only one-third can thwart the Senate from working its will.

Mr. GRIFFIN. Mr. President, will the Senator yield?

Mr. TOWER. I yield to the Senator from Michigan.

Mr. GRIFFIN. I wish to commend the Senator from Texas for his statement. Although I come from a different part of the country, and I have approached the question of cloture from a different point of view, I believe he has made a very significant statement that deserves the attention and consideration of other Senators, particularly those from the South.

In the past, the junior Senator from Michigan has voted for proposals to change the cloture requirement to three-fifths rather than two-thirds. Frankly, I will say that, in some respects, it is too bad that the Senate should have to make such a change. There is a good deal to be said for keeping the cloture rule as it is now. But when there are Senators who are so inflexible that they will never vote to invoke cloture under any circumstances—when it gets to the point where the Senate cannot get to a vote even on appropriation bills, which was the case in the last session, then it would seem clear that we are left with no real choice but to change the rule.

Mr. TOWER. The Senator will note that several southerners have signed cloture motions this year—the distinguished Senators from Mississippi, for example. I would think otherwise if unlimited debate were used as it was formerly used in the Senate, only on matters that involved vast and sweeping social change, or involved interpretation of the Constitution of the United States or matters that involved State sovereignty or statehood—as in the case of the State of Arizona. I remember our recent great colleague, Carl Hayden from Arizona, never voted for cloture except one time when he conceived that it was in the national interest to do so.

I have come to my current view reluctantly, because I wish we could leave it at two-thirds; but right now, as I have noted, there are willful men who from time to time will use unlimited debate on any issue to prevent the Senate from working its will.

I think that those of us, myself included, who have in the past been inflexible on the matter of cloture have done a disservice to the right of unlimited debate. I have mended my ways, and the next time the issue comes up, I will certainly support a vote of 60 percent of those present and voting to bring debate to a close. I think in the context of the current times that is reasonable and rational.

Mr. THURMOND. Mr. President, will the Senator yield?

Mr. TOWER. I yield.

Mr. THURMOND. Mr. President, President Nixon is to be congratulated on his selection of William H. Rehnquist to be an Associate Justice of the Supreme Court. In making this selection, the President has chosen a man unquestionably qualified to fill this high office.

Having served as a law clerk for Associate Justice Robert H. Jackson and having personally tried several cases before the Supreme Court, William H. Rehnquist is uniquely familiar with the operation of the Court.

Mr. President, the Supreme Court is the ultimate body of the judicial branch of our Government, and it is the duty of the Senate to carefully examine the qualifications of a nominee for this body. William Rehnquist is well qualified for the position of Associate Justice. He is an exceptionally qualified attorney with positive scholastic achievements. In his engagements in the practice of law and in his position as Associate Attorney General of the United States, he has performed with legal and professional excellence.

Mr. Rehnquist received his B.A. degree from Stanford University "with great distinction" and was Phi Beta Kappa. He earned his M.A. degree from Harvard University, and received his LL.B. degree from Stanford University with a ranking of No. 1 in his class. While he was attending law school at Stanford, he was a member of the board of editors of the Stanford Law Review.

Mr. Rehnquist was engaged in the private practice of law in Phoenix, Ariz., for 16 years before he was appointed Assistant Attorney General, Office of Legal Counsel by President Nixon in January 1969. His job description in this position was described by Mr. Nixon as "the President's lawyer's lawyer."

Mr. President, as Assistant Attorney General, Mr. Rehnquist frequently appeared before various congressional committees testifying as to the position of the Department of Justice on various issues. On several occasions he appeared before the Committee on the Judiciary of which I am a member. His testimony, and analysis and perceptive responses to inquiries were always of the highest calibre, and I have always been impressed with his intelligence and professional competency.

The Constitution is the guiding document upon which our great country functions. The ultimate interpretation as to its application is made by the Supreme Court. As a member of that body, William Rehnquist will insure that equal justice under law will have real meaning and application.

Mr. President, it is with distinct pleasure that I shall vote to confirm the nomination of William H. Rehnquist to be an Associate Justice of the Supreme Court. As a member of that body Mr. Rehnquist will be a strong advocate for the quality of life under the Constitution as envisioned our forefathers.

Today an article appeared in the Washington Post by Joseph Kraft entitled, "Rehnquist: Top Mind." This article concisely establishes the fact that Mr. Rehnquist is eminently qualified to be an Associate Justice of the Supreme Court.

Even though I do not agree with every idea expressed in this column, I agree with its basic premise, that is, "Mr. Rehnquist, far more than any other recent nominee, has the calibre to restore intellectual distinction to the Court."

Mr. President, I believe this article by Mr. Kraft sufficiently evidences the fact that Mr. Rehnquist is qualified for the Supreme Court and I ask unanimous consent that the article entitled, "Rehnquist: Top Mind," which appeared in the Washington Post on December 9, 1971, be printed in the CONGRESSIONAL RECORD following these remarks.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Washington Post, Dec. 9, 1971]

REHNQUIST: TOP MIND

(By Joseph Kraft)

Justice Holmes, on being asked what he thought of the intellectual abilities of another judge, once replied: "I never thought of him in that connection." And there lies the nub of the powerful, positive case that can be made for Senate confirmation of President Nixon's latest nominee for the Supreme Court, William Rehnquist.

For years now hardly anybody has thought of the Supreme Court as performing an intellectual function. Mr. Rehnquist, far more than any other recent nominee, has the calibre to restore intellectual distinction to the Court.

To understand why, it is necessary to say a word about the role of the Court in the country. The country is dominated by the million and one daily actions of an energetic population largely unconstrained in its capacity to buy and sell, move and dream, educate and obscure, build and tear down.

Given the nearly universal disposition toward almost constant action, it is ludicrous to think of tyranny being imposed on this country from above by some establishment eager to freeze the status quo or turn back the clock.

The central political problem of a populist country is to preserve some modicum of elite values—respect for achievement; toleration for difference of outlook; regularity of procedure. Partly by original design, but even more by the chance accretions of history, the Supreme Court has come to be the defender of those values—the elitist institution in a populist country.

Unfortunately for the Court, certain political decisions were thrust upon it by the deadlock that developed between Executive and Legislature during the post-war period. In the fields of civil rights and legislative reapportionment, the Court felt obliged—understandably considering that all other avenues seemed closed—to make rulings that might much more appropriately been the work of the President and the Congress.

In the heady atmosphere engendered by those decisions, the Court headed by Chief Justice Earl Warren became result-oriented. In case after case, it was increasingly hard to discover the inner logic of decisionmaking. Blacks seemed to be favored because they were blacks, baseball because it was a good clean American sport, anti-trust plaintiffs because they were against economic monsters.

President Nixon's efforts to correct the imbalance have been fumbling to the point of casting doubt on the sincerity of his claim to want "strict constructionists." His preferred candidates have been right-wingers, so little distinguished that the Senate and the American Bar Association have constrained him to throw them back in the pond.

Mr. Rehnquist is something else. He has not shown sensitivity to the needs of people in trouble, and he has said some hardline—and to me silly-sounding—things about the influence of Supreme Court clerks and the softness of judges towards communism. Some of these comments may be what ambitious juniors are required to say in order to get ahead in the Republican Party of Barry Goldwater and the Justice Department of John Mitchell. Still, I suppose they represent a genuine right-wing conviction.

But Mr. Rehnquist also has a mind of the highest candle-power. His comments in the Judiciary Committee hearings have been unfailingly lucid and discriminating. He has

been "hesitant"—a favorite word—when unsure of the fine details of a problem.

Even one of his staunchest opponents, Sen. Edward Kennedy, described him as "a man with a quick, sharp intellect, who quotes Byron, Burke, and Tennyson, who never splits an infinitive, who uses the subjunctive, at least once in every speech, who cringes when he sees an English word created from a Greek prefix and a Latin suffix."

Only it happens that the qualities that Senator Kennedy is pleased to dismiss so crudely express a critical aspect of the Court's present work. The Court does not now need more liberals, more conservatives, or more middle-of-the-roaders. There are enough of those to assure that nothing drastic is going to happen in civil rights or criminal law.

What the Court needs is more brains. Mr. Rehnquist has them—more abundantly perhaps than any present member. And by uplifting the quality of the Court in general, he will do far more than any particular decision in any particular case can do to advance the values thoughtful men hold dear.

Mr. COOK. Mr. President, earlier, I addressed the Senate in regard to the qualifications of Lewis F. Powell to be an Associate Justice of the Supreme Court as judged by the criteria or standards that I developed in previous Supreme Court nominations.

I now wish to examine the other nominee, Mr. William H. Rehnquist, in light of these standards.

WILLIAM H. REHNQUIST

In this instance, I am also combining the first two standards and considering them together.

1 AND 2. COMPETENCY; ACHIEVEMENT OR DISTINCTION

In 1948 Mr. Rehnquist graduated "with great distinction" from Stanford University and was elected to Phi Beta Kappa. The next year he received an M.A. from Harvard in government. At Stanford Law School he received his LL.B. degree, graduated first in his class, was elected to the Order of the Coif and served on the board of directors of the Stanford Law Review. Phil C. Neal, dean of the University of Chicago Law School has stated to the committee:

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. He has remained in my mind as one of the most impressive students I have had in some twenty-two years of teaching.

Mr. Jarril F. Kaplan, a Phoenix attorney who has publicly stated that he does not share the nominee's political views or philosophy, said in a letter to Senator BROOKE:

I have known Mr. Rehnquist well as a professional colleague for many years. He is an outstanding lawyer, completely thorough, scholarly, perceptive, articulate and possessed of the utmost integrity as well as a keen wit. He enjoys the highest respect of his fellow lawyers for his legal talent. There is, in my mind, no question about Mr. Rehnquist's legal qualifications to serve upon the Supreme Court.

Another prominent Arizonian familiar with the nominee, but who also disagrees with some of his views, Representative MORRIS K. UDALL, stated:

I say this though I can attest to his complete integrity and adherence to the highest ethical standards. In addition, he has had excellent legal training and experience and possesses a clearly superior legal mind. He certainly meets the demanding professional standards for and would bring intellectual distinction to the Supreme Court.

A number of law professors have given the nominee very high marks. Ralph K. Winter, Jr., of Yale Law School, said in a letter to the committee:

Mr. Rehnquist is experienced in matters of constitutional law. He will bring to the Court knowledge and a sense of history as well as intellectual power. He understands, and accepts, the fundamental principles of government established by the Constitution and appreciates the difficult role a court must play as a constitutional arbiter in a democratic society.

Thomas E. Kauper, professor of law at Michigan, said that:

He has all the qualities to become a truly great judge.

Willard H. Pedrick, dean of the Arizona State University College of Law, thought so highly of Mr. Rehnquist's qualifications that he "was moved to approach him a year ago about the possibility of an academic career with the faculty of the college of law."

John Bingham Hurlbut, Jackson Eli Reynolds, professor of law at Stanford and a former law clerk to Chief Justice Earl Warren, and also a former teacher of the nominee, praised his abilities in the following manner:

Mr. Rehnquist is the product of the Stanford Law School, a member of one of those remarkable and very competent postwar classes, composed largely of veterans, eager to exploit what the law school had to offer in the pursuit of a solid foundation for a professional career in private practice and in public service, and for satisfying those heavy obligations of a lawyer citizen. And on the other side of the platform a strong, demanding, dedicated faculty including such names as Phil Neal (now law dean at Chicago), Sam Thurman (now law dean at Utah), Harold Shepherd (former dean at Duke), and Paul Freund (visiting professor from Harvard for a term). In this setting he was graduated first in his class—and as one of my former colleagues at Stanford has put it, "he was the outstanding student of his law school generation."

I can, I think, speak with some authority on William Rehnquist the student. He was a member of my class in criminal law in his first year and evidence in his third year. For a while he was my research assistant. We had a common interest in intercollegiate athletics as well as the law. So I saw a great deal of him in the classroom, in my office and in my home.

As a student he was nothing short of brilliant, determined to achieve excellence, and persistent in his expectation of excellence on the other side of the podium. In the give and take of the classroom he was sharp, forthright, courageous, and objective—precise and deep in his analysis of difficult problems—insistent that a problem be turned over and over to expose all of its facets before its solution—and always a gentleman.

Upon graduation from law school, the nominee served as a law clerk for Mr. Justice Robert H. Jackson. From 1953 through 1969 he was a lawyer in private practice in Phoenix and according to the American Bar Association's report to the committee:

Was clearly a person of recognized professional quality who, for his age, was highly regarded.

The ABA standing committee on Federal judiciary further stated that his rating, AV, in Martindale-Hubbell was the highest rating a lawyer could receive. In his present position as an Assistant Attorney General of the United States and head of the Office of Legal Counsel, he has clearly demonstrated for the public record that he is all of what his many admirers say he is. A perusal of his statements before the various House and Senate committees clearly reveals the qualities of legal scholarship and keen intellect for which he is famous. He has demonstrated his expertise in broad areas of constitutional law through these writings.

Mr. President, only time and space in the CONGRESSIONAL RECORD prevent me from continuing in the documentation of his competency and level of achievement and distinction within his chosen profession.

3. TEMPERAMENT

Here, I once again turn to those who know the nominee best, even though many of them are in fundamental disagreement with his political or philosophical views. I believe this to be an important qualification, because hostility to a certain class of litigants cannot be condoned in any judge, but especially for a Justice of the Supreme Court. Self-discipline is essential.

Judge Walter E. Craig, U.S. District Judge for the District of Arizona, a former president of the American Bar Association, and a man who has known the nominee for 25 years had the highest praise for patience and temperament. In testimony before the committee, Judge Craig said:

He has demonstrated, I think, his patience and judicial temperament in appearing before this body. I have observed it for 19 years, so it does not come as a surprise to me that he has handled himself so magnificiently here. I have seen only a relatively few minutes of his testimony, but I have kept in some touch with the progress of the hearings.

In his appearances before my court, Mr. Rehnquist conducted himself not only with outstanding professional skills but with dignity, intelligence, and integrity. I think he has conducted his life that way so long as I have known him.

Prof. Thomas E. Kauper declared that—

William H. Rehnquist is as fine a lawyer as I have encountered. He has a scholarly, intellectual approach to legal problems which is not found in many practicing lawyers. While he and I did not always agree on the resolution of legal issues, I always received a fair hearing and found him eager to learn all that he could before making a decision.

There have been many allegations that the nominee is a "racist" or an extremist and that he, therefore, does not possess the necessary open-mindedness and judicial temperament.

Jarril F. Kaplan, a former chairman of the Phoenix human relations commission, said that during all of his years of service he never once heard reference to the nominee's hostility toward any minority group. In his letter to Senator BROOKE urging favorable consideration, he stated:

Parenthetically, I wish to state that I do not share much of Mr. Rehnquist's political views or philosophy. But that hardly detracts from his legal abilities or from my recognition of those abilities. Nor am I aware of any real basis for characterizing his views as extremist. Mr. Rehnquist is a consummate advocate, as any good lawyer must be. He states his views (or the views of those whom he represents) with the zeal of a skilled advocate. This is what he is trained to do, and should not be misunderstood as extremism.

Another supporter of the nominee, a professor of law at Yale University Law School, and a man who has seen him in action was equally impressed. Robert H. Bork stated in a letter to the committee:

I have seen Mr. Rehnquist engage in debate on highly controversial subjects. Though some persons on both sides of the issue became quite heated, he did not. He remained calm but forceful in the presentation of his views, marshalling his arguments with great skill. That performance was indicative not merely of great professional qualifications, but also of a judicial temperament.

The Reverend George Brooks, a former president of the Arizona NAACP, had charged at one time that Mr. Rehnquist harrassed and denounced in an abusive manner certain civil rights demonstrators in 1964 at the Arizona State Capitol. As the Nov. 3 edition of the Washington Post reported, the Reverend Mr. Brooks has clarified his original statement:

By the end of last week, Brooks was telling a different story. He now says that the discussion with Rehnquist was calm, "the tone was professional, constitutional, and philosophical," he said. He was neither harassed nor intimidated, Brooks added.

His latest opinion certainly agrees with that of all the others who have commented on the nominee's temperament.

Finally, the nominee has been charged with attempting to deprive certain minority groups of their voting rights in the 1960's. The committee report more than adequately replies to these unsubstantiated allegations. I refer to pages 8–13. In addition, Mr. Rehinquist in a reply to questions from Senators BAYH, HART, and KENNEDY categoricaly denies these assertions. I ask unanimous consent that question No. 10 of the Senator's letter, and Mr. Rehnquist's reply be printed in the RECORD at this point.

Mr. President, in summary, many have called Mr. Rehnquist, "the ultimate reasonable man." The record certainly supports this description.

4 AND 5. ETHICAL CONDUCT; PERSONAL CONDUCT

Mr. Rehnquist has undergone a thorough investigation of his personal life by the Federal Bureau of Investigation as well as by private individuals and groups. Furthermore, Senator BAYH questioned him extensively about his law practice and the record reveals absolutely nothing which would indicate that he violated either the canons of ethics or the statutes governing the standard of conduct required of members of the bar. Professor Hurlbut succinctly summarized the thinking of everyone who knows William Rehnquist when he said that:

Above all else he is a man of complete intellectual and personal integrity.

CONCLUSION

Mr. President, as I have repeatedly stated, I do not believe that political philosophy or ideology is a relevant factor in the Senate's confirmation of Supreme Court nominations.

On November 28, Representative PAUL MCCLOSKEY, during an appearance on the WTOP–TV program "Newsmakers," stated his opinion as to Mr. Rehinquist's qualifications and temperament. He said, in part, that—

Bill Rehnquist, in my judgment, has a reverence, respect for the law.

In reply to a question about the nominee's philosophy, Representative MCCLOSKEY summarized my feelings on this matter when he said,

I think—as I say, his political views I don't agree with at all. But I hate to see us get to the point in this country where because a man is behind the times politically we deny him a seat on the court. I think the law's too important to have political views play a part in whether he's qualified or not.

Because Mr. MCCLOSKEY's comments on "Newsmakers" were so timely and pertinent, I ask unanimous consent that the relevant portions of that program, exhibit "B", be printed in the RECORD at the conclusion of my remarks.

In an article entitled "The Rehnquist Dilemma," Tom Wicker said in the November 11, 1971, edition of the New York Times concerning the nominee's rejection on ideological grounds:

So the real question before the Senate is whether it can, or should, reject Mr. Rehnquist solely because of his political views. On the one hand, the writers of the Constitution, in giving the Senate the power to confirm or reject presidential nominees to the Judiciary, clearly meant the legislative branch to play a substantive role with the executive branch in this process. The Senate has the right, therefore, to judge for itself the qualifications of a man to sit on the Supreme Court.

On the other hand, to make that judgment solely on the basis of his political views (which, after all, may change) is dangerous business. It presumes some kind of rightful political orthodoxy.

In that same column he rebutted the argument of rejecting Rehnquist because the President has nominated a conservative, political activist by saying:

And the Senate is likely to compound the damage if it denies Mr. Rehnquist his court seat solely because of his political views.

Tom Wicker's credentials as a stout defender of political liberalism are, I believe, impeccable. However, he believes so strongly that Mr. Rehnquist should not be opposed on philosophical grounds that he wrote another column on this subject. In speaking once more of the liberal's dilemma, Mr. Wicker stated:

That means that the battle has to be fought, if at all, on the tricky ground of Mr. Rehnquist's political views—whether it is called his "judicial philosophy" or his "constitutional approach." The view was put forward in this space on November 11 that this kind of opposition was "dangerous business"—that it suggested the existence of a kind of political orthodoxy, would tend to politicize the Court, would punish some people for their ideas while frightening others out of having any and would lead inevitably to political retaliation.

He further went on to say:

On balance, with full awareness that Mr. Rehnquist's views on the Bill of Rights seem antilibertarian, and despite weighty arguments from many who disagree, it still is "dangerous business" to reject him for his political views. Is it seriously to be asserted that conservative—even arch-conservative—views disqualify a man for service on the Supreme Court? If so, then what prevents some other Senate from disqualifying a man for strongly liberal views or for being a "new leftist" or a "neo-isolationist" or some other stereotype?

I believe, as does Mr. Wicker, that it is much too late for many of Mr. Rehnquist's opponents to be faulting him on constitutional interpretation. Mr. Wicker has this to say:

Can it be shown that Mr. Rehnquist's views are factually in error or substantively wrong? No, it is a matter of interpretation, and it is late in the day for liberals to start asserting that the Constitution is an absolute document not subject to interpretation or differing ideas. It is, in fact, the prime duty of the Supreme Court to decide what the Constitution means, on given subjects at given times in history.

I ask unanimous consent that both of these columns by Mr. Wicker be inserted in the RECORD at the conclusion of my remarks as exhibits "C" and "D."

In conclusion, after attending the judiciary hearings, and examining the record I wish to give my unqualified endorsement of this very distinguished lawyer and legal scholar. As with Mr. Justice Powell, I believe Mr. Rehnquist to be uniquely qualified to sit on the Supreme Court of the United States.

If I may depart from my objectivity for just a moment, and insert a personal note, this is the first instance that I have had the opportunity to be personally acquainted with a Supreme Court nominee. I know that Bill Rehnquist is a superior human being in every sense of the word. He is superior in intellect, temperament and compassion. I wish him well.

Mr. President, I urge the immediate confirmation of the nomination of Mr. William H. Rehnquist to be an Associate Justice of the Supreme Court of the United States.

I ask unanimous consent that other exhibits be printed in the RECORD.

There being no objection, the items were ordered to be printed in the RECORD, as follows:

EXHIBIT A

QUESTION 10 BY SENATORS BAYH, HART, AND KENNEDY

10. Please describe in as much detail as possible your position (including title and the manner in which you were selected); responsibility, and activities in connection with Republican Party efforts to challenge Democratic voters in Arizona for each of the following elections, separately: 1958, 1960, 1962, 1964, 1966, 1968.

In addition, please answer the following questions concerning your position, responsibility or activities in each of the above-mentioned years:

(*a*) Did you personally engage in challenging the qualifications of any voters? If so, please describe the nature and extent of the challenging you did and the bases on which the challenges were made.

(b) Did you train or counsel persons selected to be pollwatchers or challengers about the procedures to be used in challenging? If so, please elaborate concerning how the persons were selected, and the training that you gave. Did you in any of the abovementioned years train or counsel persons selected to be pollwatchers on the bases on which challenges could be made? If so, please elaborate concerning what you advised these persons were proper bases under law for challenges in each of the relevant years.

(c) Did you prepare, select or advise on the use of printed passage from the Constitution designed to be employed by challengers to determine the literacy of a potential voter? Did any such practice come to your attention? Did you think it proper and lawful? If not, did you take steps to curb such procedures?

ANSWERS TO QUESTION 10 BY MR. REHNQUIST

10. During the course of the Committee's deliberations, I submitted the following affidavit to the Chairman of the Committee:

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

In order to fully respond to question 10, an understanding of the background of Republican challenging procedures in Maricopa County is necessary. I have therefore tried as best I can to recall and set forth that background.

A combination of the peculiarities of Arizona election law, the customary practices of the Board of Supervisors in appointing precinct election officials, and the numerical weakness of registered Republicans in part of the County resulted in the fact that the only method by which a Republican observer or poll watcher could be stationed inside a particular polling place in many precincts in order to watch for voting irregularities was to be there as a "challenger." While he was authorized by law to challenge voters, the prospects of his being successful were not great, since the challenges he made were ruled upon by a three-man election board (two judges and an inspector) and in the precincts with extraordinarily heavy Democratic registration at least two and often three members of this board would be Democrats. The challenger's real usefulness to the Party, therefore, was not that he was going to be able to prevail upon the election board to disqualify any large number of voters, but that his mere presence as a party representative would have a tendency to discourage any large-scale irregularities in voting procedures at that precinct. My recollection is that the most frequent cause of dispute which arose in Election Day during the late 50s and early 60s was the nature of the credentials required for a challenger to be allowed to enter and remain in a polling place, since in many of these precincts there had never been a Republican representation on the scene during Election Day.

With respect to the specific questions posed, I have attempted to refresh my recollection by speaking with several persons in Arizona who acted in Republican Party affairs during the years covered in this question and to Judge Hardy, who was active for the Democratic Party at the same time. I have also had occasion to see two local newspaper articles which appeared in the Fall of 1964, describing my position during the elections of 1960, 1962, and 1964. I recall that at the time there were written schedules, instructions, and the like prepared at least for the elections of 1960, 1962, and 1964, but I have not found anyone who was able to locate any of this written material, and it may no longer be in existence.

In 1958, I became involved in the Election Day program on quite short notice, and spent all the day at Republican County Headquarters in Phoenix answering questions as to the election laws on the telephone. So far as I remember, I was the only person having this responsibility at County Headquarters. I don't believe I had a title, and I cannot remember by whom I was selected. As I recall, Don Reese, then of Phoenix but presently of Houston, Texas, was County Chairman in 1958.

My attention has been called to a clipping from the *Arizona Republic* in October 1964, which states that in 1960 I was co-chairman of the "Ballot Security Program." I do not have any independent recollection of this fact, but I have no reason to dispute the account in the newspaper. As I recall, however, the program in 1960 was not called the "Ballot Security Program," since I don't remember hearing that term used before 1964.

In 1960, I supervised and assisted in the preparation of envelopes to be mailed out in advance of the election for the purpose of challenging voters on the basis of their having moved from the residence address shown on the poll list; I also recruited about a half a dozen lawyers to work on a "Lawyers Committee" on Election Day. I did not myself recruit challengers, but I did speak to a "school" held for challengers shortly before election, in order to advise them on the law. I believe I also supervised and assisted in the assembling of returns of our mailings which were returned "addressee unknown", so that they could be made available to the particular challenger who was stationed in the precinct in which the address was located. 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 arisen, and attempting to resolve it.

I cannot remember whether Don Reese or Ralph Staggs was County Chairman in 1960; I believe I was designated by whoever was County Chairman that year.

With respect to 1962, I have been shown an article in the October 1964, *Arizona Republic* which states that I was Chairman of a Lawyers Committee which operated on Election Day. This is consistent with my own recollection. I do not believe that in this year I participated in the mailing out of envelopes prior to election, though I may have. I did speak at a school for challengers, I believe, in much the same manner as in 1960. 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, I have seen an article in the *Arizona Republic* dated October 1964, stating that I was Chairman of the "Ballot Security Program." This is consistent with my recollection. I presume that I had overall responsibility for the mailing out of envelopes, the recruiting of challengers, and the recruiting of members of the Lawyers Committee to work in County Headquarters; however, I believe that there were individuals other than me who were directly responsible for each of these aspects of the program. At this time, Wayne Legg was Chairman of the Republican County Committee, and I presume it was he who designated me as chairman. My recollection is that on Election Day during this particular election I spent all of my time in County Headquarters.

I also think, though I am not certain, that I spoke at the school for challengers held just before the election; if I did not speak to the school, I believe I was present when someone else spoke on the law. Challengers were advised in this year, pursuant to an opinion issued by the State Attorney General, that challenging at the polls on the basis of literacy or interpretation of the Constitution was unlawful by virtue of the Federal Civil Rights Act of 1964.

In 1966, my best recollection is that I played no part at all in the election activities, though I am not absolutely certain. If I played any part, it was simply to serve as a lawyer on duty at County Headquarters for a period of several hours in order to handle questions that might come in over the phone.

In 1968, I played no part at all in the election activities.

(a) In none of these years did I personally engage in challenging the qualifications of any voters.

(b) The recruitment of challengers in each of these years was under the direct supervision of someone other than me. However, in at least two of these elections—1960 and 1962—and perhaps in 1964, I spoke at a challengers' school conducted shortly before the election. The purpose of my talk was to advise the various persons who were to act as challengers as to what authorization was required in order to enable them to be present in a polling place during the time the election was being conducted, and also as to the various legal grounds for challenging as provided by applicable Arizona law. My recollection is that I simply recited the grounds set forth in the Arizona Revised Statutes as to the basis for challenge, the method of making the challenge, and the manner in which the challenge was to be decided by the Election Board of the precinct in question.

(c) I did not. No such practice came to my attention until sometime on Election Day, 1962. The manner in which I saw this type of challenge being used, when I visited one precinct, struck me as amounting to harassment and intimidation, and I advised the Republican challenger to stop using these tactics. Since no question was raised at that time as to the propriety or lawfulness of the use of printed passages from the Constitution by challengers in conjunction with the election board in an otherwise courteous and lawful manner, I did not consider it. Shortly after the election, I discussed this type of challenge with Charles Hardy, now Judge of the Superior Court of Maricopa County, and expressed my vigorous disapproval of any scattergun use of literacy challenges. By the time of the next biennial election, in 1964, such challenges were no longer permitted under federal law.

EXHIBIT B

U.S. REPRESENTATIVE MCCLOSKEY COMMENTS ON REHNQUIST NOMINATION

Program: Newsmakers. Station: WTOP-TV. Date: November 28, 1971, 7:00 p.m. City: Washington, D.C.

CAROLYN LEWIS. Paul McCloskey is a third term congressman from the State of California. He's also the only announced Republican candidate for President. McCloskey served as a Marine in Korea and was decorated three times. He says he isn't against all wars; he is against America's involvement in Vietnam. The Vietnam war, however, is not the only issue dividing Paul McCloskey from Richard Nixon.

Joining us this evening is columnist and commentator Carl Rowan.

Mr. McCloskey, not long ago you criticized President Nixon for what you called a lack of moral leadership on civil rights. Today civil rights leaders are strongly opposed to the Supreme Court nomination of William Rehnquist. Yet you support William Rehnquist. Why?

Representative PAUL N. MCCLOSKEY, Jr. Bill Rehnquist, in my judgment, has a reverence, respect for the law. I disagree almost entirely with his political views. But I think that the

crucial thing with our courts and our legal system is that the law must be absolutely separated from politics. You can't have legal involvement in politics, and you shouldn't have political influence in the court.

I've known Bill for I guess twenty years. He's always had almost a fetish that people should not have their political views intrude in their judicial decisions. If there's going to be any conservative judge on the court, this would be the man I would pick.

CARL ROWAN. I find this interesting because some months ago you said this to *Congressional Quarterly:* "The attack on crime, in my judgment, is not a matter of removing civil liberties, as the Attorney General now prefers." There are a lot of people who think Rehnquist was the ringleader in the Justice Department's efforts to destroy civil liberties. How do you reconcile this to your view?

Representative MCCLOSKEY. Well, I don't know that to be true. And I have some skepticism about assigning to the counsel or the attorney for someone the basis for the arguments that were made. I know that Bill Rehnquist carries out the Attorney General's instruction. I know that he probably carries out the President's instructions. And I don't think you blame the attorney for the position that they necessarily take on all occasions.

ROWAN. Now you also have been harshly critical of President Nixon for backing away from enforcement of civil rights laws, particularly the Voting Rights Act. We've had some criticism come out of Arizona claiming that Rehnquist tried to stop blacks from voting. Is it that you don't believe the criticism, or what?

Representative MCCLOSKEY. No, I honestly don't believe that. As I say, I've known Bill since law school. He was the top man in the class the year that I left law school and went to Korea. He's not the kind of a man that would be down in the voting line elbowing people out. He just isn't the kind of a guy to do that. And I can recall in those years back in the early sixties when sometimes Democratic politicians did run people through the voting lines that may or may not have been qualified to vote in specific urban precincts. I accept Bill's explanation that be advised the people that were checking on the polls, but did not participate in it himself.

LEWIS. Mr. McCloskey, only recently Mr. Rehnquist admitted that he was a little behind the times on wanting blacks to have equal access to public accommodations. Don't you think this shows that he lags at least behind the general populace even on these issues and perhaps has . . .

Representative MCCLOSKEY. I think so.

LEWIS. . . . What did you say?

Representative MCCLOSKEY. I think so. I think—as I say, his political views I don't agree with at all. But I hate to see us get to the point in this country where because a man is behind the times politically we deny him a seat on the court. I think the law's too important to have political views play a part in whether he's qualified or not.

LEWIS. What about his sensitivity to these major issues which are cropping up and will crop up in the seventies and eightiee, and probably the nineties? Don't you think a man on the court should have a sensitivity to these things?

Representative MCCLOSKEY. Very much so. But I don't think that the speed at which sensitivity comes to him—Bill is forty-seven. He's still learning; he's still growing. He's a man who, I think, is capable of changing his mind. And, you know, what are the real attributes of a judge? Reverence, respect for the law, an open mind, an absolute insistence on not having his political views intrude into his judicial decisions.

I disagree strongly with most everything Bill believes politically. But it seems to me that this is precisely what we need—is a man unwilling to let his political views intrude in his judicial decisions.

ROWAN. Well, you've touched upon a critical question there, and that is whether political views do intrude. You remember that marvelous quote from Chief Justice Hughes, who said the Constitution is what the judges say it is. Well, a man's political views go a long way toward determining how he rules on critical cases like *Brown* v. *Board of Education,* the 1954 school desegregation decision . . .

Representative MCCLOSKEY. I agree with you.

ROWAN. . . . So how can you assure the public that Rehnquist will not let his political views get into his interpretation of the Constitution?

Representative MCCLOSKEY. Well, because if you go back into Bill's history you find that even in law school he was concerned that liberal judges were writing their political opinions into judicial decisions. It's almost been a fetish with him, as I say, that he has opposed this concept.

Now when you take a judge ruling on the Constitution, he's taking the history of the country, the history of the Constitution, the evolution of our laws, the prior court decisions. Now, Bill Rehnquist could no more bring himself to back away from, say, *Brown* v. *Board of Education,* or any one of the great civil rights cases of our time, than the man in the moon.

I don't worry about him at all in that respect. My worry about his political views goes to his authoritarian comments about the position of the executive branch of government. I think we've reached the stage where if you took Attorney General Mitchell's concept that we're entitled to wire tap because we think it's right, or we're entitled to keep these papers secret because we think it is right, there is the real danger that you have. And there I'm convinced Bill Rehnquist is a far better lawyer than to permit his political views to intrude in his decisions.

LEWIS. But he's the lawyer who argued that case for the Attorney General.

Representative MCCLOSKEY. I know. I've debated with him at tremendous length and in some violent disagreement before my own committee on government information.

ROWAN. What we really have here is you expressing a hope and trying to reassure the public on the basis of your personal friendship with Rehnquist. Isn't that about the shape of things?

Representative MCCLOSKEY. No, because you can't really say that we're friends. We've known each other. We're not of the same temperament. We have as I've mentioned, I think we disagree on nearly everything. But I would feel very comfortable, Mr. Rowan, arguing a civil rights or a human rights, or a sensitivity case in front of Bill Rehnquist. I think he'd bend over backwards to try to base his judgment on the law and the facts. And that's what you're looking for in a judge. The whole practice of law—and I come from three generations of lawyers—the whole beauty of the law is the independence and the judicious temperament of the judge that rules on it. That's where the confidence and the support and the faith in the law comes from.

And I think this man can do it, even though we disagree so violently politically.

ROWAN: Well, of course, the Rehnquist appointment is only one tiny aspect of the performance of the Nixon administration civil rights-wise and otherwise. Does this indicate a general satisfaction, on your part, with the performance of the administration?

Representative MCCLOSKEY. Not at all. I—you know, I'm accused of being a one issue candidate, because I've opposed the war. And I run against the President primarily because of the war. But the two things that bother me almost equally as much is this administration's secrecy, concealment of information, deception. That's the first thing, because they've made news management, concealment and deception almost a trademark of this administration.

The second is their failure and their refusal to enforce the civil rights acts, particularly the Voting Rights Act of 1965. When this Attorney General refused to enforce that law down in Mississippi, when he pulled the voting registrars out, refused to send them back; when he said I can't enforce the law—I think there's a Circuit Court of Appeals down in Alabama that has bitterly characterized the Attorney General as a Pontius Pilate washing his hands of the civil rights act and his responsibility even to respond when they asked whether or not the Voting Rights program received his approval.

If I thought Bill Rehnquist had any part of the advice to the President or the participation in not enforcing the Voting Rights Act, it would certainly change my opinion. I can't believe that he'd do this . . .

[From the New York Times, Nov. 11, 1971]

EXHIBIT C

THE REHNQUIST DILEMMA

(By Tom Wicker)

The spectacle of Senator Edward Kennedy defending the reputation of William Rehnquist against allegations by Joseph Rauh of the A.D.A. suggests the painful dilemma in which liberals and civil libertarians have been placed by Mr. Rehnquist's nomination to the Supreme Court.

This nomination is not like that of Clement Haynsworth, whom President Nixon earlier tried to put on the Court. Judge Haynsworth was not confirmed by the Senate on the ostensible ground that his record on the bench showed a lack of perception of possible conflict-of-interest situations.

Nor is the Rehnquist case similar to that of Mr. Nixon's other rejected nominee, G. Harrold Carswell. Judge Carswell was found to have made misstatements to a Senate committee, and his confirmation hearings disclosed a glaring lack of qualification for the Supreme Court.

The Rehnquist matter is not even like that of Lewis Powell, whom Mr. Nixon has also named to the Court.

Mr. Powell is a pillar of the Southern establishment, a good credential in the Senate. he is 64 years old and his tenure on the Court will be limited by that; he is not expected by most observers to become a powerful leader within the Court.

Mr. Rehnquist is a horse of a very different color. At 47, he can look forward to a long and active tenure on the bench. Moreover, his record is that of a hard-working and vigorous champion of conservative political causes, both in Arizona and within the Nixon Administration. Persons in and out of the Administration who know his work credit him with superior intellect and skill in the law.

Thus Mr. Rehnquist on the Court is altogether likely to become a driving force for the principles he espouses. There are those who believe that as the years go along he will be a more formidable leader than Chief Justice Burger in the conservative wing of the Court—a wing that may already be in the majority on some issues and will almost surely become dominant if Mr. Nixon wins another term in the White House.

It is no wonder, then, that liberals and liberatarians are desperately casting about for means of defeating the Rehnquist nomination in the Senate. Mr. Rehnquist's record of opposition to civil rights measures, his strong advocacy of state powers that would threaten Bill of Rights guarantees—at least what many people passionately believe to be guarantees—his youth and his obvious leadership qualities might alter the course of the Supreme Court for decades to come.

But the hard fact is that no one has as yet produced any evidence of the kind of ethical tangles that ruined Judge Haynsworth's chances—and before that led to the resignation of Abe Fortas from the Court; nor has anyone been able to identify misstatements like those that sank Judge Carswell, let alone a lack of legal or intellectual qualifications.

It was, in fact, on the matter of Mr. Rehnquist's integrity that Senator Kennedy rebuked Mr. Rauh. The latter had suggested that the nominee had been less than candid in denying ever having been a member of the John Birch Society. The Senator could hardly be sympathetic to a man of Mr. Rehnquist's views, but he insisted that the nominee's basic integrity was unchallenged.

So the real question before the Senate is whether it can, or should, reject Mr. Rehnquist solely because of his political views. On the one hand, the writers of the Constitution, in giving the Senate the power to confirm or reject Presidential nominees to the judiciary, clearly meant the legislative branch to play a substantive role with the executive branch in this process. The Senate has the right, therefore, to judge for itself the qualifications of a man to sit on the Supreme Court.

On the other hand, to make that judgment solely on the basis of his political views (which, after all, may change) is dangerous business. It presumes some kind of rightful political orthodoxy; it would tend to politicize the courts according to the temporary political coloration of Congress; it could punish some individuals for their ideas and frighten others out of having any.

Moreover, it is bound to lead to retaliation, as it did when Republicans and conservatives defeated President Johnson's nomination of Justice Fortas to be Chief Justice, at least partially on political grounds. Paying off that score had a good deal to do with Jude Haynsworth's subsequent rejection.

It may be argued that Mr. Nixon should not have handed Senators this dilemma by appointing an activist political figure to a nonpolitical court; but the precedents are ample, and the Senate is likely to compound the damage if it denies Mr. Rehnquist his Court seat solely because of his political views.

EXHIBIT D

IN RE REHNQUIST

(By Tom Wicker)

WASHINGTON.—The Senate apparently will confirm Lewis Powell next week as an Associate Justice of the Supreme Court. After that, it will either face up to or delay the far more controversial and difficult matter of William Rehnquist, President Nixon's other nominee to the Court.

As it now appears, Mr. Rehnquist will be confirmed, too, unless those who oppose him are determined enough and able to put together something like the filibuster that, in 1968, prevented confirmation of Abe Fortas as Chief Justice.

This is at least a long-shot possibility because of Mr. Rehnquist's comparative youth (47) and his reputation as a skilled, active and intent champion of strongly conservative causes. Liberals fear he may become for many years the vigorous leader of a reactionary Court, but their dilemma is that no ethical or professional charges sufficient to warrant Mr. Rehnquist's rejection have so far been proved.

That means that the battle has to be fought, if at all, on the tricky ground of Mr. Rehnquist's political views—whether it is called his "judicial philosophy" or his "constitutional approach." The view was put forward in this space on Nov. 11 that this kind of opposition was "dangerous business"—that it suggested the existence of a kind of political orthodoxy, would tend to politicize the Court, would punish some people for their ideas while frightening others out of having any and would lead inevitably to political retaliation.

On balance, with full awareness that Mr. Rehnquist's views on the Bill of Rights seem antilibertarian, and despite weighty arguments from many who disagree, it still is "dangerous business" to reject him for his political views. Is it seriously to be asserted that conservative—even arch-conservative—views disqualify a man for service on the Supreme Court? If so, then what prevents some other Senate from disqualifying a man for strongly liberal views or for being a "new leftist" or a "neo-isolationist" or some other sterotype?

This is not to deny that the Senate has a duty to consider the qualifications of a nominee to sit upon the Court. Or that among the qualifications it ought to consider is his general political, constitutional and judicial view of things. Judge Carswell, for instance, was judged to be lacking in intellectual and legal competence, a judgment that could be solidly documented.

But can it be shown that Mr. Rehnquist lacks fidelity to the Constitution? No, only that in his view it allows more power to the state and less to the individual than many other Americans believe to be the case.

Can it be shown that Mr. Rehnquist's views are factually in error or substantively wrong? No, it is a matter of interpretation, and it is late in the day for liberals to start asserting that the Constitution is an absolute document not subject to interpretation or differing ideas. It is, in fact, the prime duty of the Supreme Court to decide what the Constitution means, on given subjects at given times in history.

Nor is the political aspect of the Rehnquist nomination an open-and-shut affair. No doubt Mr. Rehnquist will be a formidable conservative force on the Court (although that remains a supposition that only time can justify). Even so, the damage he might do to liberal causes could well be less than the political consequences of a third rejected Nixon nominee, a third defeated conservative, in a Senate dominated by liberal Democrats. Just as the Court itself must sometimes practice "judicial restraint," so it may be that the Senate ought to practice some political restraint. This, of course, is a value judgment that each Senator must make for himself.

That also is true of the really crucial question about Mr. Rehnquist, which can best be explained by reference to Mr. Powell. Those who know the Virginia lawyer, a former American Bar Association president, concede that his views in many ways are as conservative as those of Mr. Rehnquist—and that fact was documented in an article by Mr. Powell recently reprinted on this page.

But Mr. Powell, it is said, is an experienced and fair-minded man of judicial temperament who, in deciding legal and constitutional questions, will put aside any personal or political preferences and prejudices that can't be squared with the law and the facts of a case. He might, for instance, generally approve wiretapping as a law-enforcement tool—yet be willing to rule against it when, in some particular case, the facts showed that the law and the Constitution had been violated.

It is to be hoped that this is true—of Mr. Powell and of any nominee, liberal or conservative. Whether or not it is true of William Rehnquist is the vital question about his nomination, and one that each Senator must judge for himself. If Mr. Rehnquist can put his personal views aside when they can't be fairly justified by the law and the facts, then those views should not be the deciding factor; but if any Senator feels that Mr. Rehnquist, or any other nominee, could not so discipline himself intellectually, voting to reject him would surely be a duty.

[From the Washington Post, Dec. 9, 1971]

REHNQUIST: TOP MIND

(By Joseph Kraft)

Justice Holmes, on being asked what he thought of the intellectual abilities of another judge, once replied: "I never thought of him in that connection." And there lies the nub of the powerful, positive case that can be made for Senate confirmation of President Nixon's latest nominee for the Supreme Court, William Rehnquist.

For years now hardly anybody has thought of the Supreme Court as performing an intellectual function. Mr. Rehnquist, far more than any other recent nominee, has the calibre to restore intellectual distinction to the Court.

To understand why, it is necessary to say a word about the role of the Court in the country. The country is dominated by the million and one daily actions of an energetic population largely unconstrained in its capacity to buy and sell, move and dream, educate and obscure, build and tear down.

Given the nearly universal disposition toward almost constant action, it is ludicrous to think of tyranny being imposed on this country from above by some establishment eager to freeze the status quo or turn back the clock.

The central political problem of a populist country is to preserve some modicum of elite values—respect for achievement; toleration for difference of outlook; regularity of procedure. Partly by original design, but even more by the chance accretions of history, the Supreme Court has come to be the defender of those values—the elitist institution in a populist country.

Unfortunately for the Court, certain political decisions were thrust upon it by the deadlock that developed between Executive and Legislature during the post-war period. In the fields of civil rights and legislative reapportionment, the Court felt obliged—understandably considering that all other avenues seemed closed—to make rulings that might much more appropriately been the work of the President and the Congress.

In the heady atmosphere engendered by those decisions, the Court headed by Chief Justice Earl Warren became result-oriented. In case after case, it was increasingly hard to discover the inner logic of decision-making. Blacks seemed to be favored because they were blacks, baseball because it was a good clean American sport, anti-trust plaintiffs because they were against economic monsters.

President Nixon's efforts to correct the imbalance have been fumbling to the point of casting doubt on the sincerity of his claim to want "strict constructionists." His preferred candidates have been right-wingers, so little distinguished that the Senate and the American Bar Association have constrained him to throw them back in the pond.

Mr. Rehnquist is something else. He has not shown sensitivity to the needs of people in trouble, and he has said some hardline—and to me silly-sounding—things about the influence of Supreme Court clerks and the softness of judges toward communism. Some of these comments may be what ambitious juniors are required to say in order to get ahead in the Republican Party of Barry Goldwater and the Department of Justice of John Mitchell. Still, I suppose they represent a genuine right-wing conviction.

But Mr. Rehnquist also has a mind of the highest candle-power. His comments in the Judiciary Committee hearings have been unfailingly lucid and discriminating. He has been "hesitant"—a favorite word—when unsure of the fine details of a problem.

Even one of his staunchest opponents, Sen. Edward Kennedy, described him as "a man with a quick, sharp intellect, who quotes Byron, Burke, and Tennyson, who never splits an infinitive, who uses the subjunctive

at least once in every speech, who cringes when he sees an English word created from a Greek prefix and a Latin suffix."

Only it happens that the qualities that Senator Kennedy is pleased to dismiss so crudely express a critical aspect of the Court's present work. The Court does not now need more liberals, more conservatives, or more middle-of-the-roaders. There are enough of those to assure that nothing drastic is going to happen in civil rights or criminal law.

What the Court needs is more brains. Mr. Rehnquist has them—more abundantly perhaps than any present member. And by uplifting the quality of the Court in general, he will do far more than any particular case can do to advance the values thoughtful men hold dear.

Mr. BROOKE. Mr. President, the confirmation proceedings on the nomination of William H. Rehnquist to be an Associate Justice of the Supreme Court appear to have narrowed to the actual intent of the nominee's 1952 memorandum to the late Justice Jackson. In a letter to the chairman of the Judiciary Committee (Mr. EASTLAND), Mr. Rehnquist has set the memorandum into a narrow context of a statement for Justice Jackson's tentative use in conference. Without attacking Mr. Rehnquist's candor in regard to this memorandum, I believe that serious questions can be raised as to the actual context in which the memorandum was drafted and for which the memorandum was to serve.

I ask unanimous consent that the memorandum be printed in the RECORD.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

MEMORANDUM

Rehnquist states that the memorandum was prepared "as a statement of Justice Jackson's tentative views for his own use" for the conference of the Justices in the *Brown* case rather than as a statement of Rehnquist's own position and recommendation to the Justice.

1. The memorandum does not represent what is known of Justice Jackson's views on minority rights. It is highly improbable that he at any time believed that *Plessy* v. *Ferguson* had been rightly decided. Justice Jackson had a strong record against racial discrimination, exemplified most notably by his dissenting opinion in the Japanese relocation case, *Korematsu* v. *United States*, 323 U.S. 214, 242. (I should point out two cases in which he voted to sustain California's restrictions on aliens' rights to own land and fish, *Oyama* v. *California*, 332 U.S. 633, *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410.) More telling, perhaps, is that Mr. Justice Jackson ultimately not only voted with the rest of the Court in *Brown* v. *Board of Education* but actually left his hospital bed to go directly to the Court to be present for the announcement of the decision on May 17, 1954. And aside from his judicial career, Justice Jackson had been America's chief prosecutor at the Nuremburg trials where his opposition to racism was manifested and reinforced. He referred to that experience in *Beauharnais* v. *Illinois*, 342 U.S. 250, 304 (dissent):

"Group libel statutes represent a commendable desire to reduce sinister abuses of our freedoms of expression—abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and persecute, even to extermination, its minorities. While laws or prosecutions might not alleviate racial or sectarian hatreds and may even invest scoundrels with a specious martyrdom, I should be loath to foreclose the States from a considerable latitude of experimentation in this field."

Even in that context, however, he was conscious that such laws must be carefully drafted because "the shoe may be on the other foot in some prosecution tomorrow." *Id.*

Not only does Justice Jackson's prior record on race repel the attribution of a pro-*Plessy* v. *Ferguson* view to him, but the memorandum contains another position which could not possibly have been intended to reflect that of the Justice:

"To the argument made by Thurgood, not John Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men."

Even if it stood alone, his opinion in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, would be eloquent testimonial that he believed that the Court can and must protect the rights of minorities, including "Jehovah's Witnesses." Of the many passages in the opinion which bear this out, quotation of one is sufficient:

"It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

"The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Id.* at 641–642 (footnote omitted).

Indeed, Mr. Justice Jackson's entire career repudiates the claim that the memorandum reflected the Justice's view that

"* * * where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases."

See, e.g., *American Communication Assn.* v. *Douds*, 339 U.S. 382, 422 (separate opinion) (freedom of speech and association); *Johnson* v. *United States*, 333 U.S. 10 (Fourth Amendment); *Everson* v. *Board of Education*, 330 U.S. 1, 18 (dissenting opinion), and *Zorach* v. *Clauson*, 343 U.S. 306, 323 (dissenting opinion) (both dealing with minority rights under First Amendment's Religion clauses). Justice Jackson sometimes disagreed with other members of the Court as to the scope of individual rights under the Constitution, but he yielded to no one in his insistence that the protection of such rights was a primary function of the Supreme Court. To put into his mouth the sentence "One by one the cases establishing such rights have been sloughed off, and crept silently to rest" is to contend that Justice Jackson was willing to repudiate a substantial part of his life's work.

2. There is considerable internal evidence in the memorandum, aside from the views which it expresses, to show that it could not have been intended for the use of Justice Jackson in a conference.

a. Taking the memorandum as a whole, it contains nothing that Justice Jackson did not know, or of which he would have to be reminded by a written memorandum. Doubtless, Justices ask their law clerks to draft summaries of precedents, or arguments of counsel to be used by a Justice at conference. But this memorandum does not contain that kind of legal analysis. It is, rather, a statement of judicial philosophy and well known, if somewhat one-sided, judicial history. It is doubtful whether any Justice would have needed a memorandum to refresh his recollection of the matters contained in that memorandum, but surely Justice Jackson, who was generally regarded as the most able and eloquent advocate on the Court, was unneedful of this kind of prop and would not have asked for it.

b. The title itself is a giveaway, "A Random Thought on the Segregation Cases." A memorandum drafted for use by a Justice in conference would probably have no title at all, but "random" is hardly an appropriate description of a memorandum written pursuant to instructions and for use in serious deliberations. On the other hand, the title is entirely appropriate if the memorandum is indeed what it otherwise appears to be, a memorandum from Mr. Rehnquist to Justice Jackson expressing the law clerk's views.

c. The history recited in the memorandum is so elementary that it would have insulted the intelligence of the other Justices if it had been recited in conference.

d. The personal references to the Justices are inconsistent with the tone which Mr. Jackson would have used, or could have been expected to use. There are three examples of this in the memorandum. Each of these is sufficiently telling that it merits separate attention.

i. "I would suggest that this is a question the Court need never reach; *for regardless of the Justice's* individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction."

If the "I" throughout this memorandum is Justice Jackson (that is, if the memorandum was, as Mr. Rehnquist asserts, a statement of Justice Jackson's own position), then the phrase *"for regardless of the Justice's* individual views on the merits of segregation" does not ring true. Rather, Justice Jackson would have said "I would suggest that this is a question the Court need never reach; for regardless of *our* individual views * * *." Indeed, the singular "Justice's" is (unless it is a typographical error) evidence that the Justice referred to is Justice Jackson being addressed by Mr. Rehnquist.

ii. "If this Court, because its members individually are 'liberal' and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects."

It is at least unlikely that Jackson would have referred to the other members of the Court as "liberal" or that Rehnquist would have thought that this usage was proper for a statement that Jackson would make.

iii. The Third passage leaves little doubt that the "I" is Rehnquist, not Justice Jackson.

"I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy* v. *Ferguson* was right and should be re-affirmed."

I know of no evidence that Justice Jackson was ever "excoriated by 'liberal' colleagues," that is, by other members of the Court. Indeed, since Justice Jackson had never previously taken any position suggesting that *Plessy* v. *Ferguson* was correct, there would have been no occasion for such excoriation. Mr. Rehnquist's explanation is questionable also because the " 'liberal' colleagues" are referred to in the third person, which would have been inappropriate if the memorandum was drafted for Justice Jackson to use in conference when only those colleagues would be addressed. If the memorandum was really intended for Justice Jackson's use in conference, it would have read something like "I realize that it is an unpopular and unhumanitarian position, for which I may be excoriated by some of my brethren * * *."

A minor, and perhaps less compelling, point as to the use of the third person is that one member of the Court is more likely to refer to the others as "brethren," and that a clerk writing for a Justice would adopt this formula. On the other hand, the word "colleague" is precisely the one which one would expect if a clerk was complaining about the treatment he was receiving from his fellow law clerks. Finally, it is particularly unlikely that Mr. Justice Jackson, of all people, should have required a law clerk to draft language for him in response to other members of the Court who had excoriated him for his position. Mr. Justice Jackson, as is well known, was entirely able to take care of himself in such intramural debate.

e. The tone of the memorandum is uncharacteristic of Justice Jackson, but more characteristic of Mr. Rehnquist. Most obvious, perhaps, is the *ad hominem* thrust, "To the argument made by Thurgood, not John Marshall * * *."

3. Evidence of Mr. Rehnquist's subsequent actions strongly suggests that the memorandum is a representation of Mr. Rehnquist's own views.

As I pointed out in an earlier floor speech.

a. The memorandum is entirely consistent with the position Mr. Rehnquist took on racial issues until the time of his nomination. For, even a decade after the *Brown* decision Mr. Rehnquist opposed a local anti-discrimination ordinance, expressing greater concern for the discriminator than those discriminated against. And in 1967 Mr. Rehnquist opposed integration of the Phoenix public schools saying, in that context, "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society." It is far more plausible to attribute the views of that memorandum to one with Mr. Rehnquist's unfortunate record on racial matters than to Mr. Justice Jackson.

b. The passage quoted earlier, "I have been excoriated by 'liberal' colleagues," is illuminated by Mr. Rehnquist's article about the practices of law clerks at the Supreme Court. In that article in *U.S. News & World Report* he objected that "the political cast of the clerks as a group was to the 'left' of either the nation or the Court". It would now appear that the article was, in part, Mr. Rehnquist's reaction to the excoriation to which he referred in his memorandum to Justice Jackson. In that same article Mr. Rehnquist said:

"An ideal clerk ought, in most aspects of his official capacity, to mirror as best he can the mind of the Justice for whom he works. There is room for sensibly presented difference of opinion when the lines of dispute are clearly drawn and in the open, but there is no room for the clerk's deliberate use of his position as research assistant to champion a cause to which his Justice does not subscribe."

As we have already shown, the statement does not appear to mirror Mr. Justice Jackson's mind, particularly on the question of the role of the Court in protecting minority rights. Indeed, if the memorandum is what it appears to be, Mr. Rehnquist's statement of his own views to Justice Jackson, it violates the very precepts which Mr. Rehnquist purported to set forth in the article and whose unconscious violation he ascribed to the other clerks.

c. The *ad hominen* approach of the memorandum is consistent with Mr. Rehnquist's normal style. As I pointed out in my remarks Tuesday, "the contemptuous tone of Mr. Rehnquist's letter [of October 21, 1971, to the *Washington Post*] is almost as disturbing as its content."

d. Mr. Rehnquist's cavalier use of history in the memorandum is mirrored by his argument in opposition to the proposed public accommodation ordinance in Phoenix where he stated:

"There have been zoning ordinances and that sort of thing but I venture to say that there has never been this sort of an assault on the institution where you are told, not what you can build on your property, but who can come on your property."

Yet, in fact, since 1701 the common law has been that a businessman, particularly an innkeeper, is "bound to serve the subject in all things that are within the reach and contemplation of" his calling. *Lane* v. *Cotton*, 12 Mod. 472, 484 (1701), quoted in *Lombard* v. *Louisiana*, 373 U.S. 267, 274 at 277 (concurring opinion). As of 1964 many states and cities had ordinances such as the one proposed for Phoenix. One such was sustained by the Supreme Court during Mr. Rehnquist's own tenure as law clerk. *District of Columbia* v. *John R. Thompson*, 346 U.S. 100.

Mr. SCOTT subsequently said: Mr. President, I have a cablegram addressed to Mr. J. R. Kendall, International Government Relations Adviser, Washington, from "Mobileurope, London." The cablegram is from Mr. Donald Cronson. The cablegram, which is from London, reads as follows:

Please relay following memorandum to William Rehnquist.

A reporter telephoned me from the States last night and asked if I had any recollection concerning the memorandum on the segregation cases attributed to you in Newsweek. As a result of his request I have examined my files and reflected on the matter. It is my recollection that the memorandum in question is my work at least as much as it is yours and that it was prepared in response to a request from Justice Jackson to prepare such a memorandum. My recollection of the events leading to it is as follows.

Prior to the preparation of the memorandum referred to in Newsweek another memorandum was prepared of which I still have a copy. It is my recollection that I actually typed the first memorandum, although it is possible that you did. It was in any case the result of collaboration between us. That first memorandum supported the position that Plessy was wrongly decided, and that the Court should announce that it was wrongly decided, but that the Court should leave to the Congress the responsibility for taking action to change the system of segregated education that had grown up on the basis of the wrong decision in Plessy. After examining that memorandum—

I say parenthetically that it is still in the possession of Mr. Cronson, in London.

Justice Jackson requested that a memorandum be prepared supporting the proposition that Plessy was correctly decided. The memorandum supporting Plessy was typed by you, but a great deal of its content was the result of my suggestions. A number of phrases quoted in Newsweek I can recognize as having been composed by me, and it is probable that the memorandum is more mine than yours.

I leave to your good judgment whether my recollection as set forth above should be publicized.

If you think I can provide any further information that will be helpful please telephone me. My office number in London is 839 1262. My home number is London 493 8181 or Gstaad, Switzerland, 43674.

DONALD CRONSON.

I think that this furnishes some very interesting and further enlightenment and establishes the credibility of Mr. Rehnquist which was so unwarrantedly attacked today.

If reporters are interested, let them call Mr. Cronson in London.

Mr. JAVITS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. BROCK). Without objection, it is so ordered.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Hackney, one of its reading clerks, announced that the House had disagreed to the amendments of the Senate to the bill (H.R. 6065) to amend section 903(c)(2) of the Social Security Act; agreed to the conference asked by the Senate on the disagreeing votes of the two Houses thereon, and that Mr. MILLS of Arkansas, Mr. ULLMAN, Mr. BURKE of Massachusetts, Mr. BYRNES of Wisconsin, and Mr. BETTS were appointed managers on the part of the House at the conference.

The message also announced that the House had disagreed to the amendments of the Senate to the bill (H.R. 10604) to amend title II of the Social Security Act to permit the payment of the lump-sum death payment to pay the burial and memorial services expenses and related expenses for an insured individual whose body is unavailable for burial; asked a conference with the Senate on the disagreeing votes of the two Houses thereon, and that Mr. MILLS of Arkansas, Mr. ULLMAN, Mr. BURKE of Massachusetts, Mr. BYRNES of Wisconsin, and Mr. BETTS were appointed managers on the part of the House at the conference.

LEGISLATIVE SESSION

Mr. BYRD of West Virginia. Mr. President, I move that the Senate resume the consideration of legislative business.

The motion was agreed to, and the Senate resumed the consideration of legislative business.

large sums and these will continue to increase.

One large part of the national defense figure is military retirement, which increases yearly. From fiscal year 1966 to 1972, the cost of paying military retirement more than doubled. And the accrued, unpaid military retirement rose from $66 billion in fiscal year 1966 to $113.8 billion in fiscal year 1972.

I have given just a few examples of the trends in Government spending, but it is evident that we are spending more and more. The current tax cut can only be effective in the short-run as a stimulus to the economy and will, I believe, inevitably give way to tax increases to cover the rising cost of Government programs. I think the people should be fully advised of this fact now so that they may fully understand the situation and make their plans accordingly.

HIGHWAY TRUST FUNDS MUST BE PROVIDED TO COMPLETE PROGRAM

Mr. RANDOLPH. Mr. President, I call the attention of the Senate to the deletion by the conferees of a section of the Revenue Act of 1971 which would have prevented a reduction in income for the Highway Trust Fund.

In its original consideration of this measure, the House Ways and Means Committee repealed the excise tax on light trucks, a tax that is dedicated to the Highway Trust Fund and one that would provide approximately $350 million during the current fiscal year for highway transportation development. I called this situation to the attention of the Senate Finance Committee, explaining that this loss of income for the trust fund would prolong the meeting of highway program commitments. To compensate for this loss, the Senate Finance Committee designated 7 percent of the excise tax on wine and beer for the Highway Trust Fund.

During floor consideration of the bill, there were proposals to earmark this money for other purposes and others to delete it entirely from the trust fund. All of these proposals were rejected by the Senate.

I inquire of my friend, the chairman of the Finance Committee, if it is correct that the germaneness rule of the House of Representatives was imposed on the Senate during the conference on this bill so that the transfer of money to the trust fund could not be agreed to. Did this rule give the Senate conferees no choice but to accede to avoid a total impasse on important legislation?

Mr. LONG. That was exactly the situation. It was purely a matter of germaneness. I regret that was the case. However, as I said in my previous statement, unfortunately under the Reorganization Act, the Senate has permitted itself to be governed by the House of Representatives rule of germaneness rather than by the Senate rule.

Mr. RANDOLPH. Is it also true, Mr. Chairman, that the elimination of the transfer was not based on opposition by the conferees to the highway trust fund or the program it supports, but was solely a matter of adhering to the House rule?

Mr. LONG. The Senator is entirely correct.

Mr. RANDOLPH. I remind Senators that the action they approved last month was not an addition of new revenues to the highway trust fund. It was compensation for revenues that will be lost because of the repeal of the light truck tax. The deletion of this income will cause a total loss estimated at $2.2 billion over the present statutory life of the trust fund. This is equivalent to approximately 40 percent of 1 year's income for the Federal highway program.

I ask the chairman of the Finance Committee if this deficiency in income means that the trust fund will have to be continued beyond its present 1977 expiration date since the lost revenues are needed to complete the Interstate System and to carry out other facets of the highway program already authorized?

Mr. LONG. If we are unable to provide additional tax so as to provide for this, I hope the Committee on Appropriations will be willing to vote an appropriation into the trust fund to assure enough funds will be available to keep the highway program on schedule.

Mr. RANDOLPH. The concept of the highway trust fund is being questioned and there are those who believe its resources should be committed to other transportation purposes.

The action of the conferees in reducing the trust fund's income, however, can not be looked at as a victory for this point of view. It must, instead, be recognized as a setback. Not only does the loss of revenue to the trust fund prolong the day when consideration can be given to altering the form and direction of the highway program, it denies improved transportation to the American people and raises the ultimate cost they must pay for highway construction.

Mr. President, I thank the chairman for his responsiveness and his attention to the subject. Our debate highlights the importance of restoring this lost revenue in the future.

The PRESIDING OFFICER (Mr. BURDICK). All time on the conference report has expired.

The question is on agreeing to the conference report. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. MANSFIELD (after having voted in the affirmative). On this vote I have a pair with the distinguished Senator from Texas (Mr BENTSEN), who is absent on official business. If he were present and voting, he would vote "yea;" if I were at liberty to vote, I would vote "nay." I withdraw my vote.

Mr. BYRD of West Virginia. I announce that the Senator from New Mexico (Mr. ANDERSON), the Senator from Virginia (Mr. BYRD), the Senator from Georgia (Mr. GAMBRELL), the Senator from Oklahoma (Mr. HARRIS), the Senator from Iowa (Mr. HUGHES), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. JACKSON), the Senator from Arkansas (Mr. MCCLELLAN), the Senator from South Dakota (Mr. MCGOVERN), the Senator from Maine (Mr. MUSKIE), the Senator from Georgia (Mr. TALMADGE), and the Senator from California (Mr. TUNNEY) are necessarily absent.

I further announce that the Senator from Texas (Mr. BENTSEN) is absent on official business.

I also announce that the Senator from Idaho (Mr. CHURCH) is absent because of illness.

I further announce that, if present and voting, the Senator from Georgia (Mr. GAMBRELL), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Washington (Mr. Jackson), and the Senator from California (Mr. TUNNEY) would each vote "yea."

I further announce that, if present and voting, the Senator from Oklahoma (Mr. HARRIS) and the Senator from South Dakota (Mr. MCGOVERN), would each vote "nay."

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. BENNETT) and the Senator from South Dakota (Mr. MUNDT) are absent because of illness.

The Senator from Nebraska (Mr. HRUSKA), the Senator from Maine (Mrs. SMITH), and the Senator from Vermont (Mr. STAFFORD) are necessarily absent.

Also, the Senator from New York (Mr. BUCKLEY), the Senator from Oregon (Mr. HATFIELD), and the Senator from Illinois (Mr. PERCY) are necessarily absent.

If present and voting, the Senator from Nebraska (Mr. HRUSKA), the Senator from Illinois (Mr. PERCY), and the Senator from Maine (Mrs. SMITH) would each vote "yea."

The result was announced—yeas 71, nays 6, as follows:

[No. 443 Leg.]

YEAS—71

Aiken	Ellender	Packwood
Allen	Fong	Pastore
Allott	Fulbright	Pearson
Baker	Goldwater	Pell
Bayh	Griffin	Proxmire
Beall	Gurney	Randolph
Bellmon	Hansen	Ribicoff
Bible	Hart	Roth
Boggs	Hartke	Saxbe
Brooke	Inouye	Schweiker
Burdick	Javits	Scott
Byrd, W. Va.	Jordan, N.C.	Sparkman
Cannon	Jordan, Idaho	Spong
Case	Kennedy	Stennis
Chiles	Long	Stevens
Cook	Magnuson	Stevenson
Cooper	Mathias	Symington
Cotton	McGee	Taft
Cranston	McIntyre	Thurmond
Curtis	Metcalf	Tower
Dole	Miller	Weicker
Dominick	Mondale	Williams
Eagleton	Montoya	Young
Eastland	Moss	

NAYS—6

Brock	Fannin	Hollings
Ervin	Gravel	Nelson

PRESENT AND GIVING A LIVE PAIR, AS PREVIOUSLY RECORDED—1

Mansfield, against.

NOT VOTING—22

Anderson	Hatfield	Muskie
Bennett	Hruska	Percy
Bentsen	Hughes	Smith
Buckley	Humphrey	Stafford
Byrd, Va.	Jackson	Talmadge
Church	McClellan	Tunney
Gambrell	McGovern	
Harris	Mundt	

So the conference report was agreed to.

EXECUTIVE SESSION—NOMINATION OF WILLIAM H. REHNQUIST

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate go

into executive session and that the distinguished minority leader be recognized.

The PRESIDING OFFICER. Without objection, it is so ordered.

CLOTURE MOTION

Mr. SCOTT. Mr. President, I send to the desk a cloture motion and ask that it be stated.

The PRESIDING OFFICER. The motion for cloture having been filed, the clerk will state the motion.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, hereby move to bring to a close the debate on the confirmation of the nomination of William Rehnquist, to be an Associate Justice of the Supreme Court of the United States.

1. Hugh Scott.
2. Paul J. Fannin.
3. William B. Saxbe.
4. Marlow W. Cook.
5. Lowell P. Weicker, Jr.
6. J. Caleb Boggs.
7. Robert Dole.
8. Robert Taft, Jr.
9. Carl T. Curtis.
10. Howard H. Baker, Jr.
11. Henry Bellmon.
12. Peter H. Dominick.
13. Gordon Allott.
14. Ernest F. Hollings.
15. Strom Thurmond.
16. Bill Brock.
17. Richard S. Schweiker.
18. William V. Roth, Jr.
19. Robert P. Griffin.
20. James O. Eastland.
21. Len B. Jordan.
22. Clifford P. Hansen.
23. Barry Goldwater.
24. Jack Miller.
25. James B. Pearson.
26. James L. Buckley.
27. Edward J. Gurney.
28. Norris Cotton.
29. J. Glenn Beall, Jr.
30. John G. Tower.

Mr. SCOTT. Mr. President, after consultation with the distinguished majority leader, I ask unanimous consent that the time on this motion start running on Saturday morning at 10 a.m.

The PRESIDING OFFICER. Is there objection?

Mr. BAYH. Mr. President, reserving the right to object, I want to ask a question of our distinguished minority leader. Is it a sign of weakness that the Senator might have to use that second cloture motion?

Mr. SCOTT. I will be glad to reply on my time.

The Senator reserved the right to object?

Mr. BAYH. I shall not object.

Mr. SCOTT. I understand. I am glad to reply. It is a sign of convenience. We are trying to accommodate Senators; and also it is a sign of credibility, because I promised Senators that I will file a cloture motion every day from now until the end of the session.

I assume that if the stars are in the right ascendancy perhaps the motion on Saturday will not be necessary and that we may be able to bring matters to a solution tomorrow in the vote.

But I am one who believes in caution and confidence, as I said to my friend the other day. Therefore, I will be doing this every day until Senators decide they want to go home. I rather think two-thirds of the Senators want to go home now. If they do not, we will give them another chance, and another next week.

Mr. BAYH. Mr. President, will the Senator yield for an observation?

Mr. SCOTT. I yield.

Mr. BAYH. I hope that more than one-third of the Senate and hopefully a majority of the Senate on both sides will be more concerned about other things than how the stars are, and weigh the merits of this man who will be on the Supreme Court for many moons if he is confirmed.

Mr. SCOTT. The merits bring us to invoke the rule. We are convinced, I believe, that a vast majority of the Senators, based on the merits, are in favor of the nominee, and believing that, we see in our minds that the time has come to vote. The Senator from Indiana may be unwilling to vote now or at any time in the foreseeable future, but this is one of the things on which we disagree.

Mr. BAYH. I respect the Senator's right to disagree, but I assure the Senator there are foreseeable dates in the future when the Senator from Indiana would be willing to vote.

I would like to ask my friend, the Senator from Pennsylvania, if he had an opportunity to read or have discussed with him the remarks that the Senator from Indiana made today in which he read into the RECORD the historical decisions that had been decided by the late distinguished Justice Jackson, and if he had a chance to review the memorandum, which the nominee said were Justice Jackson's views and not his own. The decisions, I cited we know, are Justice Jackson's.

Mr. SCOTT. I would say this to the Senator.

The PRESIDING OFFICER. The Senator's 5 minutes have expired.

Mr. SCOTT. Mr. President, I ask unanimous consent that I may proceed for an additional 3 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SCOTT. The distinguished Senator will remember I said yesterday that the nominee had been requested by the Justice to furnish him information on one side, one point of view of the question. I made the point that I, myself, disagreed with that point of view. I further went on to say that those who knew Justice Jackson, and we had outside information on this, know he already had the views of his brethren on the bench on the opposite side and he was, therefore, asking an employee to prepare information on one side of an issue, having been informed on the other. I do not see anything wrong with that.

The Senator from Indiana has staff members and he probably asks them to give him both sides of a question because he wants to be a well-rounded Senator—because the Senator is not as well rounded in some aspects as I may be, but well rounded—and I am sure he likes to hear both sides of the question.

Mr. BAYH. The observation of the Senator from Indiana is that these are various questions that we are trying to resolve. The Senator from Indiana and some of us are concerned, deeply concerned. I understand the junior Senator from Massachusetts has a presentation he wishes to make. We are looking at information on Rehnquist as we received it 24 hours ago. It is rather contrary to that stated by the Senator from Pennsylvania. This is the kind of thing we want the Senate to consider without thinking of the tinkling of Christmas bells and without being under the pressure of cloture. This is hardly the way to put a man on the Supreme Court.

Mr. SCOTT. I may be wrong but I have a strong impression the Senator from Indiana was prepared to vote against the nominee before he heard of him and certainly from the moment he did hear of him, but I am not sure too many others have been similarly persuaded. We will find out if the Senator lets us get to a vote. If we apply the standards which the Senator from Indiana is seeking to apply he very well knows one-half of the Founding Fathers of this Nation would never have qualified for confirmation to the Supreme Court.

He knows that Abraham Lincoln could not have made it before he came to the Presidency because of the Lincoln-Douglas debate in which his remarks in today's context would certainly be deemed negative in some respects by some people—by many people. Certainly I think the only member of the Founding Fathers who was in the clear, by the Senator's test, would be Benjamin Franklin.

Mr. BAYH. The Senator from Indiana has read some chapters of history relative to some of the activities of our beloved Mr. Franklin in Paris that might bring into question whether he would be qualified under the test placed by some, but I am not suggesting this type of thing.

I think my friend, the Senator from Pennsylvania, is not his usual benevolent and straightforward self when he suggests that any Member of this body is prepared to vote against a nominee before he has even heard of him.

I was more than happy to go along with Justice-designate Lewis H. Powell. I was hoping to be able to go along with William H. Rehnquist, but I must say I am concerned, and I think I have the obligation to express this concern. I would like to have the question fully discussed before the Senate votes on him, even if we are voted down by an overwhelming vote.

Mr. SCOTT. I thank the Senator. He has expressed his views, and he has done so with considerable opportunity to appear many times, more often than any other single Senator has appeared, on this issue.

The Senator opened this colloquy by asking me whether the filing of a cloture motion was a sign of weakness. I think I had better answer that it is a sign of strength. If the Senator thinks there are any signs of weakness around here, why does he not bring the matter to a vote and we shall see where the weakness is?

Mr. BAYH. The Senator from Indiana is perfectly happy to suggest that the nomination be put to a vote when the Senate has had an adequate time to

discuss it; this is my position now, and I do not intend to change it.

Mr. SCOTT. The Senator continues to hold that time when we can come to a vote, if I can use a papal term, in pectore—only in his own breast. He has not confided to the Senate and to his colleagues when it will be revealed from within his breast his intention to let the remainder of the Senate express its will.

We have been through this sort of thing before, and we have only one remedy, which is cloture, and I am sure the Senator applauds my filing of the cloture motion, because I am so clearly within the rule.

Mr. BAYH. The Senator from Indiana in no way suggested that his friend, the Senator from Pennsylvania, would violate that first rule of the Senate, and I think he approaches this with not only his conscience but his duty in mind. I would suggest that I can better answer that question, whether it is in pectore, or ad infinitim, or whatever it might be.

Mr. SCOTT. Or even ad nauseam.

Mr. BAYH. Well, perhaps it is ad nauseam to all of us.

The PRESIDING OFFICER. Is there objection to the unanimous-consent request of the Senator from Pennsylvania? Without objection, it is so ordered.

ORDER OF BUSINESS

Mr. BYRD of West Virginia. Mr. President, has the Senate gone back into legislative session?

The PRESIDING OFFICER. No, it has not.

Mr. BYRD of West Virginia. Under the order, the Senate was to go back into legislative session.

The PRESIDING OFFICER. Without objection, the Senate will return to legislative session.

LEGISLATIVE SESSION

The Senate resumed the consideration of legislative business.

ORDER FOR RECOGNITION OF SENATOR JORDAN OF NORTH CAROLINA

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that following the recognition of the Senator from Utah (Mr. Moss) under the previous order, the Senator from North Carolina (Mr. JORDAN) be recognized for not to exceed 2 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

CLAIM OF SHOSHONE TRIBE OF INDIANS

Mr. MOSS. Mr. President, I ask the Chair to lay before the Senate a message from the House of Representatives on S. 2042.

The PRESIDING OFFICER laid before the Senate the amendment of the House of Representatives to the bill (S. 2042) to provide for the apportionment of funds in payment of a judgment in favor of the Shoshone Tribe in consolidated dockets numbered 326–D, 326–E, 326–F, 326–G, 326–H, 366, and 367 before the Indian Claims Commission, and for other purposes, which was to strike out all after the enacting clause, and insert:

That the funds on deposit in the Treasury of the United States to the credit of the Shoshone Nation or Tribe of Indians and the Shoshone-Bannock Tribes that were appropriated by the Act of June 19, 1968 (82 Stat. 239), to pay a judgment in the sum of $15,700,000 entered by the Indian Claims Commission in consolidated dockets numbered 326–D, 326–E, 326–F, 326–G, 326–H, 366, and 367, and the interest thereon, after deducting attorneys' fees, litigation expenses, and other appropriate deductions, shall be apportioned by the Secretary of the Interior to the Shoshone Tribe of the Wind River Reservation, Wyoming, the Shoshone-Bannock Tribes of the Fort Hall Reservation, Idaho, and the Northwest Band of Shoshone Indians (hereinafter the "three groups"), as set forth in this Act.

SEC. 2. The sum of $500,000, and the interest thereon, less attorneys' fees and other appropriate deductions all in the proportion that the $500,000 bears to the $15,700,000, shall be credited to the Shoshone-Bannock Tribes of the Fort Hall Reservation for claims of the tribes enumerated in dockets numbered 326–D, 326–E, 326–F, 326–G, and 366.

SEC. 3. The sum of $1,375,000 plus the earned interest thereon less $181,732 shall be credited to the Northwestern Bands of Shoshone Indians for claims of the bands enumerated in dockets numbered 326–H and 367.

SEC. 4. The remainder of the award shall be apportioned between the Shoshone-Bannock Tribes of the Fort Hall Reservation and the Shoshone Tribe of the Wind River Reservation in accordance with an agreement entered into between the Shoshone-Bannock Tribes and the Shoshone Tribe of the Wind River Reservation in May 1965, approved by the Associate Commissioner of Indian Affairs in December 1965.

SEC. 5. For the purpose of apportioning the award in accordance with this Act, membership rolls, duly approved by the Secretary of the Interior, shall be prepared for each of the three groups, as follows:

(a) The governing body of the Shoshone Tribe of the Wind River Reservation and the governing body of the Shoshone-Bannock Tribes, each shall, with the assistance of the Secretary, bring current the membership rolls of their respective tribes, to include all persons born prior to and alive on the date of this Act, who are enrolled or eligible to be enrolled in accordance with the membership requirements of their respective tribes.

(b) The proposed roll of the Northwestern Bands of Shoshone Indians entitled to participate in the distribution of the judgment funds shall be prepared by the governing officers of said Northwestern Bands, with the assistance of the Secretary of the Interior, within six months after the date of the enactment of this Act authorizing distribution of said funds. The roll shall include all persons who meet all of the following requirements of eligibility:

(1) They were born prior to and alive on the date of the enactment of this Act;

(2) Either their names appear on one of the following Indian census rolls of the Washakie Sub-Agency of the Fort Hall jurisdiction:

(a) Roll dated January 1, 1937, by F. A. Gross, Superintendent of the Fort Hall Reservation.

(b) Roll dated January 1, 1940, by F. A. Gross, Superintendent of the Fort Hall Reservation.

(c) Roll dated March 10, 1954.

(d) Roll dated April 21, 1964.

or they possess one-quarter Shoshone Indian blood and they are descendants of those appearing on at least one of said rolls;

(3) They are not recognized as members of the Shoshone-Bannock Tribes of the Fort Hall Reservation, the Shoshone Tribe of the Wind River Reservation, or any other Indian Tribe; and

(4) They shall elect not to participate in any settlement of claims pending before the Indian Claims Commission in docket 326–J, Shoshone-Goshute, and docket 326–K, Western Shoshone.

The proposed roll shall be published in the Federal Register, and in a newspaper of general circulation in the State of Utah. Any person claiming membership rights in the Northwestern Bands of Shoshone Indians, or any interest in said judgment funds, or a representative of the Secretary on behalf of any such person, within sixty days from the date of publication in the Federal Register, or in the newspaper of general circulation, as hereinbefore provided, whichever publication date is last, may file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from such proposed roll. The Secretary shall review such appeals, and his decision thereon shall be final and conclusive. After disposition of all such appeals to the Secretary, the roll of the Northwestern Bands of Shoshone Indians shall be published in the Federal Register and such roll shall be final.

SEC. 6. The funds apportioned to the Northwestern Band of Shoshone Indians, less attorneys' fees, and expenses due the attorneys representing the Northwestern Band under an approved contract, effective March 1, 1968, shall be placed to its credit in the United States Treasury and shall be distributed equally to the members whose names appear on the final roll and in accordance with the provisions of this Act.

(a) The per capita shares shall be determined on the basis of the number of persons listed on the proposed roll published as hereinbefore provided and the number of persons on whose behalf an appeal has been taken to the Secretary contesting omission from such proposed roll. The share of those persons excluded from the final roll by reason of the decision of the Secretary on appeal shall be distributed equally to the persons included on the final roll.

(b) The Secretary shall distribute a share payable to a living enrollee directly to such enrollee. The per capita share of a deceased enrollee shall be paid to his heirs or legatees upon proof of death and inheritance satisfactory to the Secretary, whose findings upon such proof shall be final and conclusive. A share or interest therein payable to enrollees or their heirs or legatees who are less than twenty-one years of age or who are under legal disability shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary determines appropriate to protect the best interest of such persons.

SEC. 7. (a) The funds apportioned to the Shoshone-Bannock Tribes of the Fort Hall Reservation shall be placed to their credit in the United States Treasury. Seventy-five percent of such funds shall be distributed per capita to all persons born on or before and living on the date of this Act who are duly enrolled on the roll prepared in accordance with section 5(a) of this Act.

(b) The per capita shares shall be determined on the basis of the number of persons eligible for per capitas and the number of persons rejected for per capitas who have taken a timely appeal. The shares of those persons whose appeals are denied shall revert to the Shoshone-Bannock Tribes to be expended for any purpose designated by the tribal governing body and approved by the Secretary.

(c) Sums payable to enrollees or their heirs or legatees who are less than twenty-one years of age or who are under a legal disability shall be paid in accordance with such procedures, including the establishment of

now covered by programs that have reservoirs with some fluoridation. Approximately 120 million are not. If we were able to place the $9 million in communities in the country, we could cover an additional 45 million Americans.

This program is endorsed by 45 different organizations including the American Medical Association, the American Dental Association, the American Association of Dental Schools, the American Association of Industrial Dentists, the Association of Public Health Dentists. The list is on page 7 of the committee report.

I would say that this is really one of the most effective and important kinds of programs that can be included in the proposed legislation. If any of the people who testified before our committee, with the exception of those who came specifically to oppose fluoridation, were asked the one action that could be taken by Congress to really help meet the problems of tooth decay, they would say it is in the area of fluoridation.

I think this program is extremely modest—only $9 million. We know, in terms of appropriations, that it will be less, but it can have an important voluntary impact on communities in this Nation. Approximately 95 percent of tooth decay occurs in children under 15 years of age. They do not have a voice in the local communities. When it comes down to the town fathers, who decide where the money is going to be spent, too often we have seen, in the course of our testimony, that the money, a few thousand dollars, has not been there for the development of a fluoridation program. We think this will provide additional impetus to meet the problems of tooth decay in our country.

Mr. PASTORE. Mr. President, will the Senator yield?

Mr. KENNEDY. I yield.

Mr. PASTORE. Will the Senator be against this amendment?

Mr. KENNEDY. I am against this amendment.

Mr. PASTORE. I did not hear that.

Mr. KENNEDY. I hope the amendment is rejected.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. MAGNUSON. Will the Senator yield me 20 seconds?

Mr. KENNEDY. I yield.

Mr. MAGNUSON. I appreciate the action of the Senator from Massachusetts and the other committee members on this very important bill. I now wish to add the Senator from Maryland (Mr. MATHIAS) as a cosponsor of the bill.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. EAGLETON). Without objection, it is so ordered.

EXECUTIVE SESSION—NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

CLOTURE MOTION

The PRESIDING OFFICER (Mr. EAGLETON). The hour of 11 a.m. having arrived, under the unanimous consent agreement, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion which the clerk will state.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close the debate on the confirmation of the nomination of William Rehnquist, to be an Associate Justice of the Supreme Court of the United States:

1. Hugh Scott
2. Paul Fannin
3. Clifford Hansen
4. Bill Brock
5. William Saxbe
6. Marlow Cook
7. Howard Baker
8. James Pearson
9. Roman Hruska
10. Glenn Beall
11. Robert Dole
12. Barry Goldwater
13. Henry Bellmon
14. Carl Curtis
15. Ted Stevens
16. Norris Cotton
17. Mark Hatfield
18. Robert Griffin
19. James Eastland
20. Gordon Allott
21. Ernest Hollings
22. John Tower
23. James Buckley
24. Edward J. Gurney
25. Len B. Jordan
26. Lowell Weicker
27. Robert Taft, Jr.

The PRESIDING OFFICER. The time between now and 12 noon will be equally divided and controlled between the distinguished Senator from Indiana (Mr. BAYH) and the distinguished minority leader (Mr. SCOTT) or the designees thereof.

Who yields time?

Mr. BAYH. Mr. President——

The PRESIDING OFFICER. The Senator from Indiana.

Mr. BAYH. Mr. President, so that we might get the hour's debate started prior to the cloture vote, I yield myself such time as may be necessary.

Mr. President, we are about to undertake a cloture vote, which is unique in Senate history—this effort to shut off debate. I have read the annals and had my staff read the annals, and this is the first time any of us have been able to find where a debate was labeled a filibuster before the first day had expired. There is no way in which the present discussion of the merits of the Supreme Court nominee can be described as a filibuster. I have listened with great interest to some of the strongest supporters of filibusters, who suggest now that the whole philosophy of the filibuster should change. It will be interesting to see whether, when other issues are presented, these colleagues are equally convinced that the filibuster has become outmoded.

The Senator from Indiana has not been a supporter of the filibuster, and on most occasions has voted to terminate debate. On all occasions when the debate has become unreasonable, I have urged that the will of the Senate be put.

Mr. President, here we are talking about a Supreme Court nominee, a Supreme Court nominee who is going to be on the Supreme Court for a quarter of a century, perhaps for three decades. To suggest before the first day of debate has transpired that a filibuster is in progress is, in my judgment, a rather weak argument to present to the Senate.

Mr. President, so that our colleagues may have something to base their judgment upon as to whether, indeed, we are talking about a filibuster or not, the Senator from Indiana would like to put into the RECORD at this time the length of debate on other Supreme Court nominees.

We heard the Senator from Massachusetts describe the other day that in one nomination there was about a 4-month debate, after which the Justice reached the Court.

The Senator from Indiana is not suggesting a 4-month debate, nor any debate of such duration, but, indeed, he does feel that we should have adequate time to answer the questions that have been raised.

The Fortas nomination followed a rather extended pattern. The nomination was made on the 26th of June; debate began not until the 24th of September. There were two cloture votes, and we found ourselves into early October, before the nomination was withdrawn. In fact, we were never allowed to discuss the nominee's merits. All the debate centered around the motion to take up the nomination. There was, of course, an equal delay on Judge Thornberry.

The Haynsworth nomination was made on the 18th of August. Debate began on the 13th. The vote was taken on the 21st of November—from the 13th of November to the 21st of November.

The Carswell nomination was made on the 19th of January; debate began on the 13th of March; and a final vote was not taken until April 8.

Today we find ourselves, on the 10th of December, in debate which began late in the afternoon of the 6th. I ask the Senate to look at the equity of this, regardless of how one feels on the merits. I admit very strongly that I feel, on the merits, that Mr. Rehnquist should not reach the Court, but I wonder whether one could adequately describe as a filibuster a debate which began late in the afternoon of the 6th, and a cloture motion was filed on the 8th, and on the morning of the 7th the distinguished minority whip was calling this a filibuster.

During the period of time that we have had to debate the nomination, I would like to call to the Senate's attention that we have considered several other important pieces of legislation.

Let me just read the list of matters which the Senate has considered during the time the nomination has been before us, to show that we have not even

had full opportunity to debate the question before us: The Flood Insurance Act; supplemental appropriations; District of Columbia appropriations; District of Columbia Revenue Act; Federal election reform; Federal credit unions; Defense appropriations; the Revenue Act; foreign economic assistance; foreign military assistance; conquest of cancer; Alaska Native lands; Public Health Service.

Even this morning we find ourselves debating two important pieces of health legislation and taking time away from the Supreme Court nomination.

I am not going to take too much of the Senate's time on the merits of whether they feel this is a filibuster or not, because I think most of our colleagues are going to vote really not on whether they feel this is a filibuster or not, but rather on the merits of the issue. The distinguished Senator from Alabama, who is not here, who very dedicately yesterday said he was going to remain resolute in his feeling about free debate, but felt very strongly opposed to the Senator from Indiana on the merits. I salute him for sticking to this particular principle, if that is what he feels. I might disagree with him on that principle, but there is a man who stays with to what he believes, and I salute him for it.

This, Senators might be interested to know, is a rather unique nomination which is before us. I noticed just recently that for the first time in our history the NAACP urges that we vote against cloture because they feel so strongly about the Rehnquist nomination.

I feel that there have been significant questions raised in the past 12 hours. The distinguished minority leader read a telegram into the RECORD yesterday that arrived from somebody in London I had never heard of, who was a coclerk of Mr. Rehnquist. If we read—and I ask my colleagues not to take my word for it but to read the telegram of Mr. Donald Cronson, who was said to be a coclerk with Mr. Rehnquist—if we read the interpretation he put on that 1952 memorandum, and then read Mr. Rehnquist's interpretation of it as placed on the letter that we received the preceding day, if those do not raise questions that have not been raised before, which should be laid to rest, I have never seen any.

Mr. President, I say once again, just speaking for myself, I am not trying—and I do not think any of us who oppose Mr. Rehnquist are trying—to keep this matter from being voted upon, but to suggest in the early stages of debate that it might be a filibuster and that we want it to end so that we can go home just in order to meet our own personal conveniences, I think, is not in the finest traditions of the Senate.

Mr. FULBRIGHT. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. FULBRIGHT. Mr. President, I associate myself with that comment. I remember how long the debate went on in the Carswell matter. I think that it was for several weeks. It does not matter exactly how long, but it was for a very long time. I am quite confident that the developments that occurred during the course of that time had much to do with the result.

Aside from the fact of whether one considers it to be a filibuster or considers it to be an extended discussion, I have had long experience with extended debate, if one wants to call it that. I have never voted for cloture, except on one occasion, on a foreign aid authorization measure. And on all other matters I have not voted for cloture.

I think the most significant function of the Senate is its capacity to precipitate thorough debate if it has sufficient time.

If we destroy the capacity of the Senate to discuss these important matters—and this is certainly an important matter—we will undermine the significance and influence of the Senate and it will have much less reason to exist.

As I said in my own comments about Mr. Rehnquist, my objection to him is primarily because of his lack of concern and lack of interest in the preservation of the constitutional system. I do not think that he feels the Senate has an important role to play.

On this matter of a filibuster, as the Senator mentioned, to treat the matter casually and to say this is a filibuster after only 2 or 3 days, I think, is an absurd interpretation of the concept of a Senator having the right to a full and thorough discussion and to focus attention on this matter and to have all Senators know what they are voting on, what kind of a man it is and what he believes.

I congratulate the Senator. I think he is entirely correct in his comments about there not being any justification to call this debate a filibuster.

Mr. BAYH. Mr. President, I appreciate the comments as well as the very perceptive statement the Senator from Arkansas made on yesterday relative to the merits of the nomination.

I have not seen a more eloquent presentation of the importance of balance of power and the importance of this body and, indeed, the importance the Court could well play on unlimited executive power.

The PRESIDING OFFICER. Who yields time?

Mr. FANNIN. Mr. President, I yield as much time as he desires to the Senator from Kentucky.

The PRESIDING OFFICER. The Senator from Kentucky is recognized.

Mr. COOK. Mr. President, let me say that I have listened with great interest to the remarks of the Senator from Indiana. I think the Senator will recall that I have asked him on several occasions over the last few days when he thought we could get to a vote. The Senator from Kentucky has gotten no more than a shrug of the shoulder, which means that there is no intention even to think about the necessity of a vote on this particular matter, that it will continue as long as it is possible for it to be continued.

I merely say that I think this is great. As a new Member of the Senate, I sit here and listen with great awe to the Senator from Indiana and the Senator from Arkansas talking about how long the debate should go on.

We had an amendment a week or so ago which was called the Pastore amendment. Under the unanimous-consent agreement, there was 6 hours provided for debate on that amendment. That amendment would have turned the political system of the United States entirely around and absolutely change the political system of the United States more than anything we had ever known of before in our history. And we had 6 hours to debate that measure.

Mr. FULBRIGHT. Mr. President, will the Senator yield?

Mr. COOK. I will yield in a minute.

I say that it was very interesting to note that during the course of the debate there were Senators who were here at all hours and on all occasions except during the course of the debate. And there were a lot of handcuffs that could have been purchased rather cheaply, because everyone had them off for awhile. This is a matter that was discussed for only 6 hours.

Mr. FULBRIGHT. Mr. President, will the Senator yield?

Mr. COOK. I now yield to the Senator from Arkansas.

Mr. FULBRIGHT. Mr. President, if the Senator from Kentucky thought that was so important that there should be great debate on the matter, it would have been very easy to prevent a limitation of 6 hours on debate.

Mr. COOK. Mr. President, I might say to the Senator from Arkansas that his remarks are well taken. However, one has to be on the floor at the time when the majority whip stands up and asks for unanimous consent that a measure be limited to 6 hours for debate. As a matter of fact, there was a time limitation on that amendment before it was even printed and before it was on the desks of the Senators.

Mr. FULBRIGHT. Mr. President, I beg to differ. If the Senator believes that was an important matter, he could have told his own representatives that he registered an objection. That desire would have been carried out.

A Senator does not have to be here. The Senator from Kentucky knows that if he really feels strongly about a matter he could object to a limitation of time if he thought it to be that important.

Mr. COOK. Mr. President, that would be very fine, except that that amendment was not available to the Members of the Senate at the time the agreement was made that there would be 6 hours of debate. No one had an opportunity to see it at that time.

So, what are we faced with? We are faced with the fact that we now get into this debate—and I wish the Senator from Indiana would listen to this—and I do not have any argument over the story that was published in the Washington Post this morning. I have no argument about who former Justice Jackson's secretary was. However, when the Senator from Indiana read the article in the New York Times that talks about Donald Cronson, I wonder why he would say that Mr. Cronson was a so-called clerk. I do not dispute the fact that it was Mr. Jackson's secretary.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. COOK. I yield.

Mr. BAYH. Mr. President, I ask unanimous consent that my remarks be changed to read "clerk" instead of "so-called clerk."

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. COOK. That is fine, because I think there is an inference to "so-called clerk" that has a connotation to it with respect to certain members of the press in the gallery. And they will use it to great advantage, when, in fact, he was a clerk and the record so shows.

I do not see why we should make such remarks.

Mr. BAYH. The Senator from Indiana has not seen such a record.

Mr. COOK. Well, the Senator from Kentucky has.

Mr. BAYH. I take the word of the Senator from Kentucky on the matter. This is the first time I have ever heard anyone say that he has seen a record.

Mr. COOK. Mr. President, we deal in innuendoes and we wake up in the morning and have a new issue because the facts have changed in the last 12 hours.

I have listened with great interest to the remarks of the Senator from California (Mr. CRANSTON). In the first part of his speech, he said very distinctly that the nominee did not answer certain questions. Then when the nominee answers those questions, he says that he does not really believe him, anyway, and it does not mean that much to him. The Senator from California was not satisfied with the answers he got anyway.

The Senator from Indiana knows that he has been talking to practically an empty house and, if the cloture motion fails today at noon, I suppose he will continue to do so.

When the rollcall vote has been taken, the Senators can analyze it, and it will be to their advantage or disadvantage, as the case may be.

If a large number of votes are cast in favor of cloture, even though it might not be successful, the Senator from Indiana can take a cursory glance at the rollcall vote and see who votes on his side of the matter. But if there are not very many, although a substantial majority, that favor cloture, he will continue his argument and no one will listen to him. This matter might be over and we could put it to rest, regardless of whether there is a recess pending.

I might say to the Senator that I am in no hurry to leave. I will stay until Christmas Eve if it is the desire of the Senator from Indiana, and I will be back the day after Christmas to accommodate him if necessary.

I think that now we have gotten to the point where we are running around in circles and arguing about what people said on yesterday and what people may say today.

I will only say that we are now getting very close to getting into a rather serious discussion of a gentleman who can no longer defend himself because he is in the grave, and I refer to the late Justice Jackson.

There is a great deal on Justice Jackson at the University of Chicago that can be discussed on this floor and which may have to be discussed on this floor, but I would say I think it is a little strange that we would be attempting to interpret for ourselves a Justice of the Supreme Court of the United States. I might suggest that maybe this debate will turn into what Justice Jackson's philosophy really was and not what the philosophy of the nominee really is. I would regret if that were to happen.

I read the memorandum of the Senator from Indiana this morning and I might say I think some of the statements in it might shock some Members of the Senate—they shocked me—particularly the blatant remarks such as, "An examination raises the gravest questions of basic honesty."

I think this cuts pretty close to the line.

Mr. BAYH. That is what the Senator from Indiana felt or he would not have said it.

Mr. COOK. I might say, in all fairness to the Senator from Indiana, I wondered whether he had said it. I say that in all fairness and honesty.

Mr. BAYH. I appreciate it.

Mr. COOK. I can only say to my colleagues in the Chamber that I think the issue has been well debated and discussed. During the course of the hearings, after the matter got to committee, we made an agreement as to when the report would go out, and on the time limitation. I might say I congratulate the Senator from Indiana on the minority views they got out in the time period that was set because I think they were aware of the fact that a time limitation had been posed and agreed to by the members of the Committee on the Judiciary.

If we continue the debate until Monday or Tuesday, fine, but I would suggest to the Senator from Indiana that I have other things to do, whether it takes all of next week or does not. I only say to him there are extremely important things that must be accomplished and I am not sure the Senator from Indiana is going to come up with any change in the minds of Members of the Senate the longer he goes on.

Mr. President, I ask unanimous consent to have printed in the RECORD an article entitled, "Ex-Colleague Says Rehnquist Opposed Segregation," published today in the New York Times.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the New York Times, Dec. 10, 1971]

EX-COLLEAGUE SAYS REHNQUIST OPPOSED SEGREGATION

(By Anthony Lewis)

LONDON, December 9.—A former colleague of William H. Rehnquist said tonight that in 1952 Mr. Rehnquist was personally opposed to the legal doctrine of racial segregation.

Donald Cronson, who in 1952 was a law clerk to Supreme Court Justice Robert H. Jackson, along with Mr. Rehnquist, spoke out in the controversy over Mr. Rehnquist's nomination to the Supreme Court.

The latest phase of that controversy has turned on a memorandum bearing Mr. Rehnquist's initials, directed to Justice Jackson, concluding that the doctrine of segregation laid down by the Supreme Court in 1896 should be reaffirmed.

"Both of us," Mr. Cronson said, "personally thought at the time that the 1896 decision, Plessy v. Ferguson, was wrong. We first wrote a memorandum to that effect.

"It is 20 years ago, but I think I still have a copy of that memorandum. Then, afterwards, I think Justice Jackson asked us to prepare a second making the other argument.

"I had a desk right next to Bill's. My guess is that I physically prepared the first memorandum and he the second, but we worked together on both. In what I have read about the second I can recognize some of my purple prose. It was just part of the job."

INTERVIEWED BY PHONE

Earlier today, Mr. Cronson, an oil company executive in Europe, sent a cable to Mr. Rehnquist from London about his recollections. He then left for his home in Gstaad, Switzerland, and he was interviewed there by telephone.

"To this day," Mr. Cronson said, "I am not exactly sure what Justice Jackson's views were—and if I were, I would not say. I think this whole business is completely improper. Such memoranda from law clerks to a Supreme Court Justice should never be published."

The Supreme Court considered the school segregation issue in 1952 and 1953 before finally deciding unanimously on May 17, 1954, to overrule the Plessy case and declared racial segregation unconstitutional. Justice Jackson was part of that unanimous Court.

Mr. DOLE. Mr. President, will the Senator yield?

Mr. COOK. I yield.

Mr. DOLE. There is no doubt in the Senator's mind that Mr. Rehnquist will be confirmed, is there?

Mr. COOK. No doubt at all.

Mr. DOLE. I have not engaged in any conversation on the floor. I did not know there was a debate. I have come to the Chamber every day, and I did not see any debate. Perhaps there has been and I was not aware of it. I would have to check the record.

I think the Senator from Indiana has a perfect right to check the qualifications of the nominee at length, and that is a right that all of us have.

I do not know much about filibusters or extended debate. I learned a little last summer from the distinguished Senator from Arkansas about novices, filibusters, or extended debate, as some would use that term.

But it seems to me some of us would like to move ahead on this nomination and give it careful consideration and then perhaps adjourn this Congress. I think most people in America would be happy to see us adjourn, and I know of a few Members of Congress who would be happy to see Congress adjourn.

It appears to me that Mr. Rehnquist is qualified. As the Senator from Kentucky stated, we could speculate about what might appear in tomorrow morning's Post or Sunday's Post, or any other newspaper. I do not single out any one particular newspaper. But it appears to me there has been very little evidence that Mr. Rehnquist should be questioned further, and I hope the Senate can vote soon.

Mr. COOK. I thank the Senator from Kansas. The Senator knows I agree wholeheartedly with him.

Mr. President, I yield the floor.

Mr. FULBRIGHT. Mr. President, will the Senator yield?

Mr. BAYH. I yield to the Senator from Arkansas.

Mr. FULBRIGHT. Mr. President, the Senator from Kansas is very candid. He said he has not observed any real debate.

The supporters of the nomination have refrained from debate or discussion; they simply have boycotted debating this nomination. I have seen this before. They have declined to engage in discussion with the Senator from Indiana or anyone else about the nomination, standing on their belief they have the votes.

The Senator from Kansas said he does not know about extended debate. I accept that. I do know a lot about it. I have been here a long time. Of course, the Senator from Kansas was a Member of the House, where they did not allow debate of any consequence. They are under rules there which limit them to 5 minutes, and often that is all the time an individual Member has to discuss measures, even the important measures.

I am not criticizing the Senator from Kansas but he identifies his interest with the executive, with the President. He does not believe, as I judge his remarks, that the Senate is a significant body and that it should not debate these matters. I understand and sympathize with that; most people of the world today do identify with the executive power. There are practically no legislatures left in the world that function as legislatures should.

The influence of this body is gradually being eroded, and some of us have been trying to resurrect its traditional influence, especially in foreign policy, which has gotten us into so much trouble in recent years.

I can understand it is much more agreeable to be identified with the throne in any government, and I take that generally to mean the executive. It is always a pleasure to be associated with power, with great power, and the power to speak with a single voice, with what is in some countries such as the Soviet Union, called "cult of the personality" but we call it "cult of the Presidency," I suppose.

I have found during my experience in the Senate that I have been intimate with Presidents for brief periods, but I have found it difficult to maintain that close association because they have a different attitude about the Senate's role regarding major issues of policy in our Government, and I believe the Senate's independence is fundamental to our system.

I do not criticize the President for taking advantage of his power and using it. I do criticize the Senate when it does not exercise its power and responsibility given to it by the Constitution.

My objection to this nominee is not that he is not perfectly adequate to represent the executive branch; he speaks for it. But apparently we are now going to put a man on the judiciary who believes in supremacy of the executive. I think that would distort our fundamental system and undermine the role of the Senate in the governmental structure.

That is my one objection to this nomination.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield.

Mr. BAYH. I was on the floor listening to the very eloquent speech of the Senator from Arkansas. Maybe the Senator from Kansas does not consider that to be worthy of debate, but I thought it was one of the most perceptive presentations I have heard since I have been here, and that has been a day or two. Has anyone in this Chamber raised a challenge to the Senator from Arkansas to try to destroy the logic of that presentation in debate?

Mr. FULBRIGHT. No. The Senator from Kentucky and the Senator from Kansas both remarked that the Senator from Indiana has been speaking to an empty Chamber. All those in support of the nomination have avoided any real, debate. They have refrained from asking questions—almost completely refrained from asking questions of me or the Senator from Indiana. They do not want to discuss the nomination. They want to accept it. They want to close debate and they want to vote it up or down with a minimum of discussion.

This has been true of most people who believe the executive is the source of all wisdom. That is an understandable attitude. Three-fourths of the people of the world today are ruled by dictators of one kind of another—executive government. There are practically no other governments, outside of Scandinavia, the British, and a few others, that have what I call a functioning legislature.

Mr. COOK. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield for a question.

Mr. BAYH. Mr. President, if I may, I wish to impose an inquiry as to the time.

Mr. COOK. I ask the question on the time of the Senator from Arizona.

The question I would like to ask the Senator is: Did he look into the testimony and the background of Chief Justice Burger or Justice Blackmun and make a reasonable interpretation in his mind that these people were not in any way what one could call executive prone in background or any of their decisions, the decision he made on Mr. Rehnquist? Apparently he came to a contrary decision on Chief Justice Burger and Justice Blackmun.

Mr. FULBRIGHT. Yes, indeed, insofar as I knew about Mr. Burger. I have since become well acquainted with Chief Justice Burger. I have become much better acquainted with him since then. I served on a board with him. I have great respect for him. In fact, personally, I like him very much.

I objected at that time that we were being forced to vote ahead of time. There was almost no debate. Only a few days were devoted to it, similar to what is trying to be brought about here. I knew too little about him. I did not vote against Mr. Burger because I had no evidence comparable to what is on the record about this nominee in his attitude toward the Senate and our constitutional system.

I do not regard Mr. Rehnquist as a conservative as far as the Constitution is concerned. He is a loose constructionist; he is not a strict constructionist of the Constitution. He is quite willing to believe the proposition that the Constitution is obsolete insofar as the responsibility of the legislative branch is concerned. His statements were very similar to those of Mr. Katzenbach, who came before our committee and said the Constitution is obsolete insofar as the power to make war is concerned. He said, "That is old fashioned. Today we move quickly."

I object to that.

I do not remember Chief Justice Burger saying anything like that. I like Chief Justice Burger. I have never known—I did not know then or know now—of any evidence that he views our constitutional system the way Mr. Rehnquist views it.

Incidentally, since the Senator brings that up, I spoke about yesterday's column on the great intellectual capacity of Mr. Rehnquist. It said he is an intellectual man. People of this kind are often what I call intellectually arrogant in their views and opinions of the legislature. I remember the late Dean Acheson; God bless his soul. He used to come before us often. He had great contempt for the legislature. He thought we were fools and he had little tolerance of us and thought we had no right to ask questions of such people as he was. I thought his judgment was deeply lacking as far as our national interest was concerned. But he was an intellectual, just as Mr. Kraft has described Mr. Rehnquist.

I have no objection to men of great intellect. They do not split infinitives. I do not mind a man who does not split infinitives if he is in accord with our constitutional system and uses it to determine what is in our national interest. I think it is in the national interest that the influence of this body be preserved. I think the principle that we do not cut off debate is a sound one. The principal difference between the House and the Senate is our capacity for extended debate. That is what distinguishes us from the House. If we cannot have extended debate in the Senate, we ought to abolish it and save several million dollars. There is little value to it if we cannot have full debate on important issues.

That is the way I feel about it. The Senator from Kansas says he has not had much experience.

Mr. DOLE. I am learning.

Mr. FULBRIGHT. The Senator from Louisiana, I, and others who have been here a while used to have debates that went on all night because we felt strongly enough about some issues to warrant it. I do not wish to criticize. I sympathize with the Senator from Kentucky. A practice has grown up here of limiting debate on every issue, but, after all, it is done by unanimous consent. In matters in which I have an interest, I have appealed to the majority whip that I want to be notified on those matters and do not want to enter into an agreement. He has abided by that request, so it may work out all right—at least, that part of it—but I am wary of what could happen to the Senate.

Mr. DOLE. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield.

Mr. DOLE. I want to thank the Senator for all his instructive efforts. They have been very helpful to me. I have learned a lot from the Senator from Arkansas, some things that I cannot use, but some that I may possibly use at a little later time.

Mr. FULBRIGHT. Well, there may come a time when the Senator will want

to use it. He sees how opinions have changed about a lot of things.

Mr. DOLE. Things change. I am reminded of the fact that the distinguished Senator from Arkansas has changed from what he said in a speech in, I think, 1961, in which it was indicated that the executive ought to have more power insofar as war-making powers are concerned. I assume the Senator has changed.

Mr. FULBRIGHT. No, not war-making.

Mr. DOLE. What was it?

Mr. FULBRIGHT. If the Senator wishes—I do not know if we have time, but that article is often cited—

Mr. DOLE. I cite it frequently.

Mr. BAYH. Mr. President, a parliamentary inquiry.

Mr. FULBRIGHT. I do not mind discussing it at a proper time.

The PRESIDING OFFICER. Does the Senator from Indiana have a parliamentary inquiry?

Mr. BAYH. Yes, I do.

The PRESIDING OFFICER. The Senator will state it.

Mr. BAYH. I am glad to see that for the first time the opposition is here.

Mr. DOLE. We are just sort of passing through the Chamber. We do not intend to stay.

Mr. BAYH. The Senator from Indiana is glad to see the Senator from Kansas is here. He has been strangely missing from the debate. But a parliamentary inquiry, Mr. President: whose time is being expended in this debate.

The PRESIDING OFFICER. Immediately preceding the exchange between the Senator from Arkansas and the Senator from Kansas the time had been been charged to the Senator from Indiana. [Laughter.]

Remaining are 8 minutes to the Senator from Indiana and 17 minutes to the Senator from Arkansas.

Mr. FANNIN. Mr. President, I yield myself 5 minutes.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. FANNIN. Mr. President, when we are talking about the background and reputation of an individual, we usually go to the people who have been associated with him and who have worked with him. I am very proud to do so with William Rehnquist. Those who have been associated with him over the years certainly praise him highly, whether they be Democrats or Republicans.

There is a former colleague who has spoken about William Rehnquist when he found some of the papers in which he as well as Bill Rehnquist had been involved were under scrutiny. That is Donald Cronson, now in London, associated with a business enterprise there. I am quoting from a New York Times article in today's edition:

A former colleague of William H. Rehnquist said tonight that in 1952 Mr. Rehnquist was personally opposed to the legal doctrine of racial segregation.

Donald Cronson, who in 1952 was a law clerk to Supreme Court Justice Robert H. Jackson, along with Mr. Rehnquist, spoke out in the controversy over Mr. Rehnquist's nomination to the Suprem Court.

"Both of us," Mr. Cronson said, "personally thought at the time, that the 1896 decision, Plessy v. Ferguson, was wrong. We first wrote a memorandum to that effect.

"It is 20 years ago, but I think I still have a copy of that memorandum. Then, afterwards, I think Justice Jackson asked us to prepare a second making the other argument.

"I had a desk right next to Bill's. My guess is that I physically prepared the first memorandum and he the second, but we worked together on both. In what I have read about the second I can recognize some of my purple prose. It was just part of the job."

I have read from the interview Mr. Cronson gave the reporter. I feel these are the actual experiences he had with Mr. Rehnquist.

I know that we had testimony, and the distinguished Senator from Indiana has great respect for the person I am going to speak about now——

Mr. BAYH. Mr. President, will the Senator yield for a quick question before he gets away from the Cronson matter?

Mr. FANNIN. Mr. President, how much time do I have remaining? I will yield on the Senator's time.

The PRESIDING OFFICER. The Senator from Arizona has 14 minutes, the Senator from Indiana has 8 minutes.

Mr. FANNIN. Will the Senator take this out of his time?

Mr. BAYH. Let us forget it. The other side can ask questions on our time, but we cannot even make a comment on their time. That has been the rule during the course of this debate.

Mr. FANNIN. I do not think that has been the rule.

I was referring to the testimony of Mr. Rehnquist and others when they were before the Judiciary Committee. Hon. Walter Early Craig, a judge in the Federal District Court of Arizona, appeared and said, "I have known Mr. Rehnquist"—incidentally, this judge is also the past president of the American Bar Association. He said:

I have known Mr. Rehnquist since his admission to practice law in Arizona, both in a professional capacity and since I have been on the bench, which I ascended in 1964.

Mr. Rehnquist's academic achievements are already a matter of record. They are remarkable. The only reason I mention those high achievements is because it relates to his qualifications as a lawyer. In my experience, Mr. Rehnquist's professional skills and ability are outstanding.

This is coming from a past president of the American Bar Association, and now U.S. District Judge in Arizona, Walter E. Craig:

In his appearances before my court, Mr. Rehnquist conducted himself not only with outstanding professional skills but with dignity, intelligence, and integrity. I think he has conducted his life that way so long as I have known him.

When we talk about whether or not Mr. Rehnquist has compassion, I would like also to refer to what Judge Craig had to say about that. This was in answer to a question from the distinguished Senator from Indiana (Mr. BAYH). The Senator asked:

Do you know anything about the nominee that would lead you to have cause for concern about his insensitivity in the area of human rights if he were sitting on the Supreme Court of the United States?

Judge Craig said:

I want to say this in response to that inquiry: 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 with respect to the necessity to improve their lives and their society. I don't think that he would be in any way insensitive to the philosophy of civil rights or the Bill of Rights, or any other rights.

He went on throughout that testimony praising William H. Rehnquist for his accomplishments both as an outstanding member of the bar and also in his private life. He is a fine family man and one of the outstanding men in the community.

There are many in Arizona, both on the Democratic side and on the Republican side, who have come forward with statements supporting Mr. Rehnquist. We have had a considerable response from the academic community. In fact, in one of our schools, Arizona State University, the dean of the Law School, tried to obtain Mr. Rehnquist's services. The dean offered him a very good position at the Arizona State University, but Mr. Rehnquist had an obligation with the Justice Department; he had made a commitment, and so he did not accept that assignment.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. FANNIN. I feel that the greatest praise we can give to this man is the fact that the people who have been associated with him are his very strong supporters. Even when they have opposed him, whether in legal cases or in political causes, they still speak very highly of him. When statements have been made about what Mr. Rehnquist is alleged to have done on different occasions, and they knew those statements were wrong, his former adversaries as well as his friends were quick to make efforts to correct the record. I have had many calls from Arizona after the stories we saw in the press, and there were many who wanted to come back and appear as witnesses, but time was limited, and we did not think it was necessary. This man has such a splendid, impeccable record, I did not see how he could possibly be challenged. Mr. President, I think it is now very clear that the attempts to raise questions about his outstanding reputation have failed, and I feel very confident that this man will be overwhelmingly approved by the Senate.

The PRESIDING OFFICER. Who yields time?

Mr. FANNIN. I yield 3 minutes to the distinguished Senator from Nebraska.

Mr. HRUSKA. Mr. President, no one believes in the principle of full and free debate more than this Senator. So much has been said on this subject that I feel no need to expound further on this feature. But I have also voted for cloture in the past when I have been convinced that a discussion on the Senate floor has become relatively meaningless with regard to the issue being considered. This is why I will vote in favor of cloture today.

We could go on and on talking about Mr. Rehnquist, of course. Most of this would be sheer repetition, however—a devise that the record will show has already been used to excess. We have heard over and over about the nominee's alleged lack of devotion to civil rights, his alleged lack of sensitivity to human liberties, and even his alleged lack of candor and honesty. We have heard of his alleged unwillingness to disclose his

position on certain issues and then, when he makes a clear and unequivocal statement, he is allegedly not believed. If I have heard or seen the quotation which follows once, I have heard or seen it a dozen times:

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

Mr. President, repetition is not full and free debate. It is instead a very obvious attempt to follow the doctrine that if you repeat something often enough and loud enough people may begin to believe it. Not that I really blame the opponents of this nomination from attempting to use this technique, for they have little of substance to offer. I feel strongly, however, that the time has come to end this fruitless exposition and get on with the business of the Senate. This is why I signed the cloture petition, and why I will support it with my vote.

Those who want this nomination defeated act as if the supporters of Mr. Rehnquist were bulldozing this man through the Senate. But let us look at the facts. First, the following chronology of events will no doubt be of interest to all Senators:

Nomination made, October 21;

Hearings begun, November 3;

Hearings concluded, November 10;

Committee exchange session, November 11; November 18; November 23;

Minority views filed, November 30; and

Debate on floor begun, December 6.

It might further be pointed out that on November 11, at the first executive session of the Judiciary Committee, a majority was ready to report the nomination to the Senate. Four Senators, however, delayed a committee vote until November 23—and then asked for an additional week to file minority views. I am not complaining, Mr. President, as this is their right. However, when we talk about insufficient time to explore this nomination this sequence of events must be borne in mind.

Let us talk about another nomination for a moment. Mr. Butz, now Secretary of Agriculture, was nominated by the President on November 11. This was a situation not without some controversy. In fact, I would venture the guess that Mr. Rehnquist will be confirmed by a greater margin than that by which Secretary Butz was approved by the Senate. And yet, the Senate managed to explore this candidate and work its will by December 2. This nominee's name was sent up after Mr. Rehnquist, and he has already been confirmed.

Mr. President, here are a few more facts on the subject of exploration. Have Senators had a chance to express their views, for the record or otherwise? An examination of the CONGRESSIONAL RECORD will show that the opponents of Mr. Rehnquist have been able to fill some 202 columns of the RECORD with statements of concern about the candidate—all prior to the date the actual floor debate began. I would not begin to presume to set limits on anyone and the fullest expression of his views. However, 202 columns is not an insignificant amount when one considers the size of the print used in the RECORD.

Mr. Rehnquist's opponents have run up one trial balloon after another, only to see it shot down. While I admire their persistence and dedication to a cause in which they believe, I do not believe the Senate as a body should any longer indulge them in their fishing expedition. Frankly, I believe each time they raise an issue only to see it resolved by the true facts they lose more ground and more votes. Each day they have made their position less credible, not more. But there is no sense in prolonging this matter.

Let us waste no further time in sending him to the Court or, if the majority so decides, let us say now we do not want to send him there.

Mr. President, I have said in my individual views and on this floor that those who know Mr. Rehnquist best have given him the strongest support. This is of critical importance. We learn the make-up of a man when we can observe him on a daily basis, working and socializing with him over a period of time. In this connection, the Washington Post yesterday printed a letter from Richard Berg, a former attorney in the Office of Legal Counsel who is now executive secretary of the Administrative Conference of the United States. Having served under four Assistant Attorneys General who headed the office, Mr. Berg is in an excellent position to evaluate Mr. Rehnquist and compare him with his predecessors.

Mr. President, the letter is short, and the insight so valuable, that I ask unanimous consent that it be inserted at this point in my remarks.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

[From The Washington Post, Dec. 9, 1971]

REHNQUIST'S APPROACH

Since the public discussion of the nomination of William Rehnquist to the Supreme Court has turned to a considerable extent on his civil rights record, I believe that some comments of mine may be pertinent.

I served as an attorney in the Office of Legal Counsel of the Department of Justice for eight years (1961–65, 1967–71). In the latter period, which included two years under Mr. Rehnquist, I worked on most of the civil rights problems handled by the Office, including the question of the legality of the Philadelphia Plan.

Mr. Rehnquist's approach to these problems, like his approach to all other matters on which we worked together, was objective and lawyerlike in the highest degree. He never expressed or showed, to my knowledge, any reluctance or disinclination to interpret or enforce the laws against discrimination in accordance with a sympathetic reading of their terms. Indeed, the legal opinions and memoranda on civil rights matters issued by the Office during Mr. Rehnquist's tenure differed little, if at all, in general philosophy from those issued by his predecessors.

It was suggested, however, in Professor Arthur Miller's article of some weeks ago that Mr. Rehnquist's legal conclusions as head of the Office of Legal Counsel were shaped by a desire to please his superiors. No lawyer can be oblivious to the needs of his client, and the president's lawyer's lawyer is no exception. For any head of the Office of Legal Counsel there is an obvious tension between his role as adviser to and advocate for the Executive Branch and his role as the foremost interpreter and expounder of the law to the Executive Branch. I served in the office under four assistant attorneys general, all lawyers of uncommon ability and integrity. Of the four Mr. Rehnquist was, in my opinion, the most objective, and the most rigorous in excluding nonlegal considerations from the process of resolving a legal problem.

In his tenure as head of the Office of Legal Counsel Mr. Rehnquist has won the respect and high regard of his colleagues, including many, like myself, whose views on political and social issues differ considerably from his. I believe that Mr. Rehnquist is highly qualified for service on the Supreme Court and that the Senate should confirm his nomination.

RICHARD K. BERG.

ARLINGTON.

Mr. HRUSKA. He concluded that letter with the following statement:

I served in the office under four assistant attorneys general, all lawyers of uncommon ability and integrity. Of the four Mr. Rehnquist was, in my opinion, the most objective, and the most rigorous in excluding nonlegal considerations from the process of resolving a legal problem.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. HRUSKA. One more minute, please?

Mr. FANNIN. I yield the Senator 1 additional minute.

Mr. HRUSKA. Mr. President, it has been said that this nominee is more in favor of executive power than of congressional power. Yet it is overlooked that he asserted that position when he was a representative and an advocate of the executive department.

What else would one expect of him?

Secondly, I want to mention a classic example of his always being bound by the limitations of the Constitution. Up until the time Mr. Rehnquist came to the legal counsel's office it had been the position of the Department of Justice that there was an inherent right on the part of the National Government to wiretap in cases of national security. Mr. Rehnquist pushed that aside, and asserted instead this doctrine: that it was reasonable, within the Bill of Rights, for the National Government to wiretap in cases of national security—a classic example of his being for the executive, but all within the bounds of the Bill of Rights.

The PRESIDING OFFICER. Who yields time?

Mr. SCOTT. Mr. President, will the Senator yield me 4 minutes?

Mr. FANNIN. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has only 3 minutes remaining.

Mr. FANNIN. I yield it to the Senator from Pennsylvania.

Mr. SCOTT. Mr. President, the opponents of this nominee have struck the rock of reason and evoked a waterfall of illogic.

They have abandoned totally, they have jettisoned, every one of the 100 or more arguments which they raised in hearings in the committee and elsewhere in order to rely on an undated, unsigned, otherwise unsubstantiated—by them—document which allegedly reflected the views 19 years ago of the nominee. How ridiculous can you get? How many people live who know what really happened on that occasion? One man. They evoke

the opinions of Mr. Justice Jackson. They allege the nominee held different opinions or the same opinions, as the argument suits them.

What really happened? Only one other man living today, so far as we know, was there, and that is Mr. Cronson of London. A reporter from the Baltimore Sun called him, and Mr. Cronson said:

We haven't even heard of this furor over here. We didn't know about this law clerk memorandum, but I have it. As a matter of fact, I wrote most of it.

As a matter of fact, as I have been arguing for over a week there were two memorandums. I had only a well-founded instinct as a lawyer that a Justice would want to know both sides. He did.

Then what does Mr. Cronson say? That Rehnquist has all these deplorable views attributed to him. Not at all. Mr. Cronson says that he and Mr. Rehnquist both personally thought at the time that Plessy against Fergusen was wrong and "We wrote the first memorandum to that effect."

That shoots the whole argument out of the water. Since they have elected to put everything that they had, all their eggs, into one fragile, melting basket, they find nothing to support their one remaining argument.

Mr. Rehnquist thought that law was bad, and he wrote some portion of these two memorandums, and the other man wrote some portion of the two memorandums.

There is no reason at all why the nomination should not be confirmed.

The PRESIDENT pro tempore. The time of the Senator has expired. Who yields time? The Senator from Indiana has 8 minutes.

Mr. BAYH. I yield myself 6 minutes.

Mr. President, I think it is important for the Senate to understand what is happening here. We are trying to invoke cloture. That is the issue; the merits of the nominee are not being debated.

Interestingly enough, it is my judgment that the charges that have been made by those in support of the nominee lend support to our contention that we have not had adequate debate. The distinguished minority leader just got through substantiating this. He talked about our coming up with an undated, unsigned memorandum. That memorandum, strangely enough, had the initials of the nominee at the bottom. Although he has written us three pages explaining his recollection of what was in that memorandum, he has not denied that he wrote it—has not denied it. I believe his recent letter actually acknowledges authorship.

Now this surrebuttal raises more questions. If this latest telegram is to be believed, why did not the nominee, in explaining the anti-Brown against Board of Education memorandum, mention that there had been a preceding memorandum? Why did he not mention that there was a man by the name of Cronson, who had been his coclerk? He said nothing about coauthorship. He did not say anything about somebody else expressing the views in the memorandum. Nothing.

I want to say, before going ahead, that I concur with the Senator from Pennsylvania; the Senator from Kentucky, no one will ever be able to answer these questions finally, I was not there. Nobody really knows what was in Justice Jackson's mind. But I will take issue whenever anybody who is going to be on the Supreme Court of the United States has the audacity to write the U.S. Senate a letter suggesting that the content of that memorandum was prepared to express the views of the late Justice Jackson. It just makes no sense at all.

I suggest that Justice Jackson believed exactly the opposite of the views that were expressed in that memorandum. That is what I take issue with, and I think these questions have not been laid to rest. They have not been laid to rest.

Why did not Mr. Rehnquist mention the presence of Mr. Cronson? Why did he suggest that he, indeed, did prepare these words in the memorandum for the Justice to use as his own statement of his own views at conference? I read in this morning's paper that the late Justice's secretary had expressed her disdain and concern that Mr. Rehnquist had said that this memorandum represented the late Justice Jackson's views. I think she summed it all up by saying that the man who opened and closed the Nuremberg Trial did not need a 28-year-old law clerk to tell him how to argue before his brethren or colleagues on the Supreme Court of the United States.

That is why I think the question of credibility has been raised. I could understand if a man could not remember what has happened, but when he does remember, when he does recollect what happened, and he tries to suggest that the content of that 1952 memorandum is consistent with the views of the late Justice Jackson, that just is not based on the fact.

I see my friend, the Senator from Hawaii, sitting here. I am sure he is very familiar and sensitive about the issue that was before the Court dealing with the way in which the Japanese-American citizens were treated during World War II. The man who wrote the stellar, the ringing defense in opposition to what the Supreme Court decided—that those American citizens could be put in detention camps—was Justice Jackson. He argued eloquently that one could not, indeed, treat individuals this way.

Yet, to suggest that some of the passages in this memorandum, which are directly contrary to the Jackson dissent in the Korematsu case are Jacksonian phrases, is totally wrong—totally wrong. And it is impossible to suggest that Justice Jackson was not a strong advocate of personal liberties or individual rights over property rights, when one recognizes that Jackson was the one who wrote the Barnette case—a very tough decision about the rights of Jehovah's Witnesses children not to pledge allegiance to the flag if that was going to be demeaning to them in their religion. This is just not the Justice Jackson of that memorandum.

I do not know whether Cronson is right or whether Rehnquist is right, but I think the Senate ought to look into it and not rush headlong into a Christmas recess in an effort to tend to our own convenience rather than to the qualifications of the man whose nomination is now before the Senate.

The PRESIDENT pro tempore. The time of the Senator has expired. There are 2 minutes remaining. Who yields time?

The Senator from Indiana has 2 minutes.

Mr. BAYH. Since I have 2 minutes, as I look around the floor here, I am sure we can change a lot of votes.

I have been in the Senate for 9 years, and I have not participated in any filibuster and do not intend to, but I would hope that the Senate would give us a chance to answer the questions that have been raised.

I would like to answer my friend, the Senator from Kentucky, whom I did not have the chance to answer earlier. I would be glad to talk to him, or the minority leader, or anybody else, about what date certain the Senator from Indiana will set, I do not know what facts are going to arise. I was thinking that we would have voted by now, had that 1952 memorandum not been uncovered last Sunday. Now it has been answered, and it has been reanswered. The telegram from London, and the Rehnquist reply are diametrically opposed to one another.

I ask anyone in the Senate to look at the Cronson explanation of that memorandum and to look at the Rehnquist explanation of that memorandum, and then to decide for himself whether those are similar replies or whether they are totally inconsistent and therefore inconclusive.

CALL OF THE ROLL

The PRESIDENT pro tempore. The hour of 12 o'clock noon having arrived, under rule XXII, the Chair directs the clerk to call the roll to ascertain the presence of a quorum.

The legislative clerk called the roll and the following Senators answered to their names:

[No. 445 Ex.]

Aiken	Fong	Montoya
Allen	Fulbright	Moss
Allott	Gambrell	Muskie
Baker	Goldwater	Nelson
Bayh	Gravel	Packwood
Beall	Griffin	Pastore
Bellmon	Gurney	Pearson
Bentsen	Hansen	Pell
Bible	Harris	Proxmire
Boggs	Hart	Randolph
Brock	Hartke	Ribicoff
Brooke	Hatfield	Roth
Buckley	Hollings	Saxbe
Burdick	Hruska	Schweiker
Byrd, Va.	Hughes	Scott
Byrd, W. Va.	Humphrey	Sparkman
Cannon	Inouye	Spong
Case	Jackson	Stafford
Chiles	Javits	Stennis
Church	Jordan, N.C.	Stevens
Cook	Jordan, Idaho	Stevenson
Cooper	Kennedy	Symington
Cotton	Long	Taft
Cranston	Magnuson	Talmadge
Curtis	Mansfield	Thurmond
Dole	Mathias	Tower
Dominick	McGee	Tunney
Eagleton	McGovern	Weicker
Eastland	McIntyre	Williams
Ellender	Metcalf	Young
Ervin	Miller	
Fannin	Mondale	

The PRESIDENT pro tempore. A quorum is present.

VOTE

The PRESIDENT pro tempore. Pursuant to rule XXII, a rollcall has been had, and a quorum is present.

The question before the Senate is: Is it the sense of the Senate that debate on the confirmation of the nomination of William Rehnquist to be an Associate Justice of the Supreme Court of the United States shall be brought to a close?

The yeas and nays are mandatory under the rule.

The clerk will now call the roll.

The assistant legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from New Mexico (Mr. ANDERSON), and the Senator from Arkansas (Mr. MCCLELLAN) are necessarily absent.

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. BENNETT) and the Senator from South Dakota (Mr. MUNDT) are absent because of illness.

The Senator from Illinois (Mr. PERCY) and the Senator from Maine (Mrs. SMITH) are necessarily absent.

If present and voting, the Senator from Illinois (Mr. PERCY) would vote "yea."

Also if present and voting the Senator from Maine (Mrs. SMITH) would vote "nay."

The yeas and nays resulted—yeas 52, nays 42, as follows:

[No. 446 Ex.]

YEAS—52

Aiken	Fong	Randolph
Allott	Gambrell	Ribicoff
Baker	Goldwater	Roth
Beall	Griffin	Saxbe
Bellmon	Gurney	Schweiker
Bentsen	Hansen	Scott
Boggs	Hatfield	Sparkman
Brock	Hollings	Stafford
Buckley	Hruska	Stennis
Chiles	Jordan, N.C.	Stevens
Cook	Jordan, Idaho	Taft
Cotton	Long	Talmadge
Curtis	Magnuson	Thurmond
Dole	McIntyre	Tower
Dominick	Miller	Weicker
Eastland	Montoya	Young
Ervin	Pearson	
Fannin	Pell	

NAYS—42

Allen	Fulbright	McGovern
Bayh	Gravel	Metcalf
Bible	Harris	Mondale
Brooke	Hart	Moss
Burdick	Hartke	Muskie
Byrd, Va.	Hughes	Nelson
Byrd, W. Va.	Humphrey	Packwood
Cannon	Inouye	Pastore
Case	Jackson	Proxmire
Church	Javits	Spong
Cooper	Kennedy	Stevenson
Cranston	Mansfield	Symington
Eagleton	Mathias	Tunney
Ellender	McGee	Williams

NOT VOTING—6

Anderson	McClellan	Percy
Bennett	Mundt	Smith

The PRESIDENT pro tempore. On this vote the yeas are 52 and the nays are 42. Two-thirds of the Senators present and voting not having voted in the affirmative, the cloture motion is rejected.

The Senator from Indiana addressed the Chair.

The PRESIDENT pro tempore. The Senator from Indiana is recognized.

Mr. PASTORE. Mr. President, may we have order now?

The PRESIDENT pro tempore. The Senate will be in order.

Mr. BAYH. Mr. President, a parliamentary inquiry.

The PRESIDENT pro tempore. The Senator will state it.

Mr. BAYH. The Senator from Indiana would like to have 5 minutes to explain to the Senate his thoughts on where we are on this nomination while we all are here. It is the understanding of the Senator from Indiana that we have a previous unanimous consent agreement.

What steps would the Senator from Indiana have to take to have the opportunity to proceed at this time for 5 minutes?

The PRESIDENT pro tempore. Without objection, the Senator may proceed.

Mr. BAYH. Mr. President, my colleagues, this is the first time during this debate where the number of Senate colleagues present is consistent with the importance of the issue. I say that not as a matter of controversy because I know full well the heavy demands that have been on the shoulders and in the minds of each and every Senator here. Each of us has legislative responsibilities, conference committees, the responsibility to tie up last minute details on legislative issues, and, thus, we have not had the opportunity to give careful attention to this Supreme Court nomination.

Some of us, and he Senator from Indiana happens to be one, and other Senators who are members of the Committee on the Judiciary—the Senator from Michigan (Mr. HART), the Senator from Massachusetts (Mr. KENNEDY), the Senator from California (Mr. TUNNEY), and the Senator from Indiana—have been personally charged with this responsibility and thus have studied it very carefully.

After great consideration we compiled a minority report, which some Senators may have had a chance to read. Since the compilation of that report other matters have come to the attention of the Senate which are not contained therein, although there are some Rehnquist supporters who feel strongly that all these questions have been dealt with. I suggest that anyone who feels that way should read the eloquent presentation made by the junior Senator from Massachusetts yesterday relative to the differences of opinion raised by the 1952 memorandum, the efforts on the part of the nominee to explain them, and now, efforts on the part of a coclerk, now in London, to explain them differently. I suggest that anyone who reads that presentation has to come to the conclusion that the Senate has not dealt with answering the questions. The Senator from Indiana really has not been able to resolve all the questions in his own mind.

I intend to send to the desk a resolution, and to ask the Senate to consider it, postponing further consideration of this nomination until the first day we return after the Christmas recess, and guaranteeing that we vote on it at that time, that no further debate, or limited debate be agreed upon. I think this is a good faith effort to try to show that the Senator from Indiana and those of us who are trying to explore the issues are not trying to use the floor of the Senate to prevent the question from being put.

I have talked to the majority leader and he is opposed to this, and he will express himself, because of commitments he made.

I feel that to put this matter over to the first of the year and then vote on it up or down is consistent with what we have done on other controversial matters, such as the education bill, the genocide bill, and equal rights for men and women amendment. We have put those measures off to next session.

It is also consistent with the amount of time which elapsed during which the Senate debated this nomination, compared with the amount of time that has been used to debate previous nominations on which there was controversy.

It would meet the convenience of the Senate. The Senate has not been inconvenienced. We would not be home before now if it were not for the Rehnquist nomination. But if we went on to pursue this matter it might cause inconvenience to the Senate.

My proposal would give us a chance to study the issues, absent international turmoil with which the world is faced, and absent legislative packages which have come to this body in the last week or two, before we put a man on the Supreme Court.

Before we put a man on the Supreme Court for the best part of a quarter century, let each of us in his own mind determine that the questions have been laid to rest finally.

I can note that right now there is a strong majority supporting the Rehnquist nomination. I doubt very much if between now and the first and second day upon returning that very many Senators' minds are going to be changed, but I think each of us would have a better opportunity to resolve in his own mind the accuracy of the determination we have made now.

I suggest that Senators not make this final determination in a precipitate effort to convenience the Senate. We all want to adjourn. But let us put our responsibility for the Court above our personal convenience.

Mr. President, I send to the desk the motion.

The PRESIDENT pro tempore. The motion will be stated.

The assistant legislative clerk read as follows:

I move that the Senate postpone further consideration of the nomination of William H. Rehnquist to be an Associate Justice of the Supreme Court until January 15, 1972.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that I may be recognized for 4 minutes and that one-half of that time be given to the distinguished minority leader, the Senator from Pennsylvania.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. BAYH. Mr. President, reserving the right to object, and I will not object, the Senator from Indiana is fully aware of the fact that the best way to dispose of this particular motion, I am told by the Parliamentarian, is to table it, and thus, to cut off further debate. I would be willing, if I may say to the distinguished minority leader and the distin-

guished majority leader, to agree to a definite time certain to vote on the measure.

I am not trying to be arbitrary but I would like some give and take so we have a full discussion of views here on the motion.

Mr. MANSFIELD. Mr. President, may I say that this disrupts the schedule somewhat. I hope it will not discommode anyone insofar as the votes already announced are concerned.

It is anticipated that on the basis of the move made by the Senator from Indiana, a move entirely within his rights as a Senator, that that vote might be delayed in view of the situation which has developed.

May I first, before making my position clear, ask the distinguished Senator from Indiana if he would agree to a vote on his motion at 1 o'clock.

Mr. BAYH. Mr. President, I have no objection.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that a vote on the pending motion occur at the hour of 1 o'clock.

The PRESIDENT pro tempore. Is there objection?

Mr. CANNON. Mr. President——

The PRESIDENT pro tempore. The Chair hears none, and it is so ordered.

Mr. SCOTT. Mr. President, I demand the yeas and nays.

Mr. CANNON. Mr. President, reserving the right to object——

Mr. SCOTT. Mr. President, a point of order. The Chair has ruled.

The PRESIDENT pro tempore. The Chair has announced the vote would be at 1 o'clock.

Mr. SCOTT. Mr. President, I demand the yeas and nays on the vote.

Mr. CANNON. Mr. President, I requested recognition, reserving the right to object.

Mr. MANSFIELD. Mr. President, I ask that the request granted be vacated, in view of the situation that has arisen.

The PRESIDENT pro tempore. Is there objection to the request of the majority leader to vitiate the agreement? The Chair hears none, and it is so ordered.

Mr. CANNON. Mr. President, I am simply trying to clarify one point. Did I understand the motion provides for the date January 15? January 15 happens to be a Saturday, I believe, and I am trying to clarify the date when we are going to come back in session——

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the date be changed to January 18.

Mr. BAYH. Mr. President, the Senator from Indiana does not intend to object.

Mr. ALLEN. Mr. President, a parliamentary inquiry.

The PRESIDENT pro tempore. The Senator will state it.

Mr. ALLEN. Would the motion of the Senator from Indiana be amendable?

The PRESIDENT pro tempore. Yes.

Mr. MANSFIELD. Mr. President, I renew my request.

The PRESIDENT pro tempore. That the Senate vote at 1 o'clock?

Mr. MANSFIELD. Yes.

The PRESIDENT pro tempore. And that the date in the motion be changed to January 18? Without objection the date in the motion will be changed to January 18.

Mr. MANSFIELD. Yes.

The PRESIDENT pro tempore. That the vote occur at 1 o'clock. Without objection——

Mr. MILLER. Mr. President, reserving the right to object—and I shall not object—may I ask the distinguished leader, in view of the question of the Senator from Alabama (Mr. ALLEN), is this 1 o'clock vote to be on the motion without regard to any amendments that may be offered to it, or will we have time to consider any amendments to be offered at that time?

Mr. MANSFIELD. No; under the rules amendments could be offered, but they would not be debatable.

Mr. SCOTT. After 1 o'clock. After the vote.

Mr. MILLER. Mr. President, if the Senator from Alabama is going to offer an amendment, it seems to me he ought to have time to explain it. I thought the Senator would yield him 5 minutes.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that I may proceed for several more minutes, and I would hope that we would not engage in a squabbling match.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. MANSFIELD. A most serious issue is before us. The Senator from Indiana, in good faith, is trying to achieve what any Senator has a right to do—to set a date certain on which to vote on the pending nomination. The agreement had already been entered to vote at 1 o'clock. Then the distinguished Senator from Alabama raised a question as to whether or not amendments could be offered. The Chair answered in the affirmative. But if the time is used up between now and 1 o'clock and amendments are offered at that time, they are not debatable, but they can be voted on if the Senate so desires.

So again I renew my request that the vote occur at 1 o'clock.

The PRESIDENT pro tempore. Is there objection?

Mr. KENNEDY. Mr. President, reserving the right to object, just for the information of the Senate, we have an agreement to vote on S. 1874, so I do not want any illusion that if we agree to the majority leader's recommendation there will be that much time, because 15 minutes will be used for the rollcall vote. If the Senator would like to couple his request with the request that the vote on S. 1874 come after the motion, I will be glad to agree, but I think Senators should be informed that we are going to use 15 minutes of the next 25 minutes on a rollcall vote.

Mr. MANSFIELD. The Senator is not going to lose any time on the next bill——

Mr. KENNEDY. I understand, but I understood the Senator wanted 5 or 7 minutes for an opportunity to discuss the matter, and there would not be that much time if we proceed under the previous order——

I am glad to hear the request of the majority leader, but I just thought the vote on S. 1874 should be put off until after the vote at 1 o'clock.

Mr. MANSFIELD. That is correct, and the Senator will lose not one second.

I make that request, Mr. President.

The PRESIDENT pro tempore. Is there objection to the request to postpone the vote on the bill (S. 1874) until after the vote is had on the motion? Without objection, it is so ordered——

Mr. HUMPHREY. Mr. President, reserving the right to object——

Mr. MANSFIELD. Mr. President, if we keep having objections, the hour of 1 o'clock is going to be passed and we will not be able to get to it. We will not have time.

The PRESIDENT pro tempore. There has to be unanimous consent.

Mr. HUMPHREY. Mr. President, I am not going to object. I want to ask a parliamentary inquiry on the vote on S. 1874. Is that subject to further amendment?

The PRESIDENT pro tempore. Yes, it is, but there is no time for further debate.

Is there objection to the request that the Senate vote at 1 o'clock? Without objection, it is so ordered.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the time between now and 1 o'clock be equally divided between the distinguished minority leader and the distinguished Senator from Indiana (Mr. BAYH).

The PRESIDENT pro tempore. Is there objection? Without objection, it is so ordered.

Mr. MANSFIELD. Mr. President, will the minority leader yield me 2 minutes?

Mr. SCOTT. Yes.

Mr. MANSFIELD. I am torn by the move made by the distinguished Senator from Indiana because of the fact that at the time these nominations were first brought before us, in my capacity as the majority leader I stated to the Senate that we would stay with these two nominations until they were completed. I had anticipated that that would be the situation which would bring about a final vote on both the Powell and Rehnquist nominations this month.

However, I must reiterate, the Senator from Indiana is wholly and fully within his rights. I make this explanation only to indicate to the Senate that it was the intent of the joint leadership to stay with these nominations until finished. It may well turn out to be that way. Only the final count will tell. But at the same time I emphasize that while this will not be possible under certain circumstances, the Senator from Indiana is absolutely, wholly, and fully within his rights to make the motion which is now before the Senate for consideration.

Mr. SCOTT. Mr. President, I yield myself 3 minutes, first of all for a parliamentary inquiry.

It is now the order of the Senate that we vote at 1 o'clock today on the motion of the Senator from Indiana and any amendments thereto. Is that correct?

The PRESIDENT pro tempore. That is correct.

Mr. SCOTT. Would an amendment be in order in the nature of a substitute that the Senate proceed immediately to

vote on the nomination of Mr. Rehnquist?

The PRESIDENT pro tempore. It would not be in order.

Mr. SCOTT. Would the Chair advise me why a substitute amendment in that form would not be in order?

The PRESIDENT pro tempore. Under rule XXII, when a question is before the Senate, the following motions are in order before the motion pending is disposed of: to adjourn; to adjourn to a day certain, or that when the Senate adjourn it shall be to a day certain; to take a recess; to proceed to the consideration of executive business; to lay on the table; to postpone indefinitely.

All those motions are in order before the question can be disposed of. Such a substitute would have the effect of shutting out these motions. Besides, it takes unanimous consent to set a specific time to vote on final passage of a bill or to fix a time for final action on a treaty or nomination.

Mr. SCOTT. Mr. President, I first demand the yeas and nays, then, on the vote.

The yeas and nays were ordered.

The PRESIDENT pro tempore. Who yields time?

Mr. SCOTT. I now yield myself 3 minutes.

Mr. President, I do not know how many Senators heard that motion, but I think if they did hear it, they would be appalled, because the motion is simply to postpone consideration to the date on which we reconvene, the 18th of January, at which time it is hoped that there will be matters of some importance before the Senate.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. SCOTT. Could I read the motion first?

I move that the Senate postpone further consideration of the nomination of William H. Rehnquist to be an Associate Justice of the Supreme Court until January 18, 1972.

I would rather finish first; I shall not be long.

Mr. BAYH. Mr. President, if the Senator will permit me to state this, the original proposition of the Senator from Indiana when we were discussing the matter and talking about the parliamentary rules was to establish not only the date of the 18th, but to guarantee a vote after 2 hours of debate, the time to be equally divided between the opposing factions.

I am advised by the Parliamentarian that that kind of motion would require a special order by a two-thirds vote. If the Senator from Pennsylvania will bear with me, I pledge that that is what I am trying to accomplish.

Mr. SCOTT. I appreciate the pledge of the Senator from Indiana, but it would not accomplish it, because on the 18th, any other Senator could raise the question that the matter is debatable, and we have no applicable rule; therefore we could be here from January 18 until July 4, or some such date, debating the Rehnquist nomination.

A far better reason, however, is the fact that the distinguished majority leader has given his word to the Senate that we will stay in session until we dispose of this matter. I have joined in that pledge, and have committed myself to a daily cloture motion until we dispose of it. I think we could dispose of it by the vote on the cloture motion tomorrow, is my judgment. So certainly the Senate is only falling over its own feet. If Senators should decide that all this debate is useless, then we will start afresh, with a whole lot of new ideas, on January 18.

Moreover, both the minority and majority leaders ought to have some trust on the part of their colleagues, and I believe we do. When we are trying to dispose of legislation and bring the Senate to an adjournment, we ought to have, and I hope we will have, the backing of our colleagues when we make commitments.

This commitment was made in good faith, and the majority leader ought not to be reversed by the Senate. While he has been very generous in saying that the Senator from Indiana has a right to do this—and I agree with that—and while I do not wish to belabor this point, I certainly hope that the Senator will not repudiate the majority and minority leaders.

The PRESIDENT pro tempore. Who yields time?

Mr. BAYH. Mr. President, I yield myself 30 seconds.

I ask unanimous consent that after the vote on the pending resolution, if it is accepted, the vote occur 2 hours after the reconvening of the Senate on January 18, the 2 hours to be equally divided between the Senator from Pennsylvania and the Senator from Indiana.

Mr. SCOTT. I object.

The PRESIDENT pro tempore. Objection is heard.

Who yields time?

Mr. BAYH. Mr. President, I yield myself such time as I may require.

Mr. President, the Senator from Indiana is operating in as good faith as he knows how, and I do not find anyone here to suggest that, although we may differ on issues, we have had a breakdown of faith between the Senator from Indiana and another individual Senator.

I think it is important for the Senate to answer one question, and that is: Has each Member of this body had a sufficient opportunity to look at all of the factors involved in this nomination?

The PRESIDENT pro tempore. The Senate will be in order.

Mr. BAYH. The Senator from Arkansas (Mr. FULBRIGHT) this morning was on the floor of the Senate articulating once again in a most eloquent manner his opposition to the nominee on the basic question of division of powers.

Do we want a man put on the Supreme Court of the United States who, the Senator from Arkansas feels very strongly, does not have the proper respect for the legislative branch, and wantstoexpand t he powers of the executive branch?

I do not know whether every Member or any Member of this body has had a chance to study the very pertinent remarks of the Senator from Arkansas. How many Members of this body have had a chance to read the Cronson telegram? How many have had a chance to read the Rehnquist response in explanation of the 1952 memorandum? How many have had a chance to read the memorandum?

These are questions which have to be asked and answered and laid to rest in my mind before I could vote on the nomination, and I would think every other Senator would feel likewise.

Mr. PASTORE. Mr. President, will the Senator yield?

Mr. BAYH. Let me just finish with one other sentence.

I made this motion with great reluctance, because I knew in advance—I had discussed the matter with the majority leader, and he knew what I was going to do—that because of his commitment to resolve the question—and I would not want to cause the majority leader to violate his commitment—he would vote against the motion of the Senator from Indiana.

But I respectfully suggest that any commitment that was made, was made on the basis of the facts which existed at the time. There have been a number of facts disclosed since the decision was made to resolve this issue before we go home that were not present and available to the majority leader or the minority leader at the time that commitment was made.

Mr. PASTORE. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

The PRESIDENT pro tempore. How much time does the Senator yield?

Mr. PASTORE. Mr. President?

I think the Senator from Indiana is absolutely correct, in the sense that many of us have been busy in conferences and have not had the opportunity to be on the floor of the Senate as the merits of this particular nomination deserved, and I do not think anything should be tied up here with our desire to go home for Christmas. I think that, too, would be a mistake.

I think, in view of the fact that we had the Cronson rebuttal, and then the rebuttal by Mrs. Douglas, we ought to have the weekend over which to consider some of these communications.

Would the Senator from Indiana be willing, in view of the fact that there is another cloture motion that will be voted on tomorrow, to consider a unanimous consent agreement to vote at 5 o'clock, let us say, next Monday, giving us an opportunity to read the record over the weekend and to read these letters over the weekend?

I think much of the story has been told. I think some parts of it have not been completely told. But that would give us the opportunity, over the weekend, to study the record, as we would want to in our individual capacities and responsibilities, and then it could be debated the rest of the day today. Here it is, only a quarter to 1. It could be debated all day tomorrow, we could debate it with ourselves on Sunday, and we could debate it again in communication with one another on Monday, and at 5 o'clock have a vote.

I think at that time the complete story

would have been told, and we could get away from all of these cloture motions and we could get away from all of this misunderstanding.

I would hope the Senator would consider that. I repeat, I have not made up my mind. I may vote for him, and I may vote against him. But the fact remains that at some point, there must come a time of decision, and the question is: Has the full story been told?

Maybe it has not been fully told, as the Senator from Indiana has said. He would have 2½ days to tell the rest of it, and we would have 3½ days to consider it.

I would hope the Senator would consider that, and withdraw his motion, and that the cloture motion would be withdrawn.

We are going to come back here next Monday.

We are hung up on the foreign aid bill. We are hung up on the defense appropriation bill. We are hung up on the campaign and election reform bill. We are pretty well hung up, if you ask me. [Laughter.]

That being the case, I think that if we could get a unanimous-consent agreement to vote at 5 p.m. on Monday, we would eliminate all this confusion.

The PRESIDENT pro tempore. Is the Senator putting that in the form of a request?

Mr. PASTORE. No.

The PRESIDENT pro tempore. Who yields time?

Mr. BAYH. Mr. President, what is the time situation?

The PRESIDENT pro tempore. The Senator from Indiana has 7 minutes, and the Senator from Pennsylvania has 3 minutes.

Mr. BAYH. Mr. President, I think the request of the Senator from Rhode Island is very reasonable. Those of us who have carried on what I think is a most legitimate debate on the merits of the Rehnquist nomination have been very concerned about imposing our feelings and the continuance of this debate on the Senate. However, the Senator from Indiana has two reservations about it.

Although there are some here who have said that the Rehnquist nomination might necessitate the possibility of a delay, going on until Christmas—I have heard some of these proclamations—this has not been the case, and it is not my desire. I have heard from some that it is entirely possible that we will be out of here by Saturday night. Frankly, the Senator from Indiana does not want to cause his colleagues to come back on Monday.

I would, however, like to get a test of the Senate. If a sizable majority of the Senate feels that they have really answered all these questions in their own minds, in the face of 42 Members of the Senate who have said they have not, just now, then the Senator from Indiana would be willing to accept such a unanimous-consent request. But I suggest that I just heard that a number of reporters have talked to Mr. Cronson, who is now in Gstaad, Switzerland. I understand that he does not have access to the memorandum which he says he and Mr. Rehnquist wrote, the one that Mr. Rehnquist has tried to explain to us.

I do not see how any of us, between now and Monday, can answer the questions that have been raised in our minds. With a date certain, with a guarantee that we are going to vote as soon as we return, we can be free to consider the other business before us. We could go home, study this matter, come back, have a couple of hours of debate, and put it to rest.

The PRESIDENT pro tempore. Who yields time?

Mr. COOPER. Mr. President, will the Senator yield?

Mr. SCOTT. I yield 1 minute to the Senator.

Mr. COOPER. Mr. President, the Senator from Indiana has said that the vote on cloture indicated that many of us have not made up our minds. I voted against cloture, as I said yesterday I would, because I thought that over the weekend everyone would have the opportunity to study the record and the opponents to provide any additional information. I am for Mr. Rehnquist, I spoke in his support yesterday so I do not want it to be thought that my vote against cloture meant I am against him.

I think the proposal of the Senator from Rhode Island is very reasonable. I have read the record and the report in just a few hours and the speeches of those who have spoken against Mr. Rehnquist.

I think one can read the record of hearings, read it all, in a few hours. We should vote on the nomination in this session.

Mr. SCOTT. I yield myself 1 minute.

Mr. President, I think the Senator from Indiana is justified in saying that he wants a record vote of the views of his colleagues. Our point is, of course, that the majority leader and I are committed, and we will stay committed, that we should vote on it now. I am opposed to the resolution. The majority leader said he is opposed to the resolution at the desk. I hope it will be rejected. I do not think we need too much time on it.

I would hope we could then move to a decision either to vote up and down on the nomination or to go on to cloture tomorrow. Anything that serves the convenience of the Senate serves the convenience of the majority leader and the minority leader.

If the Senator from Indiana wishes to yield back his time, I will be glad to do the same.

The PRESIDENT pro tempore. Who yields time?

Mr. BAYH. Mr. President, what is the time situation?

The PRESIDENT pro tempore. The Senator from Indiana has 3 minutes remaining.

Mr. BAYH. How much time does the Senator from Pennsylvania have to yield back?

The PRESIDENT pro tempore. Two minutes.

Mr. BAYH. I would rather use the 3 minutes at my disposal.

I think it is important for us to recognize that the Supreme Court is about to go into recess. I am advised that they are not going to return until the 10th of January. I am advised, also, by a recent story in one of the local newspapers that the Court has done an exceptional job and is far ahead of where it was this time last year and the year before, so far as its docket is concerned.

I say to Senators that I do not think we are imposing any great burden on the country or on the Court. What we are deciding is whether, after 3 days of debate on a Supreme Court nomination, we are going to say that we will invoke cloture, or whether we are going to put it off to a day certain, after the disposition of the other matters that have occupied our minds during the last 2 weeks, and then give this matter the kind of attention and deliberation a decision like this deserves.

Mr. FULBRIGHT. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. FULBRIGHT. I recall that in the case of the nomination of Justice Fortas to be Chief Justice, a tremendous change came about by virtue of the time that elapsed and certain incidents which were brought to light. It seems to me that in view of the fact that the Court is going into recess, nothing is to be lost by having the vote on the 17th of January.

Nobody knows what will turn up in the meantime.

Mr. BAYH. That is right—nobody knows what will turn up in the meantime. But I think of greater significance is the fact that we will have a chance to thoroughly examine what has been brought up already.

I suggest that this is consistent with what this body has tried to do during the past month. In an effort to adjourn by Christmas, we have put off a half-dozen or so very important matters—which is understandable—so that we can approach them carefully and give them the type of consideration they deserve next year. We have postponed the post card registration matter, the EEOC, the genocide treaty, the equal rights amendment, the higher education bill. These matters were put off so that the Senate will have a chance to make a final determination in a responsible, dispassionate way. No date was set for those matters. I think we should set a date certain on the nomination. I do not want to filibuster this. I do not want to treat this nomination the way the Fortas nomination was treated.

I think we all owe an obligation to ourselves to consider this in the environment in which we can make a dispassionate, objective decision, and then let the nomination rise or fall on the merits.

The PRESIDENT pro tempore. The time of the Senator has expired.

Mr. SCOTT. I yield 2 minutes to the Senator from Virginia.

Mr. BYRD of Virginia. Mr. President, I voted against cloture. I did so because I wanted to give additional time to the opponents to debate on the floor of the Senate the Rehnquist nomination.

I favor the nomination of Mr. Rehnquist, but I wanted the opponents to have additional time. Under this proposal there will be no more debate on the floor, but the nomination will be carried over until January, another month.

I do not think that is fair to the nominee. I do not think it is fair to the President.

As a result of this, I must reexamine any future votes, if there are any future cloture votes, on this nomination.

I shall vote against the pending proposal by the Senator from Indiana (Mr. BAYH).

Mr. BAYH. Mr. President, a parliamentary inquiry.

The PRESIDENT pro tempore. All time has expired.

Mr. BAYH. Mr. President, is a parliamentary inquiry appropriate?

The PRESIDENT pro tempore. The Senator will state it.

Mr. BAYH. Is it possible for the Senator from Indiana to change his amendment to read that the pending order of business, the nomination, will be debated until the Senate adjourns sine die. At that time, the nomination will be put off until the January 18 date——

Mr. SCOTT. Mr. President, reserving the right to object——

The PRESIDENT pro tempore. It would take unanimous consent to do that.

Mr. DOLE. Mr. President, I object.

Mr. HANSEN. Mr. President, I object.

The PRESIDENT pro tempore. Objection is heard.

Mr. BYRD of West Virginia. Mr. President, I ask that the clerk restate the motion for the benefit of the Senate.

The PRESIDENT pro tempore. The clerk will state the motion.

The legislative clerk read the motion as follows:

I move that the Senate postpone further consideration of the nomination of William H. Rehnquist to be an Associate Justice of the Supreme Court until January 18, 1972.

The PRESIDENT pro tempore. The question is on agreeing to the motion of the Senator from Indiana (Mr. BAYH).

On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from New Mexico (Mr. ANDERSON), the Senator from Oklahoma (Mr. HARRIS), the Senator from Arkansas (Mr. MCCLELLAN), and the Senator from Wyoming (Mr. MCGEE) are necessarily absent.

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. BENNETT) and the Senator from South Dakota (Mr. MUNDT) are absent because of illness.

The Senator from Illinois (Mr. PERCY) and the Senator from Maine (Mrs. SMITH) are necessarily absent.

If present and voting, the Senator from Illinois (Mr. PERCY) and the Senator from Maine (Mrs. SMITH) would each vote "nay."

The vote was announced—yeas 22, nays 70, as follows:

[No. 447 Ex.]

YEAS—22

Bayh	Hartke	Nelson
Brooke	Humphrey	Pell
Cannon	Kennedy	Proxmire
Church	McGovern	Stevenson
Cranston	Metcalf	Tunney
Fulbright	Mondale	Williams
Gravel	Moss	
Hart	Muskie	

NAYS—70

Aiken	Ellender	Montoya
Allen	Ervin	Packwood
Allott	Fannin	Pastore
Baker	Fong	Pearson
Beall	Gambrell	Randolph
Bellmon	Goldwater	Ribicoff
Bentsen	Griffin	Roth
Bible	Gurney	Saxbe
Boggs	Hansen	Schweiker
Brock	Hatfield	Scott
Buckley	Hollings	Sparkman
Burdick	Hruska	Spong
Byrd, Va.	Hughes	Stafford
Byrd, W. Va.	Inouye	Stennis
Case	Jackson	Stevens
Chiles	Javits	Symington
Cook	Jordan, N.C.	Taft
Cooper	Jordan, Idaho	Talmadge
Cotton	Long	Thurmond
Curtis	Magnuson	Tower
Dole	Mansfield	Weicker
Dominick	Mathias	Young
Eagleton	McIntyre	
Eastland	Miller	

NOT VOTING—8

Anderson	McClellan	Percy
Bennett	McGee	Smith
Harris	Mundt	

So Mr. BAYH's motion was rejected.

Mr. SCOTT. Mr. President, I move to reconsider the vote by which the motion was rejected.

Mr. FANNIN. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

MESSAGE FROM THE PRESIDENT

Messages in writing from the President of the United States, submitting nominations, were communicated to the Senate by Mr. Leonard, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session,

The PRESIDING OFFICER (Mr. EAGLETON) laid before the Senate messages from the President of the United States submitting sundry nominations, which were referred to the appropriate committees.

(The nominations received today are printed at the end of Senate proceedings.)

LEGISLATIVE SESSION

The PRESIDENT pro tempore. Under the previous order, the Senate will now return to the consideration of legislative business.

ORDER FOR RECOGNITION OF SENATOR MCCLELLAN TOMORROW

Mr. MANSFIELD. Mr. President, again I ask the Senate to indulge me and ask unanimous consent that I may be recognized to make a series of proposals.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that after the joint leadership is recognized tomorrow morning, the distinguished Senator from Arkansas (Mr. MCCLELLAN) be recognized for not to exceed 15 minutes.

The PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER FOR SUPPLEMENTAL APPROPRIATIONS BILL TO BE MADE THE PENDING BUSINESS UNDER A TIME LIMITATION

Mr. MANSFIELD. Mr. President, I ask unanimous consent that, after the vote on the dental health bill, the supplemental appropriations bill become the pending business and that there be a time limitation of 1 hour, the time to be equally divided between the manager of the bill and the ranking minority Member or whomever he may designate.

The PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER TO VOTE ON CONFIRMATION OF NOMINATION OF WILLIAM H. REHNQUIST AT 5 P.M. TODAY

Mr. MANSFIELD. Mr. President, if I may have the attention of the distinguished Senator from Indiana, I ask unanimous consent that the vote on the confirmation of the Rehnquist nomination occur at 5 o'clock this afternoon.

The PRESIDENT pro tempore. Is there objection to the request of the Senator from Montana?

Mr. BAYH. Mr. President, reserving the right to object, and I will not object, the Senator from Indiana has tried his best, as have several of the other Senators, to convince the Senate that we have not had sufficient time to debate the pending question. This morning 42 Members of the Senate said "yea" to that question.

It is conceivable to the Senator from Indiana that a sufficient number of votes could be secured on tomorrow to again prevent cloture from being invoked.

In light of the vote which was just now taken, it seems that we have a clear indication of the number of Senators who feel that we need a prolonged length of time in which to discuss the matter.

The Senator from Indiana has not felt that those who opposed Mr. Rehnquist's confirmation should impose their views on the Senate and perhaps inconvenience the Senate thereby. I do not intend, as one Senator to do so.

Thus, with great reluctance, I am inclined not to object to the request of the majority leader.

Mr. NELSON. Mr. President, reserving the right to object, I wonder if the distinguished majority leader would respond to a question. I wish to make some remarks on this nomination. Am I assured that I will have about an hour and a half in which to speak prior to the time set for the vote?

Mr. MANSFIELD. I would think so, because we have an hour on the supplemental appropriations bill and 2 minutes on the District of Columbia revenue bill. We will have plenty of time. The time will be under the control of the Senator from Indiana and the distinguished minority leader or whomever he may designate. And I would hope that one of them would agree to that request.

Mr. NELSON. Mr. President, will the Senator from Indiana yield at least 30 minutes to me prior to the vote at 5 o'clock?

Mr. BAYH. I will be glad to yield to the

Senator from Wisconsin. It is ironic in that we have several Members present who feel that Senators are not interested in debating this matter. Here, we have the example of a good colleague who has not been heard from, and he can have all the time he requests, as far as I am concerned.

Mr. BYRD of Virginia. Mr. President, reserving the right to object, may I inquire of the majority leader with respect to this matter. The Senator from Indiana, in making the previous motion, which has just been rejected, requested a unanimous consent agreement that 2 hours of debate occur on January 18.

I want to be sure the majority leader's proposal now will permit the Senator from Indiana to have the same amount of time he would have had on January 18.

Mr. MANSFIELD. The Senator from Indiana is agreeable to the time, and I think that would suffice.

Mr. BYRD of Virginia. I thank the Senator.

The PRESIDENT pro tempore. Is there objection? The Chair hears no objection, and it is so ordered.

Mr. MANSFIELD. Mr. President, as I understand it, the next order of business will be the dental care bill.

The PRESIDENT pro tempore. The Senate will be in order so the majority leader may be heard. The Senate is not in order. The galleries will be in order, please. Will the Senate please be in order.

The Senator from Montana may proceed.

ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, I ask unanimous consent that at this time the distinguished Senator from Missouri (Mr. EAGLETON) be recognized for not to exceed 1 minute to present the District of Columbia Revenue Act.

The PRESIDING OFFICER. Without objection, it is so ordered.

DISTRICT OF COLUMBIA REVENUE ACT OF 1971—CONFERENCE REPORT

Mr. EAGLETON. Mr. President, I submit a report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 11341) to provide additional revenue for the District of Columbia, and for other purposes.

I ask unanimous consent for the present consideration of the report.

The PRESIDENT pro tempore. Is there objection to the present consideration of the report?

There being no objection, the Senate proceeded to consider the report, which reads as follows:

CONFERENCE REPORT

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 11341) to provide additional revenue for the District of Columbia, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 1, 2, 3, 4, 5, 6, 7, 9, 15, 16, 17, 19, 20, 21, 22, 28, 30, 31, 32, 33, 34, 35, and 37.

That the House recede from its disagreement to the amendments of the Senate numbered 8 and 10 and agree to the same.

Amendment numbered 11: That the House recede from its disagreement to the amendment of the Senate numbered 11, and agree to the same with an amendment, as follows:

On page 4, line 3, of the Senate engrossed amendments, strike out "502" and insert in lieu thereof the following: "402"; and the Senate agree to the same.

Amendment numbered 12: That the House recede from its disagreement to the amendment of the Senate numbered 12, and agree to the same with amendments, as follows:

On page 4, line 7, of the Senate engrossed amendments, strike out "503" and insert in lieu thereof the following: "403," and strike out the period immediately following "Act".

On page 4, line 8, of the Senate engrossed amendments, strike out "7–1571a" and insert in lieu thereof the following: "47–1571a"; and the Senate agree to the same.

Amendment numbered 13: That the House recede from its disagreement to the amendment of the Senate numbered 13, and agree to the same with an amendment, as follows:

On page 4, line 11, of the Senate engrossed amendments, strike out "504" and insert in lieu thereof the following: "404"; and the Senate agree to the same.

Amendment numbered 14: That the House recede from its disagreement to the amendment of the Senate numbered 14, and agree to the same with an amendment, as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

"SEC. 405. The amendments made by sections 401 and 402 of this title shall apply with respect to taxable years beginning after December 31, 1971, but before January 1, 1974. The amendments made by sections 403 and 404 of this title shall apply with respect to taxable years beginning on or after January 1, 1974."

And the Senate agree to the same.

Amendment numbered 18: That the House recede from its disagreement to the amendment of the Senate numbered 18, and agree to the same with amendments as follows:

"Restore the matter proposed to be stricken out by the Senate amendment and—"

On page 7, line 17, of the House engrossed bill insert "(a)" immediately after "601.".

On page 7 of the House engrossed bill, strike out lines 19 through 21 and insert in lieu thereof the following:

"is amended to read as follows:

"'SECTION 1. There are authorized to be appropriated, as the annual payment by the United States toward defraying the expenses of the government of the District of Columbia, not to exceed $173,000,000 for the fiscal year ending June 30, 1972, and not to exceed $178,000,000 for the fiscal year ending June 30, 1973, and for each fiscal year thereafter. Sums appropriated under this section shall be credited to the general fund of the District of Columbia.'

"(b)(1) In addition to the amount authorized to be appropriated under section 1 of Article VI of the District of Columbia Revenue Act of 1947 (D.C. Code, sec. 47–2501a) for the fiscal year ending June 30, 1972, there is authorized to be appropriated to the District of Columbia for such fiscal year not to exceed $6,000,000 which may only be used in such fiscal year to pay officers and employees of the District of Columbia increased compensation which is required by comparability adjustments made on or after January 1, 1972, in the rates of pay of statutory pay systems (as defined in section 5301(c) of title 5, United States Code), based on the 1971 Bureau of Labor Statistics survey.

"(2) In addition to the amount authorized to be appropriated under section 1 of Article VI of the District of Columbia Revenue Act of 1947 (D.C. Code, sec. 47–2501a) for the fiscal year ending June 30, 1973, and for each fiscal year thereafter, there is authorized to be appropriated to the District of Columbia not to exceed $12,000,000 for each such fiscal year which may only be used to pay officers and employees of the District of Columbia increased compensation which is required by comparability adjustments made on or after January 1, 1972, in the rates of pay of statutory pay systems (as defined in section 5301(c) of title 5, United States Code), based on the 1971 Bureau of Labor Statistics survey." And the Senate agree to the same.

Amendment Numbered 23: That the House recede from its disagreement to the amendment of the Senate numbered 23, and agree to the same with amendments as follows:

Restore the matter proposed to be stricken out by the Senate amendment, and—

On page 10, line 16, of the House engrossed bill, strike out "(including a sublessor)".

On page 10, line 18, of the House engrossed bill, strike out "shall" and insert in lieu thereof the following: ", after appropriate notice to all interested parties and an opportunity for a hearing, may".

On page 10, line 20, of the House engrossed bill, strike out "such notice" and insert in lieu thereof the following: "the notice to the Commissioner".

On page 11, line 22, of the House engrossed bill, strike out "shall" and insert in lieu thereof the following: ", after appropriate notice to all interested parties and an opportunity for a hearing, may".

On page 12 of the House engrossed bill, insert after the period at the end of line 11 the following: "If such recipient vacatss the premises with respect to which such allegation was made, rents other premises in the District of Columbia, and the Commissioner determines on the basis of such allegation that such recipient was justified in vacating the premises with respect to which the allegation was made, the Commissioner may pay to the recipient an amount (not to exceed his monthly shelter allotment) to enable him to make the rental payment required (if any) for such other premises for the period preceding the period for which the recipient will first receive his monthly shelter allotment under the preceding sentence."

On page 12, of the House engrossed bill, strike out lines 12 through 14 and insert in lieu thereof the following:

"'(d) The failure of any lessor to receive all or part of a monthly shelter allotment withheld from any recipient pursuant to subsection (b), or the suspension of rental payments under subsection (c), of this section shall not be cause for eviction of any recipient."

On page 12, line 25, of the House engrossed bill, strike out the quotation marks and add after line 25 the following:

"'(f) For purposes of subsections (b) and (c), the term "lessor" includes a sublessor.

"'(g) The District of Columbia Council is authorized to issue such regulations as may be necessary to carry out the provisions of this section.'."

And the Senate agree to the same.

Amendment numbered 24: That the House recede from its disagreement to the amendment of the Senate numbered 24 and agree to the same with an amendment as follows:

On page 7, line 10, of the Senate engrossed amendments, strike out "804" and insert in lieu thereof the following: "705"; and the Senate agree to the same.

Amendment numbered 25: That the House recede from its disagreement to the amendment of the Senate numbered 25 and agree to the same with an amendment as follows:

THE SUPPLEMENTAL, 1972 (H.R. 11955)—Continued

COMPARATIVE STATEMENT OF NEW BUDGET (OBLIGATIONAL) AUTHORITY ESTIMATES AND AMOUNTS RECOMMENDED IN THE BILL—Continued

Doc. No.	Department or activity	Budget estimate*	Version of bill: House	Version of bill: Senate	Conference agreement
	CHAPTER VII				
	DEPARTMENT OF TRANSPORTATION AND RELATED AGENCIES				
	Office of the Secretary				
92-164	Transportation planning, research and development	$5,000,000	$2,500,000	$5,000,000	$2,500,000
	Federal Aviation Administration				
92-164	Research and development	[9] 15,033,000	15,033,000	15,033,000	15,033,000
S. 92-43	United States International Aeronautical Exposition	2,200,000	[10] (200,000)	[11] 2,200,000	[11] 2,000,000
	Federal Highway Administration				
92-164	Forest highways (liquidation of contract authorization)	(10,000,000)	(10,000,000)	(10,000,000)	(10,000,000)
	Total, Department of Transportation	22,233,000	17,533,000	22,233,000	19,533,000
	RELATED AGENCIES				
	Aviation Advisory Commission				
	Salaries and expenses (Airport and Airway Trust Fund)			750,000	750,000
	Washington Metropolitan Area Transit Authority				
92-164	Federal contribution	38,011,000	38,011,000	38,011,000	38,011,000
	Total, chapter VII	60,244,000	55,544,000	60,994,000	58,294,000
	Appropriation to liquidate contract authorization	(10,000,000)	(10,000,000)	(10,000,000)	(10,000,000)
	Transfer		(200,000)		(200,000)
	CHAPTER VIII				
	TREASURY DEPARTMENT				
92-164	Bureau of Accounts, salaries and expenses	10,556,000	10,556,000	10,556,000	10,556,000
	POSTAL SERVICE				
92-164	Payment to the Postal Service Fund	216,400,000	216,400,000	200,000,000	200,000,000
	INDEPENDENT AGENCIES				
	General Services Administration				
	Construction, public buildings projects			11,200,000	
	Sites and expenses, public buildings projects			250,000	
92-151	National Archives and Records Service, operating expenses	636,000			
	Civil Service Commission				
92-164	Federal Labor Relations Council, salaries and expenses (limitation increase)	(12,000)	(12,000)	(12,000)	(12,000)
	Funds appropriated to the President				
S. 92-43	Economic Stabilization Activities, salaries and expenses	[12]		[14] (20,153,000)	[14] (20,153,000)
	Total, chapter VIII—new budget (obligational authority)	227,592,000	226,956,000	222,006,000	210,556,000
	Transfer	[1]		(20,153,000)	(20,153,000)
	CHAPTER IX				
92-164 and S. 92-45.	Claims and judgments	21,569,856	19,029,734	21,569,856	21,569,856
	Grand total:				
	New budget (obligational) authority	3,254,924,371	786,282,654	3,998,045,371	3,406,385,371
	Appropriation to liquidate contract authority	(20,000,000)	(20,000,000)	(20,096,000)	(20,096,000)
	Transfers	(6,732,000)	(5,846,100)	(26,459,100)	(26,659,100)
	Fiscal year 1971 (by transfer)			(250,000)	(250,000)

* Estimates considered include $36,225,000 for international radio broadcasting activities and $2,540,122 for claims and judgments (S. Doc. 92-45); exclude $85,300,000 for other items transmitted in S. Doc. 92-45 of Dec. 2, 1971.

[1] For transfer to National Parks Centennial Commission.
[2] For transfer to departmental operations.
[3] By transfer from salaries and expenses.
[4] Changed to $3,746,100 after enactment of Public Law 92-76.
[5] By transfer from National Park Service, construction.
[6] Does not include additional $68,300,000 considered by Senate.
[7] Does not include additional $2,210,000 considered by Senate.
[8] House received no budget estimate.
[9] Requested under the heading "Civil supersonic aircraft development termination."
[10] By transfer from "Salaries and expenses, Office of the Secretary."
[11] $2,000,000 contingent upon enactment of authorizing legislation by the 92d Congress.
[12] And $200,000 by transfer.
[13] Unlimited transfer language.
[14] To be derived by transfer.

MESSAGE FROM THE HOUSE— ENROLLED BILL SIGNED

A message from the House of Representatives, by Mr. Berry, one of its reading clerks, announced that the Speaker had affixed his signature to the enrolled bill (H.R. 10947) to provide a job development investment credit, to reduce individual income taxes, to reduce certain excise taxes, and for other purposes.

The President pro tempore subsequently signed the enrolled bill.

EXECUTIVE SESSION

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate go into executive session to consider the nomination of Mr. Rehnquist to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Without objection, it is so ordered.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate resumed the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Who yields time?

Mr. NELSON. Mr. President, would the Senator from Indiana yield me 30 minutes?

Mr. BAYH. Mr. President, I would be glad to yield 30 minutes to the Senator from Wisconsin.

Mr. President, I ask for the yeas and nays on the nomination.

The yeas and nays were ordered.

Mr. NELSON. Mr. President, almost a half century ago during the debate over the nomination of Judge John J. Parker for the Supreme Court, Senator George Norris of Nebraska observed:

> When we are passing on a judge, we not only ought to know whether he is a good lawyer, not only whether he is honest—and I admit that this nominee possesses both of these qualifications—but we ought to know how he approaches the great question of human liberty.

During the same debate, Senator William E. Borah of Idaho described the unique role of a Supreme Court Justice in our constitutional system:

> Upon some judicial tribunals it is enough perhaps, that there be men of integrity and of great learning in the law, but upon this tribunal something more is called for, here the widest, broadest, deepest questions of government and governmental policies are involved.

There is no doubt in my mind that Mr. Rehnquist is an able lawyer, a man both of deeply held convictions and personal integrity. If these were the sole qualifications for a Justice of the Supreme Court, then he should be confirmed unanimously. But there are other broader, deeper, more sweeping philosophical and constitutional matters at stake here which involve, as Senator Norris said, "the great question of human liberty."

We are concerned here with much more than technical legal ability and personal integrity. We are concerned about the makeup of that institution which must deal with the most important business of the human enterprise—freedom.

It will be the measure of this society as to how we honor a commitment to equality for all men and a mark of our form of government as to how we preserve the individual liberties of our citizens.

An examination of Mr. Rehnquist's record and views leads me to conclude that he is inadequately sensitive to human rights, and misunderstands the fundamental nature of the liberties guaranteed to our citizens in the first 10 amendments to the Constitution. If a fair share of the responsibility for the preservation of freedom, equality, and human liberty under the Constitution is to be entrusted to the Supreme Court, as it is, then each Senator must make a personal judgment on how adequately the nominee will perform that responsibility.

Such judgments are difficult to make because there are no simple, clear objective standards by which we can measure justice, freedom, and human rights or balance individual rights against the power of the state. So one must concede that such judgments are a mix of subjective and objective considerations. Thus conscientious citizens concerned about the same great issues may very well reach different conclusions about the same man.

I claim no special insights or superior qualities of judgment about the important matter before us. My conclusion is based upon a careful evaluation of what Mr. Rehnquist has said on a number of issues which, it seems to me, go to the very heart of what this Nation is all about. Reading the same document, we come to different conclusions about what it means. These differences are of such significance that I cannot support his nomination just as in other circumstances he would not be able to support mine.

As I read Mr. Rehnquist's record, and as I interpret his position, he is prepared to grant much greater authority and far broader powers to the state at the expense of the individual citizen than is consistent with a free and democratic society.

As Assistant Attorney General, Mr. Rehnquist has consistently subordinated the first 10 amendments to the Government's requirements for expediency. He has actively supported the Federal Government's power to wiretap on its own initiative and without the supervision of the Court, to preventively detain persons in jail without trial, to enter private premises without announcement, to suspend normal criminal procedures and make mass arrests, to use illegally obtained evidence against the accused, and to gather information about the public activities of persons who are in no way connected with illegal activities.

At the same time that this nominee has defended the right of the Government to disregard individual rights for the interests of the State without the overview and protection of judicial supervision, he has also defended the right of the Executive to expand his war powers on his own initiative and invade Cambodia without so much as a nod toward Congress or the Constitution.

These public positions go far beyond what I believe the Founding Fathers intended when they carefully described the powers and limitations of Government in the Constitution and the Bill of Rights.

With regard to Mr. Rehnquist's commitment to racial equality, his record indicates that even as late as 1964 he was opposing a public accommodations law in his city that was far weaker than the statute which has been the law of the State of Wisconsin since 1895.

Thirteen years after the Supreme Court declared that segregated schools were inherently unequal, the nominee wrote a letter to the editor in 1967, opposing a modest program to implement this law of the land in the Phoenix schools. This is not a record which indicates to me a sensitivity to human rights or an appreciation of this Nation's quest for social justice during the last 25 years.

It is argued by some that "what the Senate should be looking for are integrity, intellectual strength and legal qualifications" alone and that a nominee's views on civil rights and individual liberties are not the prime criterion.

I am more in accord with the view which George Norris expressed in the 1930 debate:

> I believe we ought to put more humanity into the courts . . . We ought to know that everyone who ascends to that holy bench should have in his heart and in his mind the intention of looking after the liberties of his fellow citizens . . . of discarding, if necessary, the old precedents of barbarous days and construing the Constitution and the laws in the light of a modern day, a present civilization . . . Human liberty is the issue. The preservation of our government is the issue.

It would also appear that on the issue of the scope of Senate examination of a Supreme Court nominee's qualifications, Mr. Rehnquist and I would agree. In an article entitled "The Making of a Supreme Court Justice" which appeared in the Harvard Law Record of October 8, 1959, Mr. Rehnquist advocated that the Senate begin—

> Thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him . . .

The concept of "judicial philosophy" to which Mr. Rehnquist referred was meant to encompass more than a strictly legal definition of whether written laws and decisions should be widely or narrowly interpreted. Rather he makes it quite clear that he considers a full investigation of a nominee's social and political views on substantive issues of the day a proper and necessary subject for Senate inquiry.

It is clear from any historical view of the constitutional responsibilities assigned to the Senate through the "Advice and Consent" power, that a broader review than a nominee's intellect, integrity, and legal talent is required. This should be readily apparent from an examination of the documents describing the birth and adoption of the Constitution and from the actual practice of the Senate in confirmation of Supreme Court Justices since 1789.

The Constitution of the United States expressly gives the Senate an important role and responsibility in the selection process for Supreme Court judges. Reflecting the deliberations and decisions during the Constitutional Convention in 1787, the "Advise and Consent" role given to the Senate in article II, section 2 of the Constitution is much more than a perfunctory perusal of Presidential preferences for Supreme Court positions. Rather, the duty and the responsibility delegated to the Senate by this provision is to give complete and careful consideration to the qualifications for office of Supreme Court nominees before making an independent decision as to whether the high standards for this position have been met by a Presidential nominee.

Historically, the strong role given to the Senate in the nomination process for Supreme Court Justices can be traced back beyond James Madison's notes of the Constitutional Convention to an earlier period of America. Under British rule, the American colonies had been subjected to the capricious administra-

tion of justice. One of the express grievances of the Declaration of Independence was that King George had—

Made Judges dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries.

As a result of this colonial experience, the Founding Fathers of this Nation were determined to establish an independent judiciary free from the excesses of either executive or legislative pressures.

Decisions on nominations for the Court which are made today, can actively influence the quality of our society for many years in the future. It is certainly a responsible exercise of constitutional duty, therefore, to require that the Senate closely examine a nominee's record and insist upon high standards of personal integrity, a strength of intellect, and a sensitivity to the rights and aspirations of all.

Three distinguished law professors recently expressed the view that it is not only proper for the Senate to examine a nominee's judicial and political philosophy, but it is—

The Senate's affirmative responsibility to examine a nominee's political and constitutional philosophy, and to confirm his nomination only if he has demonstrated a clear commitment to the fundamental values of our Constitution, the rule of law, the liberty of the individual, and the equality of all persons.

Mr. Rehnquist, himself, has quoted with approval the remarks of Senator William E. Borah, of Idaho, during the debate on the Supreme Court nomination of John J. Parker in 1930. In commenting on the proper scope of the Senate inquiry into a Supreme Court nominee's views, Senator Borah said:

They (the Supreme Court) pass upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters. I say this in great sincerity. We declare a national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Court something of their views on these questions.

Forty-one years after Senator Borah's comments, it is particularly appropriate to call for "something more" in addition to the requisite qualities of integrity and of great learning in Supreme Court nominees. We are not just participating in a singular selection process that is the isolated replacement of a Supreme Court vacancy. We are instead asked to consider one in a series of nominations in a unique historical context which may give this President the opportunity to make an unusual number of appointments to the Court during his term in office. It is, therefore, quite possible that the entire temper and character of an independent equal branch of Government could be altered within a very short period of time. The consequences of this alteration, however, would not be short-lived, but would affect this Nation directly for years to come.

In an article in this November's New York Law Journal entitled "The Roles of the Executive and Legislative Branches in Judicial Appointments," former Attorney General and Assistant Secretary of State Nicholas de B. Katzenbach concluded:

When a President by chance is able to make several appointments . . . the possibility of changing the institution for many years beyond the President's term is raised. In such circumstances the Senate's obligation to advice and consent is no mere formality, but a judgment of crucial importance to the judicial branch of government.

My particular concern with any and all nominations to the Supreme Court at this point in our Nation's history was succinctly expressed in the October 8, 1971, issue of Commonweal magazine written before the current two nominations were presented to the Senate for its consideration. The editorial entitled "The Senate and the Court" opened:

At a time when Constitutional processes face some of their most crucial challenges in America, when in fact the fundamental law of the land is brought into assessment as a result of challenges to the courts and the legal system, indeed to the Bill of Rights itself, the sudden appearance of two vacancies on the Supreme Court places a responsibility of historical significance in the hands of the President and the United States Senate.

We must be particularly concerned that the Supreme Court, in its role as final interpreter of the Constitution, continue to champion that document's guarantees of equal justice for all people and the free exercise of individual liberties. As the late Justice Hugo L. Black said:

I believe that our Constitution with its absolute guarantee of individual rights, is the best hope for the aspirations of freedom which men share everywhere.

The Bill of Rights was made a part of our Constitution as an express guarantee of individual freedom against the oppressive uses of power by the State. This view has prevailed not because of divine intervention, but because Justices have come to understand, accept, and expound this view. Yet, just as these guarantees have become a shining star in our system of laws because of judicial actions, so they can be eroded and lost. The choice will be made by the men who sit on this and future Supreme Courts.

Bit by bit, many of the provisions of the Bill of Rights have been strengthened and applied to State governmental actions as well as Federal: The sixth amendment and the right of the indigent to free counsel; the fifth and sixth amendments and the right to counsel and silence during police interrogation; the fifth amendment and the right of protection against self-incrimination; the sixth amendment and the right to confront witnesses; the fourth amendment and protection against illegal searches and seizures; and the eighth amendment and the prohibition against cruel and unusual punishment.

These are still controversial issues in some parts of the political spectrum, however, and the questions of the level of guarantee provided by the Bill of Rights and its application to the States through the 14th amendment are not moot issues. At a time when the composition of the Supreme Court is in a state of flux, those who have supported civil liberties cannot be unconcerned about maintaining these advances in jurisprudence and constitutional justice.

At the same time, new civil liberties issues are rapidly developing and coming before our courts for adjudication as to their constitutionality. Increasing technical sophistication and electronic gadgetry have tremendously advanced the art of obtaining and storing vast amounts of information. With the proliferation of large private and governmental organizations the opportunity to impinge upon the actions and expressions of individual citizens is greatly expanded.

The never ending struggle to define the relationship between the individual and the State will require continuing evaluation of issues such as wiretapping, electronic surveillance, "no knock" entry, preventive detention, the rights of the accused, freedom of speech, and the extent of the use of Executive privilege to withhold information from Congress and the public, among other issues.

We must exercise vigilance before the power of government is expanded and new authorities are delegated which infringe upon and undermine the freedom of individuals. The preservation of constitutional form will never make up for the loss of constitutional substance. And once the expansion of governmental power at the expense of individual liberty has been extended, the task of securing the lost remnant of liberty is made all the more difficult.

In seeking to insure that the Bill of Rights will be diligently protected by this and future Supreme Courts, it should be clearly stated that this is not an issue that pits the "rights of society against the rights of criminal defendants, of pornographers and of demonstrators," as stated in Mr. Rehnquist's letter to the Washington Post. A more accurate presentation of the issue was expressed editorially by the New York Times on October 24, 1971:

The balance that must be maintained is not, as Mr. Nixon would have it, primarily between the rights of society and those of accused criminals, although the protection of the latters' rights was indeed an accomplishment of the Warren Court that must not be undone under the guise of "law and order." The more important balance, however, is between individual liberties and the powers of the Government. It is a delicate balance precisely because the Government's power is naturally so great that, without protection by sympathetic courts, the individual soon becomes powerless and ultimately oppressed.

In my study and reading of the public statements and printed hearing record of the nomination I have tried to assess where the nominee would place the weight of his opinion and reason in questions involving conflicts between individual liberties and the powers of Government. In making this assessment, it is necessary to ask more than whether a nominee can merely "see both sides of the difficult questions in this area" as the majority report of the Judiciary Committee requires. Recognizing both sides of a problem is a task of defining issues which any first-year law student should quickly master.

In addition to recognition of issues in-

volving individual liberties and equal justice, it is necessary to probe further and inquire whether there is an understanding and proper sensitivity to the importance which constitutionally guaranteed and court protected civil rights and liberties play in our democratic society and form of government. Finally, it is necessary to inquire whether recognition, understanding, and sensitivity for individual freedom will be aggressively promoted and given privileged consideration when placed in conflict with exercises of governmental power.

The attention which the late Justice Black focused upon the Constitution was not only intellectual, but was very literal—an affection of the heart as well as the head. It is well known that Justice Black liked to have a copy of the Constitution at his hand at all times, and his devotion to the words and the spirit of this document is perhaps best illustrated by a story reported in the New York Times when he died this September. A visitor found the Justice in his office without a copy of the Constitution a few years ago. As the story is related Justice Black admonished the visitor for not keeping a copy with him at all times and buzzed for his secretary to ask the whereabouts of his Constitution:

"I like to read what it says, I like to read the words of the Constitution," Justice Black said in a slight Southern drawl, after dispatching the secretary to fetch one. "I'm a literalist, I admit it. It's a bad word these days, I know, but that's what I am."

Shortly, the Constitution was delivered. Hugo Lafayette Black, then 81 years old and completing his 30th year on the United States Supreme Court, laid it tenderly on his lap and opened it to the Bill of Rights.

"Now," he said with a warm smile, "now let's see what it says."

It is certainly not too much to require that we look beyond the intellectual capacity of a Supreme Court nominee and ask whether in addition to proper pronunciation of the words there is any affection for the spirit in his reading of the Constitution and the first 10 amendments.

My review of the civil liberties record and statements on this subject by Mr. Rehnquist leads me to conclude that whenever there is a clash between the rights of individual citizens and the exercise of governmental powers, the nominee comes down on the side of State power.

Mr. Rehnquist's record with regard to civil liberties issues has been primarily established as an Assistant Attorney General in this administration. As such, his statements and speeches have most often been as the defender of the administration position, rather than as a private citizen. There is no indication in the public record, however, that Mr. Rehnquist has disassociated himself with any of the administration's positions, has disagreed with these positions or has given a contrary personal view. Therefore, they stand as his record and his views.

I believe that a focus upon several of the specific positions that Mr. Rehnquist has advocated will be sufficient to show a strong preference for the expansion of governmental powers at the expense of individual liberties.

In testifying before Senator ERVIN's Subcommittee on Constitutional Rights on the subject of limitations on Government surveillance of private citizens, Mr. Rehnquist said:

I think it quite likely that self-restraint on the part of the Executive Branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering.

Obviously, reliance upon executive self-restraint is no guarantee of liberty at all.

He later attempted to explain this remark by indicating that executive "self-restraint" should be assumed in a context of constitutional and legislative limitations. A further look at the written record, however, would indicate that while Mr. Rehnquist feels that it is not proper for the "Department of Justice or of any other governmental agencies to surveil or otherwise observe people who are simply exercising their first amendment rights," if the Justice Department should go ahead and snoop on public meetings anyway, "I do not believe it violates the particular constitutional rights of the individuals who are surveilled."

Furthermore, in a later speech, he indicated his opposition to any judicial limitations or controls on the gathering of information on private citizens by the executive branch:

I do not believe, therefore, that there should be any judicially enforceable limitations on the gathering of this kind of public information by the Executive Branch of the government. Must we then leave the government to police itself? My answer would be that first, such a result is not as bad as it may sound, and, second, that forms of oversight other than those afforded by judicial supervision are available.

The other form of oversight, however, turns out to be a congressional hearing after the occurrence of any particular excess of informational gathering zeal by the executive branch. Oversight, by its very definition, can only take effect after the injury has occurred.

This viewpoint indicates to me overemphasis on governmental investigatory powers and a complete misunderstanding of the effect which the unrestrained power of Government snooping can have on the vital exercise of first amendment activity by the general public. By advocating only retrospective investigations of governmental intelligence gathering activities and relying upon executive self-restraint to prevent excesses from occurring in the first place, Mr. Rehnquist ignores the chilling effect which such actions have on the free and open public discussion of the important issues of the day by all elements of our society. It is not enough to say that first amendment questions may be raised if it can actually be proven that someone was in fact deterred from speaking out. The only way we can adequately protect this fundamental and necessary right to speak out is to take the steps to insure to the greatest practicable degree that infringements will not occur in the first place.

It is not enough to say that surveillance and information gathering can be proper exercises of law enforcement in some instances, such as where criminal laws have actually been violated or where there is a reasonable cause to believe that a criminal violation is going to occur. We must inquire as to the exact nature and boundaries of these investigatory activities and formulate specific controls to limit the powers of surveillance to their authorized scope and halt excessive or unwarranted snooping before it happens. This will not be accomplished through reliance upon self-restraint by the agency doing the snooping or by calling for an investigation after a bout of dossier stuffing by an arm of the Government.

The PRESIDING OFFICER (Mr. TAFT). The Senator's time has expired.

Who yields time?

Mr. NELSON. Mr. President, I ask unanimous consent to proceed for an additional 5 minutes of Mr. BAYH's time, since he is not here to yield or to object.

Mr. FANNIN. Mr. President, I yield the Senator from Wisconsin such additional time as he desires.

Mr. NELSON. Mr. President, I ask unanimous consent that the full text of my remarks be printed in the RECORD as though read.

Mr. FANNIN. Mr. President, if the Senator will yield, we do have plenty of time, and I would be very pleased to yield. We have affirmatively made our case, and we are ready to vote, so the Senator can certainly have all the time he wishes.

Mr. NELSON. I thank the Senator.

The PRESIDING OFFICER. The Senator from Wisconsin may proceed.

Mr. NELSON. It is apparent that Mr. Rehnquist does not feel that constitutional infringements upon individual liberties occur until data that is improperly or illegally gathered is actually used against someone, even though the original gathering of this information was not a legitimate function of Government. In answer to a question from Senator ERVIN asking whether an interference with the constitutional rights of participants at a rally had occurred where Army intelligence agents pretending to be photographers had taken pictures of participants, and then built up informational dossiers, Mr. Rehnquist replied:

I do not, Senator. I think, from my reading of the cases, that the time at which the courts would say there has been an interference with an individual's constitutional rights in that area is where the government seeks by some sort of legal sanction either to force divulgence of information or to put the information it has gathered without forcing it to some use such as criminal prosecution or a civil action against the individual. I don't think the gathering by itself, so long as it is a public activity, is of constitutional stature.

It is in my judgment precisely this kind of wholesale intelligence gathering at public meetings, and the compilation of dossiers on individual citizens who are in no way connected with known or suspected illegal activities, which has that chilling effect upon the full and complete public discussion of ideas, and which should be firmly and clearly resisted. Preventive action to preserve the public's right to full and open discourse without the specter of governmental retaliation cannot be held in abeyance until the collected data is actually used to

still one dissident voice. It is the threat of such use, as much as the possible retaliatory action itself, which causes the greater harm, for it makes no distinction between those it touches with its muzzling effect.

The difficulty with not only making individual liberties conditional upon the expedient needs of Government, but also making the executive the arbitrator of this balancing act, is perhaps best exemplified in the area of Government surveillance by wiretapping or electronic devices.

There is no doubt that the use of sophisticated electronic equipment which is now available makes the gathering of information an easier task for law enforcement officials. The ability to surreptitiously monitor purely private and personal conversations through these electronic means, however, also makes this practice a greater threat to individual freedom and rights of privacy. The measure of acceptable use, therefore, is particularly dependent upon the extent of the authorized applications, and the methods of control that are applied to insure that wiretapping or other electronic bugging use is kept well within its restricted boundaries.

The practice of wiretapping or electronic surveillance are serious invasions of privacy. They must be carefully prescribed and restricted to the most serious of law enforcement issues—national security and organized crime. Even with these exceptions, we must be sure to exactly define the boundaries and limits of the practice, for what is national security to one person may be protected political expression to another.

On first reading, it would appear that Mr. Rehnquist was in general agreement with this limitation of scope and prior review with regard to wiretapping by Government authorities. His supporters quote this statement during the hearings in support of Mr. Rehnquist's recognition of the first line to be drawn between the Government's desire to tap and the individual's interest in privacy:

> I think a good example of a line that has been drawn by Congress is the Act of 1968 which outlawed all private wiretapping and which required, except in a national security situation, prior authorization from a court before wires could be tapped.

Again, in a speech before the American Bar Association Convention in London this summer, Mr. Rehnquist specifically used the example of organized crime to justify governmental wiretaps:

> When we deal with the activities of organized crime, we deal with the most sordid sort of trafficking in drugs, prostitution, and gambling, as well as in illegitimate aberrations of legitimate business. Persistent efforts, not always unsuccessful, to corrupt local law enforcement officials; murder, committed by anonymous hired guns, are its trademarks. Normal detection techniques of Sherlock Holmes, Hercule Poirot, and the long succession of Scotland Yard inspectors who have been immortalized in print, are of far less use here . . . Is the invasion of privacy entailed by wiretapping too high a price to pay for a successful method of attacking this (organized crime) and similar types of crime? I think not, given the safeguards which attend its use in the United States.

Taken alone, the statements would seem to indicate a desire for a so-called "strict construction" of the limits of wiretapping. When Mr. Rehnquist's other statements and his support as an advocate for the Justice Department are taken into consideration, however, a quite different view of Mr. Rehnquist's sympathies and convictions emerges.

The fact of the matter is that this administration and the Justice Department have actively moved to expand the use of wiretaps far beyond the stated limitation of organized crime. In the District of Columbia crime bill which they presented to Congress last year, the authority for electronic surveillance given in S. 2601 went far beyond the exception and limitations mentioned by Mr. Rehnquist for organized crime. The offenses for which the Justice Department advocated wiretapping included: Arson, blackmail, bribery, burglary, destruction of property of value in excess of $200, gambling, grand larceny, kidnaping, murder, obstruction of justice, receiving stolen property of value in excess of $100, robbery, extortion, and offenses involving dealing in narcotic drugs, marihuana, and other dangerous drugs. Now, as deplorable as these criminal activities are, there is no doubt that this is not a list of activities designed to restrict the use of wiretaps to the fight against organized crime.

Furthermore, Mr. Rehnquist has not only supported the Justice Department's efforts to expand the scope of court authorized wiretaps beyond the activities of organized crime, he has been an active force in the Justice Department's advocacy of expanding the right of the executive to wiretap without securing any fourth amendment type of warrant from the courts whatsoever in certain situations.

As previously noted, there is a limited exception to the general rule that the fourth amendment requires court supervised wiretaps that has been granted to cases involving "national security." This exception is based upon a 1940 Presidential order authorizing the use of wiretaps against "persons suspected of subversive activities." Mr. Rehnquist, however, has advanced the claim that this order gives the executive, through the Attorney General, the inherent power to authorize the use of electronic surveillance wherever and whenever the Attorney General determines on his own initiative that "the use of such surveillance is reasonably required in the interests of national security," and that this power extends not only to foreign agents but covers U.S. citizens and domestic activities which are not otherwise illegal as well.

In answers to supplemental questions to the confirmation hearings, Mr. Rehnquist indicated that he had advised the Attorney General to no longer advocate the Department's previous position that it had the "inherent power" to tap, but only because of tactical reasons. He still supported the position that unsupervised wiretapping by the executive is reasonable under the fourth amendment where the Attorney General decides on his own that the security of the Nation is threatened by domestic elements.

There is no justification for extensive Government snooping into domestic political activities based upon President Roosevelt's 1940 order. In the first paragraph of his order, President Roosevelt recognized the danger of widespread Government spying when he agreed with the Supreme Court that it was—

> Also right in its opinion that under ordinary and normal circumstances wire-tapping by government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

President Roosevelt went on to limit wiretapping in the national security interest to "grave matters involving the defense of the Nation," to "persons suspected of subversive activities against the Government of the United States, including suspected spies," and specifically requested his Attorney General to "limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens." The exigencies of subversion, treason, espionage, and sabotage during World War II conducted by agents of foreign powers are a far cry from the political protests and expressions of political freedom and dissent during the late 1960's and 1970's by U.S. citizens who hold views contrary to those of established power in Washington.

The initial fallacy of the position enunciated by Mr. Rehnquist in expanding the use of unsupervised wiretaps from foreign agents to domestic elements upon the Attorney General's own finding of subversion is the failure to note the important distinctions between the Government's rights of action in domestic and foreign affairs. As the courts have repeatedly explained, the Government is limited in the actions it can take in the area of domestic politics. Unlike the area of foreign affairs, the Government can act only to prevent or punish unlawful acts in the domestic arena, not unpopular acts or iconoclastic thoughts. Yet, in a speech at Brown University reported in the Providence Journal of March 11, 1971, it is just such domestic political activities, which cannot support a court-ordered tap for the control of organized criminal activity, that Mr. Rehnquist wants to get at through a tap based upon the "national security" exception.

To permit Government surveillance of lawful activity would have a disastrous effect upon the willingness of individual citizens and organizations to exercise their constitutional freedoms of speech, expression, and association and their right to petition their Government for the redress of grievances.

As U.S. District Judge Warren J. Ferguson pointed out in a recent case involving Government wiretapping of Black Panthers in Los Angeles without court supervision:

> The Government seems to approach these dissident domestic organizations in the same fashion as it deals with unfriendly foreign powers. The government cannot act in this manner when only domestic political organizations are involved, even if those organizations espouse views which are inconsistent with our present form of government. To do so is to ride roughshod over numerous polit-

ical freedoms which have long received constitutional protection. (United States v. Smith 321 F. Supp. 424 (1971))

As Judge Ferguson concluded in United States against Smith:

To guarantee political freedom, our forefathers agreed to take certain risks which are inherent in a free democracy. It is unthinkable that we should now be required to sacrifice those freedoms in order to defend them.

To allow the Attorney General to decide upon his own initiative who is a domestic threat to the national security, and then to proceed to tap without court supervision, may be consistent with Mr. Rehnquist's theories of how to balance civil liberties with executive power. In my view, this philosophy is a radical departure from our founding principles and does violence to the Constitution and free political expression in this country.

Also included in the District of Columbia crime bill was a provision authorizing police officers under some circumstances to enter a dwelling without previously knocking or identifying themselves. Mr. Rehnquist asserted in a December 2, 1970, speech that—

This provision of law is actually nothing more than a codification of constitutional law, and of practices which were held not to violate the Constitution in a case decided a few years ago by the Supreme Court of the United States.

The no-knock provision of the District of Columbia crime bill was in actuality a vast expansion of this authority and is not merely codification of existing common law as the nominee states. While it is true that the common law does recognize certain exceptions to the fourth amendment's requirement that Government officers must announce their presence before entering a man's home, the District of Columbia crime bill which Mr. Rehnquist supported expands these exceptions greatly and therefore is not mere codification.

No-knock authority raises very serious questions of diminishing the fourth amendment guarantee of the right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." History serves to remind us that eternal vigilance is the price of liberty and as Santayana asserted:

Those who cannot remember the past are condemned to repeat it.

In the case of *Miller* v. *United States*, 357 U.S. 301 (1958) Justice Brennan discussed the legal history of the common law prohibition of "no-knock" or unannounced entries in private homes.

The requirement was pronounced in 1603 in Semayne's Case, 5 Coke 91, 11 ERC 629, 77 Eng. Reprint 194:

In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors* . . . (Emphasis supplied)

In the same case, Justice Brennan stated the importance of maintaining this restriction upon the exercise of governmental power and guarding against making expendiency the prime factor in law enforcement:

We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers . . . of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in Sec. 3109 the reverence of the law for the individual's right of privacy in his house. Every householder . . . the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

The ease with which arguments are raised to give a higher priority to the need to enforce governmental edicts than to the need to protect individual liberties reminds me of an earlier period in Anglo-American history. At one time the British Parliament had taxed cider and the authorities were having a difficult time collecting the excise tax. To ease their difficulties it was proposed that the collectors be given the authority to enforce their cider tax by entering a man's house without knocking. When this proposal was debated in the House of Lords some 205 years ago, William Pitt closed his speech in opposition to extending this power of no-knock to the tax collectors with these eloquent words:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail. Its roof may shake. The wind may blow through it. The storm may enter. The rain may enter. But the King of England cannot enter. All his force dares not cross the threshold of that ruined tenement.

It would appear that as years pass and Kings give way to Presidents, and Parliament to Congress, it is necessary to reaffirm the validity of Pitt's statement, and to reassert opposition to any possible executive, legislative, or judicial actions to narrow that protection.

In the light of a modern day and present society in this country, it would also appear to be time that equal rights under the law would no longer be an issue in a Supreme Court nomination. Unfortunately, the record of Mr. Rehnquist in this regard does not dispel my disquiet that the legal basis for civil rights may still be in dispute.

As noted previously, Mr. Rehnquist has impressively demonstrated his polemic and legal talents in his aggressive arguments for the expansive interpretation of traditional constitutional doctrines dealing with the limits of governmental powers. In his public briefs on the issue of the Government and the Bill of Rights, he has been consistent in his advocacy for the broadest reading of constitutional provisions and judicial decisions favoring Executive powers over individual liberties whenever there is a conflict. On the other hand, whenever the issue has been equal protection under the law for all citizens, the nominee has promoted the narrowest view.

Thirteen years after a unanimous Court, including Justice Jackson, had decided Brown against Board of Education in 1954 and declared the constitutional principle that segregation in the school systems was "inherently unequal," Mr. Rehnquist wrote to the editor of the Arizona Republic on September 9, 1967, to criticize the Phoenix school superintendent's very modest "integration program" for the Phoenix high schools. While Mr. Rehnquist recognized that in this society each man should be equal before the law, this equality, despite the Supreme Court's express holding to the contrary, did not involve a commitment to integrating the schools. In his letter he said:

But I think many would take issue with his statement on the merits, and would feel that we are no more dedicated to an "integrated" society than we are to a "segregated" society . . .

This is not only a perversion of constitutional holding, but contrary to the dominant thought in the country at that time.

The State of Wisconsin enacted a tough public accommodations law in 1895 guaranteeing to all persons of every race and color the right of full enjoyment of "inns, restaurants, saloons, barber shops, eating houses, public conveyances on land and water, theaters, and all other places of public accommodation and amusement." Sixty-nine years after Wisconsin declared her opposition to discrimination in public facilities, Mr. Rehnquist appeared before the Phoenix City Council in 1964 to oppose a modest municipal public accommodations law. When the ordinance passed, the nominee wrote a letter to the editor of the Arizona Republic calling the passage a "mistake" and elevated economic rights above human rights.

When President Nixon announced his two nominations for the vacancies which existed upon the Supreme Court on October 21, 1971, he prefaced his remarks on the nominees by saying:

During a four-year term, the President of the United States, sitting at his desk, in this historic room, makes over 3,000 major appointments to various Government positions. By far the most important appointments he makes are those to the Supreme Court of the United States. Presidents come and go but the Supreme Court through its decisions goes on forever. Because they will make decisions which will affect your lives and the lives of your children for generations to come.

It is worth while to note that the President, himself, has consistently said he would nominate men to the Supreme Court who reflected his philosophy. He reminded us in his speech on the two nominations that—

I pledged to nominate to the Supreme Court individuals who shared my judicial philosophy, which is basically a conservative philosophy.

When he went on to give specific examples of what he meant by a "conservative judicial philosophy," however, it became readily apparent that the President was not talking about what is the

accepted legal concept of that term—that is, a decider of individual cases who honors precedent and avoids breaking constitutional ground when there is a narrower ground on which to hold. Instead, the President made it clear that he was seeking men who would share his social, political, and personal views and who would advocate them on the Court.

In 1959 Mr. Rehnquist stated in the Harvard Law Record article "The Making of a Supreme Court Justice":

Nor is the law of the Constitution just "there" waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the Constitution which have been the most productive of judicial lawmaking—the "due process of law" and "equal protection of the laws" clauses—are about the vaguest and most general of any in the instrument.

Mr. Rehnquist ended his article with the advice:

It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the Constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws", then men sympathetic to such desires must sit upon the high court.

It is, therefore, apparent that it is not a "conservative judicial philosophy" in the tradition of Black and Harlan that President Nixon seeks in nominating William Rehnquist to the Supreme Court. Rather he is seeking a judicial activist who is willing to advocate his own interpretation of the Constitution and previous judicial decisions in accordance with his own conservative political philosophy.

In concluding an article in the Yale Law Journal on the scope of senatorial review in Supreme Court nominations, the legal scholar, Charles L. Black, Jr., concluded:

To me, there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote. I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view.

On the question of the guarantee of individual rights in the first 10 amendments to the Constitution, I am a strict constructionist. The Bill of Rights was specifically adopted to protect individual liberties against oppression and the excesses of governmental power. Mr. Rehnquist's interpretations of these guarantees are at such variance with my own that I am unable to support his nomination.

PUBLIC OPPOSITION TO WILLIAM REHNQUIST

Mr. BAYH. Mr. President, I ask unanimous consent that a sample of the outpouring of public opinion in opposition to the nomination of William Rehnquist be printed in today's RECORD. I am including editorials from the New York Times, the Washington Post, the Boston Globe, the Chicago Sun Times, the St. Petersburg, Fla., Times, the St. Louis Post-Dispatch and the Christian Science Monitor. I also wish to have printed in the RECORD for the information of my colleagues, a number of statements by national organizations opposed to Mr. Rehnquist. The organizations include the American Federation of Labor and Congress of Industrial Organizations, the American Civil Liberties Union—for, I might add, the first time in its history taking a position on a nominee—the Leadership Conference on Civil Rights, the Ripon Society, the National Legal Aid and Defender Association, the Washington Council of Lawyers, the Chicago Council of Lawyers, and the National Catholic Conference for Interracial Justice.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the New York Times, Nov. 15, 1971]

THE COURT APPOINTMENTS

In recent years, the Senate has been loath to argue about the judicial philosophy of Supreme Court nominees. It has generally assumed in the absence of damaging evidence to the contrary that any nominee who is intellectually qualified, honest and experienced in some branch of the legal profession will cultivate the detachment and perspective which the task of judging requires. But inasmuch as President Nixon has to a far greater degree than normal politicized the process of selection and has so insistently proclaimed his determination to remake the Court in his own image, the Senate needs to recall that its traditional deference to Presidential nominations is an institutional courtesy rather than a constitutional command.

Assistant Attorney General William H. Rehnquist's published belief that the Senate has an obligation to inquire into the basic philosophy of a Supreme Court nominee is applicable to his own position today. The question is whether the nominee should be evaluated by the Senate in terms of his specific, political, social and economic views—quite apart from the obvious requirements of integrity, ability, temperament and training. Does not the President have the privilege of nominating to the Supreme Court a man or woman of any political orientation that pleases him, without interference by the Senate; or does the Constitution, through its "advise and consent" clause give the Senate the right to reject a candidate because it disagrees with his politics or his philosophy?

* * * * *

The Supreme Court should be above politics; yet it is obvious that the Supreme Court deals with the stuff of politics. We have repeatedly argued that while the President owes it to the Court and the American people to keep partisan politics out of his judicial appointments, he ought to have the broadest latitude in his selections so long as they are made within the context of the American democratic system. What this means is that the candidate, whether liberal or conservative, of the right or of the left, must not be hostile to the broadly accepted principles of American constitutional democracy. This test the Senate has the right and duty to make.

The choice of Lewis F. Powell presents in this context relatively little difficulty. A leading lawyer of Richmond, a highly regarded member of the profession, a thorough-going conservative in political philosophy, Mr. Powell has demonstrated during a long record of service to the community as well as to the bar that he has the requisite personal, intellectual and basic philosophic qualities.

The same cannot be said for Mr. Rehnquist. Though he is undoubtedly a capable lawyer of impressive academic and intellectual attainments, his entire record casts serious doubt on his philosophic approach to that pillar of the American constitutional system, the Bill of Rights. On every civil liberties issue—wiretapping, electronic surveillance, "no knock" entry, preventive detention, rights of witnesses before Congressional committees and state legislatures, the rights of the accused—Mr. Rehnquist's record is appalling. He seems to have scant respect for the individual citizen's right to privacy, relying on "self-discipline on the part of the executive branch" to provide the protection needed. But if "self-discipline" by Government officials were sufficient in such circumstances, why would this nation need the carefully defined safeguards of the Bill of Rights?

* * * * *

What alarms us about Mr. Rehnquist is not the conservatism of his views—Mr. Powell certainly shares that characteristic—but our conviction on the basis of his record that he neither reveres nor understands the Bill of Rights. If this is so, then he certainly does not meet the basic requirement that a justice of the Supreme Court be philosophically attuned to the irrevocable premise on which the American political structure rests: the protection of individual liberty under law, particularly against the repressive powers of government.

The Constitution leaves room for a wide diversity of political and social interpretation and even of judicial philosophy; but through the issues of human freedom as set forth in the first ten amendments there runs a basic imperative that cannot be dismissed and must not be trifled with. A deep-seated respect for these liberties, a belief that they cannot be arbitrarily abridged or diminished by any power, even that of the President, is indispensable for service on the Supreme Court.

Mr. Rehnquist's elevation to the Supreme Court could have a critically regressive effect on constitutional protection of individual liberties for a long time to come. On Mr. Nixon's own premises, the Senate would be within its rights in insisting that while it may be content to accept a distinguished conservative like Mr. Powell, it is not obliged to accept a radical rightist like Mr. Rehnquist.

[From the Washington Post, Nov. 28, 1971]

THE SENATE, THE COURT AND THE NOMINEES—II

A fe wdays ago, we noted that although the nomination of Lewis F. Powell Jr. to be an Associate Justice of the Supreme Court gave us no problem, the nomination of William . Rehnquist did. It still does. Mr. Rehnquist's written response to questions submitted to him by some members of the Senate Judiciary Committee does not dispose of all the doubts that have arisen about his views on the concepts embodied in the Bill of Rights.

Those doubts are what have led us to make a distinction between Mr. Powell and Mr. Rehnquist. We believe both men to be suited intellectually and professionally for the positions to which they have been nominated, perhaps better suited in those re-

spects than any of the four men previously selected by Mr. Nixon for the court. We are aware of no incident in the record of either man that raises the kind of questions that plagued the nominations of Judges Haynsworth and Carswell. That leaves open only (1) the matter of the views they hold of the Constitution, or to be more precise about what is troubling us, the sensitivity they have shown toward the Bill of Rights and (2) the commitment they have demonstrated to undo some of the court's recent interpretations of those amendments. It is here that the records of the two men differ.

These aspects of their constitutional philosophy are particularly relevant now because the court is narrowly divided on some issues that arise under the First, Fourth, Fifth and Sixth Amendments. Its general course in recent years has been to stress the protections for individuals provided in those amendments, a course that President Nixon has pointedly said he hopes to reverse. In judging these two men, then, the Senate has to decide how far their confirmation would move the court toward President Nixon's goal—and whether it wants to let him move the court that far.

There are, or so it seems to us, three striking themes which run through most of the writings and speeches of Mr. Rehnquist over the last 15 years. These are : (1) his lack of understanding of the problem of racial discrimination as late as 1964; (2) a somewhat cavalier attitude toward interpretations of the Bill of Rights that differ from his own; and (3) the underlying philosophy about the role of government that runs through so much of what he has had to say on these subjects.

Of the three, Mr. Rehnquist's attitude toward civil rights is the least troubling. He did oppose a public accommodations law in 1964 and he now explains his opposition on the ground that he did not understand "the strong concern that minorities have for the recognition" of their rights. We can't help wondering where he was during the years preceding 1964 when the depth of feeling about such matters was driven home so eloquently by Dr. King and others. But we accept his current statement that his horizons have broadened since then. Perhaps they will broaden more. Beyond this, however, the area of civil rights is not one in which his presence on the court is likely to make much difference one way or the other. It's course in that area seems well nigh irreversible.

The second aspect of Mr. Rehnquist's views that has been questioned is the degree of sensitivity he has shown toward the concepts underlying the Bill of Rights. It is possible to review his record and come away with the feeling that he thinks those on the other side of the constitutional argument are, almost by definition, Communists, criminals and pornographers. But it is also possible to come away with the feeling that he has merely expressed his position strongly and perhaps was carried away in his rhetoric by the zest of the struggle. On this matter we are inclined to give him the benefit of the doubt, based principally on the testimony of some of those who have known him well, that he is thoughtful and careful in his approach to constitutional questions.

The philosophy that ties his speeches and writings together is one in which property rights outrank human rights and in which the power of government to trample on the civil liberties—free speech, privacy, peaceful protest, and the rest—of its citizens outranks the restrictions placed on his power by the Bill of Rights. In his view, a store owner's desire to select his customers outweigh a customers' desire to be served there; the government's interest in collecting information is more important than an individual's interest in being free from surveillance; the majority's interest in suppressing pornography or in convicting criminals far outweighs the individual's right to read or to be safe from self-incrimination, and so on. This is a view of the Constitution we do not share. But it is a view Mr. Nixon shares and the view he has said he will try to make dominant on the Supreme Court.

So far as Mr. Powell is concerned, we do not find in his record the first two of these three themes. He has been fully aware of the issues of our times and sympathetic toward, if not always in agreement with, interpretations of the Bill of Rights that are not his. On the third point, there may well be little difference between his views of the Constitution and those expressed by Mr. Rehnquist. But there may be a decided difference in the commitments of the two men to do something about this trend of the court. We have the distinct impression that Mr. Rehnquist is intellectually committed to the overturning of several of the court's major decisions of the last 15 years involving the Bill of Rights. Mr. Powell may or may not have such deeply held views and it is conceivable that on some key votes he will surprise the President. We doubt that Mr. Rehnquist has such flexibility. And given the balance on the court now, this is a factor the Senate must weigh. Thus, the choice before the Senate is especially difficult.

Those senators who share our perspective on the paramountcy of civil liberties questions in this matter and on the essential correctness of the course staked out on these questions by the court in recent years could in fact argue the case for voting to confirm Mr. Rehnquist on several pragmatic grounds. One is that the prediction of how a justice will vote is a chancy and accident-prone business. Justices have often turned out to be quite different (once on the court) from what their previous records might have led one to expect. President Kennedy's appointee, Justice White, and President Eisenhower's appointee, Chief Justice Warren, are recent examples. Another argument might be that the addition to the court, at this time, of a particularly strong anti-civil libertarian voice could easily have the effect of impelling some of its present members in the other direction. Finally, there would be the argument that the rejection of Mr. Rehnquist would likely only bring forth from the President another nominee of similar view and lesser professional competence—thus setting off what would be, at best, another prolonged and corrosive struggle. For all its plausibility and practical attractiveness, however, this last point deserves special comment, since it amounts to an indirect abdication of the individual senator's constitutional right and duty to exercise his judgment on the President's Supreme Court nominees: neither the likelihood of Mr. Rehnquist's confirmation (which seems real) nor the course the President might take if his nominee is rejected seems to us an adequate basis on which to determine the way a senator votes on this nomination. This would be especially true of a senator who shares the reservations and apprehensions we have spoken of in connection with Mr. Rehnquist.

For against all the pragmatic hopes and speculations set forth above that might argue for his confirmation, one must consider another set of possibilities, no more certain but much more dire. Which is to say, a vote to confirm Mr. Rehnquist is a vote to take a considerable risk with the future of civil liberties in this country. It is not as if Mr. Rehnquist would become the first or the second or the third justice holding his point of view. The breaks of history have given President Nixon a chance to achieve his goal of changing the court's direction with four nominations within the first three years of his term, an opportunity provided only two other Presidents—Taft and Harding—since the Civil War. Nor is there compelling evidence that Mr. Rehnquist is a flexible and moderate man who might or might not help the President reach his goal. On the contrary, on the basis of his record of articulate commitment, it would seem that his might well become the vote and the voice that tipped the balance. Those senators who believe, as we do, that the preservation of vital, court-defined civil liberties is the principal issue at stake here, have in our opinion good and sufficient reason to vote against the confirmation of Mr. Rehnquist.

[From the Boston Globe, Nov. 13, 1971]

THE HIGH COURT NOMINEES—2

For the United States Senate to concur at this time in President Nixon's nomination of Asst. Atty. Gen. William H. Rehnquist to the Supreme Court would be, on the basis of all available information, a dereliction of the Senate's duty to the Constitution, to the high court, and to the people of the United States.

This is not said lightly. Mr. Rehnquist is a man of superior intellectual and technical qualifications. But the record to date is virtually bare of evidence that he is anything but hostile to the principle that the Supreme Court's central role in our Constitutional system is to stand as the ultimate guardian of human rights and liberties.

Invoking the doctrine of lawyer-client confidentiality, Atty. Gen. Mitchell has declined to permit Mr. Rehnquist to complete the record by giving the Senate Judiciary Committee his precise personal views on such hard-line Administration policies as preventive detention, "no-knock" laws, wiretapping and electronic surveillance of US citizens, and indiscriminate mass arrest of demonstrators.

Mr. Mitchell asserts that for Mr. Rehnquist to discuss these matters in full detail with the Judiciary Committee would jeopardize the attorney general's future access to "the free exchange of ideas and thoughts so essential to the proper and judicious discharge of my duties."

This is preposterous. The Senate has an unlimited right to be informed of the personal views of a prospective member of the Supreme Court. Mr. Rehnquist himself said as much when he urged in the Harvard Law Record in 1959 that the Senate should vigorously exercise its former practice "of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him."

The lawyer-client privilege makes great good sense where the client is a private citizen and any breach of confidentiality by his lawyer would jeopardize the legal rights of the client in pending proceeding.

But to invoke the privilege where the client is the attorney general of the United States and the lawyer is an assistant attorney general, where both have been engaged in the formulation of public policies crucially affecting individual rights, and where the lawyer is a nominee for a seat on the Supreme Court, is just untenable.

AN ADDED IRONY

It is an added irony that an attorney general so callous about the privacy and personal security of ordinary citizens should plead that his own official privacy transcends the Senate's—and the public's—right to learn all about Mr. Rehnquist's views before his nomination is acted upon.

Mr. Rehnquist is on record as saying, in effect, that when it comes to Supreme Court nominees, the Senate should adamantly refuse to buy a pig in a poke. But Mr. Mitchell is now asking that the Senate do just that.

The Administration should not be permitted to have it both ways in this vital matter.

In his testimony before the Judiciary Committee last week, Mr. Rehnquist did in fact

engage in some slight breaches of confidentially—where it suited his purposes to do so.

For example, he told Sen. Edward M. Kennedy that he had felt there was "a misguided and unwarranted use of force" by National Guardsmen in the Kent State shootings, but that he never communicated his private feeling to the attorney general because "he never asked me" and other agencies were at work on the case.

Again, he testified that he had argued successfully within the Justice Department for abandoning the novel claim that the government had "inherent power" to wiretap domestic subversives without prior court permission.

It is true that in his testimony Mr. Rehnquist did back off a little from earlier public positions against free access of blacks to places of public accommodation and integration of public schools. But these remarks were scarcely reassuring in light of his long and theretofore unmitigated public opposition to civil rights.

Mr. Rehnquist has denied in an affidavit that he was ever a member of the John Birch Society in his home town, Phoenix, Ariz., as charged by New York newsman Sidney Zion. This denial must be taken at face value. Mr. Rehnquist has a reputation for veracity. Indeed, even if he had been a member of this organization, that fact, standing alone, would not be grounds for condemning him. The right of free association is everyone's right. People join organizations for myriad reasons, and similarly leave them. The critical issue is not what people join but what they do.

In this connection, the record on Mr. Rehnquist probably does not indicate the full extent to which he may have actively worked for political causes in the 16 years during which he engaged in the private practice of law in Phoenix. And this is information which the Senate Judiciary Committee ought to have, and should demand. And man's political actions and beliefs are necessarily related to the question of what sort of "judicial philosophy" he may bring with him to the bench, especially the bench of the Supreme Court, which is the ultimate arbiter of controversies over constitutional interpretation.

Mr. Rehnquist has himself declared: "It is high time that those critical of the (Supreme) Court recognize with the late Charles Evans Hughes that for 175 years the Constitution has been what the judges say it is. If greater judicial self-restraint is desired. or a different interpretation of the phrases 'due process of law' or 'equal protection of the laws,' then men sympathetic to such desires must sit upon the high court."

Consider this appraisal of Mr. Rehnquist's political stance by John P. Frank, a noted constitutional and Supreme Court expert who knew Mr. Rehnquist in Phoenix for many years:

THE GOLDWATER VIEW

"He will represent the Goldwater view on the Supreme Court. Bill has been an intellectual force for reaction. I do not believe he will put the manacles back on the slaves, but I'm sure from his point of view that it will be more than a pause . . . there will be backward movement. In terms of race relations, I would expect him to be retrograde. He honestly doesn't believe in civil rights and will oppose them. On criminal matters, he will be a supporter of police methods in the extreme. On free speech, Bill will be restrictive. On loyalty programs, McCarthyism, he'll be 100 percent in favor."

iWth a good lawyer's ingrained respect for professional excellence, Mr. Frank states that despite this appraisal of Mr. Rehnquist his nomination should be confirmed by the Senate.

As the record now stands we cannot agree, and the fact that Mr. Rehnquist is a conservative Republican has nothing to do with it. What does matter greatly is the judicial philosophy of Mr. Rehnquist, on which more must be heard.

For if what Mr. Frank says is true, and goes uncontradicted, and Mr. Rehnquist's nomination is confirmed, then a society already grievously polarized will become more so. It is vital that our highest court of justice be able to carry out indefinitely its constitutional mission of protecting the liberties of the people against any excesses of the Federal and local governments. That is why the judicial philosophy of a nominee to that court is so important, and why it should be explored further.

[From the Boston Globe, Dec. 6, 1971]

MR. BROOKE ON MR. REHNQUIST

Sen. Edward W. Brooke's opposition to Asst. Atty. Gen. William H. Rehnquist could be a determining factor in the soon-to-be-recorded Senate vote to confirm or reject Mr. Rehnquist as an associate justice of the United States Supreme Court.

Mr. Brooke was right in all of the reasons for his opposition to Mr. Rehnquist. But there are other reasons, too. Mr. Brooke does not oppose Mr. Rehnquist because he is a conservative, a Southerner or a strict constructionist. Nor do we. His opposition is based on his determination, after long study, that Mr. Rehnquist is lacking in commitment to an integrated society. It is unfortunate that some of the senator's colleagues are inclined to excuse this as unimportant.

Mr. Brooke has noted the nominee's opposition to a public accommodation ordinance in Phoenix, Ariz., in 1964, his opposition to a Phoenix school desegregation plan in 1967, and his comment at that time that "we are no more committed to an integrated society than we are to a segregated society," Mr. Brooke finds this view "unsupportable." Such a view is not only unsupportable, it is a denial of the meaning of the Constitution which the nominee would be pledged to support, and it is hazardous at this time in particular when the lack of commitment to the brotherhood of all men threatens to tear the nation apart.

Mr. Brooke, himself a lawyer and himself Supreme Court material, is more kind to Mr. Rehnquist than he perhaps has any right to be. If Mr. Rehnquist were to be confirmed, Mr. Brooke hopes that he might serve in the great tradition of the late Justice Hugo Black, at one time a member of the Ku Klux Klan, and that he might demonstrate on the Court, as Mr. Black did, "a capacity to grow and change."

This might be. But to confirm a nominee in the hope that he might change would be not only a fool-hardy gamble. It also would amount to the ludicrously untenable assumption that, in this nation, replete with great legal talent, Mr. Rehnquist is the only available candidate—confirm him, for there is no other.

Mr. Brooke did not suggest, as we wish he had, that Mr. Rehnquist's vulnerability is manifest in the Administration's insistence that his and the almost unassailable Lewis F. Powell Jr's nomination be considered as a kind of package deal, as though they were one of baseball's double play combinations—Tinker and Evers, say. Or was it Chance? There scarcely could be a franker acknowledgment that Mr. Rehnquist cannot stand scrutiny on his own. Nor is it enough that he is generally acknowledged to be "a fine gentleman," as one of his Senate supporters has put it.

Mr. Brooke, weighing his own heavy responsibilities as a senator, has asked pertinent questions and reluctantly found that the right answers are still wanting. Mr. Rehnquist may be every bit as brilliant as he is said to be. But how can his supporters rationalize their support for him so long as they quite literally have no way of fully knowing his views on matters on which he steadfastly has refused to be questioned and on which the Administration will not permit him to be questioned? Mr. Rehnquist, hiding behind a dubious lawyer-client relationship, has, in effect, "taken the Fifth"—unprecedented and intolerable in confirmation proceedings.

Sen. Brooke was one of the leaders in the Haynsworth and Carswell rejections. It is to be hoped that his Senate colleagues will listen to him now as they listened to him then.

[From the Chicago Sun-Times, Dec. 5, 1971]

POWELL, YES—REHNQUIST, NO

The Senate will vote Monday on President Nixon's latest nominations to the Supreme Court. The choice of Lewis F. Powell, Jr., a distinguished Southern lawyer highly regarded in his own profession, would seem to present few difficulties. Powell is a thoroughgoing political conservative who has demonstrated in his writings and actions a commitment to the basic philosophic premises of American democracy. He has understood the constitutional mandates that all citizens be treated equally, that personal liberties be rigorously safeguarded and government powers limited. Indeed, his healthy skepticism of state authority and his regard for individual rights are true to one of the oldest strains of conservative thinking. We urge his confirmation by the Senate.

Mr. Nixon's other choice, Assistant Atty. Gen. William H. Rehnquist, presents a far more troubling dilemma. Like Powell, Rehnquist has impressive legal and intellectual credentials and a reputation for hard work and personal integrity. But his record, both in and out of government, casts grave doubt on whether he understands and reveres the Bill of Rights, which is the pillar of the American constitutional system.

Rehnquist's writings, actions and recent testimony characterize him as a zealous proponent of unharnessed state power. He has shown a corresponding insensitivity to the need for protecting individual liberty and equality from the potential repression of government.

His attitudes toward government surveillance, criminal procedure protections, equal access to public accommodations, the free speech interests of federal employes and witnesses before congressional and state legislative bodies demonstrate persistent hostility to constitutional protections of privacy, unfettered expression and equal justice. Where he modified his positions in recent Senate testimony, he did so in a manner that left unchanged the basic views and reasoning which led to his earlier stands.

In short, Rehnquist is no conservative but rather a radical rightist. * * * No ideological radical—from either the left or right—belongs on the Supreme Court, for none can possess the open-mindedness so essential to the fair rendering of justice. Rehnquist demonstrates that despite his intellectual and legal gifts, he has a closed mind and therefore is an apologist for an extreme ideology and not a legal reasoner. Extensive research of his record shows that he argues back from desired conclusions to their justifications.

Such a philosopbic predisposition transcends specific political and social views. That is a key point, because we don't think it reasonable to vote a nominee up or down solely on the basis of differing views on current affairs. It is essential to foster vigorous stands in public life and it is worth remembering that judges change their opinions sometimes drastically. But most importantly, there is no one correct way of approaching the great issues of our society. Therefore we would not expect to agree with all the views of any nominee to the Supreme Court and currently do not in the case of nominee Powell.

It is necessary, however, to be philosophi-

cally attuned to the basic concepts of American life built into the Bill of Rights. On that score we find Rehnquist grievously wanting and recommend that the Senate vote no on his nomination to the Supreme Court.

The Senate has ample precedent for rejecting nominees on philosophic grounds, stretching all the way back to the denial of President Washington's selection for chief justice, John Rutledge. In this century, the recommendation of Judge John J. Parker was similarly turned back. During the Senate debats then, that great Nebraska senator, George Norris, focused the issue and what he said is as relevant today as in his time.

"When we are passing on a judge, we not only ought to know whether he is a good lawyer, not only whether he is honest—and I admit that this nominee possesses both of these qualifications—but we ought to know how he approaches the great questions of human liberties."

[From the St. Petersburg Times, Nov. 7, 1971]

POWELL, YES; REHNQUIST, NO

After careful review of President Nixon's choices to fill Supreme Court vacancies left by John Harlan and the late Hugo Black, we can easily support Lewis Powell, but must oppose confirmation of William Rehnquist.

Powell, 64, a Richmond, Va., lawyer and former president of the American Bar Association, is the third Southern conservative nominated by Mr. Nixon. A racial moderate, Powell would bring to the court unquestionable standards of professional achievement, judicial temperament and personal integrity.

Rehnquist, 47, a Phoenix, Ariz., lawyer, has unfortunately exhibited during his last two years as assistant attorney general a marked insensitivity to basic constitutional concepts.

In 1964, Rehnquist opposed a Phoenix City ordinance prohibiting racial discrimination in public accommodations, despite federal law to the contrary. (He changed his mind last Wednesday.)

In 1967, he defended the separate but equal educational concept struck down 13 years earlier by the Supreme Court.

More recently:

In September 1970, he said citizens lose at least part of their right to free speech when they take government jobs, and for good measure added that public employees who differed publicly with President Nixon could lose their jobs.

In December 1970, he told Congress that preventive detention (jailing of unconvicted defendant on the ground he might commit a crime if freed before trial) was valid and proper.

In March 1971, he defended government data banks kept on law-abiding citizens whose only crime was opposition to government war policies and other lawful activity. He changed a bit Thursday, saying government surveillance of peaceful activities was unconstitutional, but only if it had a "chilling effect" on exercise of the right to free assembly.

In July 1971, he supported expanded federal wiretap powers without recourse to court permission. Last week he said he advised the Administration against taking an official position that it had the inherent power to tap telephones without court orders in domestic security cases.

In addition, Rehnquist has endorsed the use of illegally obtained evidence, backed the President's abortive effort to manipulate the Subversive Control Board controlled by Congress, supported the massive denial of defendant rights surrounding May Day arrests in Washington, and maintained that presidents have the right to fill Supreme Court vacancies without congressional interference, in utter disregard for constitutional requirements for Senate confirmation.

Although Rehnquist has partially recanted some of his earlier views, his record is one of past support for narrowed personal rights and advocacy of enlarged government power. It forms a pattern of political extremism outside the fundamental support for the Constitution which every Supreme Court justice must possess. This pattern is sufficient, we think, for any senator to vote to deny Rehnquist confirmation.

The responsibility for nominating another unsuitable candidate clearly falls upon President Nixon, whose overall record in this respect is abominable.

But now the burden has been transferred to the U.S. Senate. It has the constitutional duty and the resources to investigate every nominee fully. These duties cannot be delegated—either by the president or the Senate.

[From the St. Louis Post-Dispatch, Nov. 22-28, 1971]

NOT WILLIAM REHNQUIST

The Senate Judiciary Committee has voted unanimously to approve the nomination of Lewis F. Powell for the Supreme Court and accepted the nomination of William H. Rehnquist by 12 to 4. If the two nominees had not been paired, Mr. Rehnquist might have faced more trouble. On the Senate floor, his nomination should face defeat.

Long before his nomination Mr. Powell had proved himself both a highly respected attorney and a thorough conservative. Mr. Rehnquist is an intelligent man and an able lawyer, but as a conservative is something else again.

We do not refer here to the questions arising about his alleged membership in an extremist right-wing group in his native Arizona, which Mr. Rehnquist flatly denies. That is secondary. If Mr. Rehnquist's supporters were willing to make comparison with a great champion of liberties, they could note that the late Justice Hugo Black once belonged to the Ku Klux Klan. But Justice Black had a fine record in the Senate by which he could be judged before he was placed on the court. Mr. Rehnquist's record, which runs the other way, does not indicate such capacity for intellectual growth.

By Mr. Rehnquist's record we refer, in short, to his views. He has opposed civil rights measures such as a public accommodations ordinance and school bussing. As an assistant attorney general he has championed, not the people's liberties, but Attorney General Mitchell's repressive ideas: arbitrary wiretapping in some cases, preventive detention which means jail without trial, the "no-knock" police raid and so on. Indeed, he once charged that Communists "scored significant victories" from decisions of the court to which he now aspires.

That much of the record suggests misapprehension and, indeed, mistrust of the court and some of its major decisions, along with constitutional guarantees. But there is more.

Mr. Rehnquist also defended President Nixon's decision to invade neutral Cambodia as "precisely the sort of tactical decision traditionally confided to the Commander in Chief." No president, however, has asserted so sweeping a doctrine. Though Mr. Nixon has said no court nominee should "twist or bend" the Constitution to promote political views, that is what his nominee did here.

There are, of course, lawyers and laymen who will argue that a court candidate's views should be of little moment; that what counts in the confirmation process is ability and honesty or, to put it crassly, if a nominee is a member of the bar in good standing and is not a crook, that is enough. Mr. Rehnquist himself is not of this opinion; he has argued that a nominee's views are pertinent.

In our opinion the degree of the president's latitude in making appointments to the court, and the degree of the Senate's role in providing advice and consent, are illustrated well enough in the cases of Mr. Powell and Mr. Rehnquist. Mr. Rehnquist's consistently-held views about the court, the Constitution and presidential powers are more than enough to draw the line against him.

That is because Mr. Rehnquist's confirmation would place on the high court a dedicated advocate of unilateral executive power and privilege, of authoritarian policies the Constitution was written precisely to prevent. So more is at stake here than the Nixonizing of the court. The issue involves the long tradition of divided and balanced powers of government.

Congress has already seen its war-making authority eroded by the executive—a process justified by Mr. Rehnquist. A self-respecting Senate is only beginning to challenge that extension of presidential power. It should not acquiesce in executive subjugation of the Supreme Court.

[From the Christian Science Monitor, Nov. 20, 1971]

THE REHNQUIST QUESTION

There is no serious doubt about the right of the President of the United States to name persons of his preference to the Supreme Court—provided their professional qualifications are suitable. Precedent has by now made it clear that the individual must be competent in the law, judicious of temperament, and of personal probity. Otherwise they don't get by the Senate. Beyond that—a liberal president is entitled to name a conservative candidate.

The Senate hearings have established that both of Mr. Nixon's latest nominations for the court are men of personal probity, judicious temperament, and competence in the law. In those three categories both men are entirely qualified. And so far as Lewis Powell is concerned that is an end of the matter. He will have the approval the Senate.

There is one difference in the Rehnquist case.

His record on civil-rights issues indicates that he is, or has been, sufficiently conservative in civil liberty matters to fit what is popularity known as the "Southern strategy."

His nomination to the court expresses Mr. Nixon's own attitude toward racial matters which is one of going only as fast as the law and the courts require. He is not out in front leading the parade.

Mr. Nixon wants a man of conservative views on such matters on the court. He wants to prove to Southern conservatives his own sincerity on this point. Putting a person with views similar to his own on the court is one way of providing his sincerity.

It is perfectly proper for a president to consider a matter of this kind in his appointment. It is a political point of view. Presidents Roosevelt, Johnson, and Kennedy all looked around for persons with political points of view similar to their own when they wanted candidates for the Supreme Court.

But it is equally proper for senators of a liberal bent to oppose a president when the issue is political in this manner. It is just as proper for Senator Bayh to resist a civil-rights conservative as it is for President Nixon to promote one

In other words the issue in respect to Mr. Rehnquist is neither personal nor professional. It is purely political. The outcome therefore is bound to be political. It will measure the extent of sentiment in the Senate on civil righte and how many votes the White House can muster in favor of a candidate who would be a welcome addition in the eyes of Southernsrs who favor going as slow as is legally permissible down the road to equal opportunities for Negroes.

It will also record the number of senators who wish to push ahead as fast as possible toward equal legal, political, and social rights for Negroes—and other minority groups in the United States.

AFL–CIO CONVENTION, NOVEMBER 19, 1971—REHNQUIST RESOLUTION

Political extremism of the right and of the left has no place on the Supreme Court of the United States. It is for that reason that this Convention views the nomination of William H. Rehnquist as an Associate Justice of the Supreme Court as a dangerous departure from the philosophy of a broadly representative, constitutionally sound Court.

We do not believe a President's desire to name Justices with a similar political philosophy to his should extend to a nomination that is a direct rebuff to the rights and liberties of individuals guaranteed by the Constitution and its first 10 amendments.

The President has said that Mr. Rehnquist is a "strict constructionist" of the Constitution. However, his record, his writings, his self-expressed philosophy clearly show he is a strict constructionist of the Constitution prior to the adoption of the Bill of Rights.

Mr. Rehnquist purposely avoided the efforts of members of the Judiciary Committee of the Senate to question his views on such constitutional questions as wiretapping, executive power and civil liberties. These questions must he answered in open session or risk a lack of confidence on the part of the American people in the Court as an equal and independent institution of American society.

The American people are already deeply concerned by the circus atmosphere surrounding the latest Court nominations made by President Nixon. The "leaks" and "counter-leaks," the "lists" and "non-lists" followed by the nomination of one of the Administration's chief apologists hardly reflects the "respect for the Court" of which the President spoke when he announced the nominations.

The Supreme Court is too important, too respected and too necessary to American society for the Senate to now confirm Mr. Rehnquist while the American people ask questions: Is he more loyal to a President than to the Constitution? Will he respect individual liberties more than Executive power?

These are proper questions. These are questions Mr. Rehnquist has not answered.

President Nixon has attempted to pack the Supreme Court with ideological and demagogic reactionaries. The Senate properly rejected his nominations of Clement Haynsworth and G. Harrold Carswell.

It must do so again—this time with the nomination of William Rehnquist. The future of today's citizens, their children, and their grandchildren is too important to permit a man of Mr. Rehnquist's philosophy to exert his influence over the constitutional direction of American society for the remainder of this Century.

Therefore, be it resolved that the Ninth Convention of the AFL–CIO urges the Senate to reject the nomination of William Rehnquist. Men of his philosophy, just as men of the philosophy of the far left, have no place on the Court.

STATEMENT OF EDWARD J. ENNIS, CHAIRMAN ACLU

"The National Board of Directors of the American Civil Liberties Union has decided to depart from the organization's 51 year policy of never endorsing or opposing candidates for public office in order to oppose the nomination for the Supreme Court of William Rehnquist.

"The ACLU prizes its tradition of political non-partnership. We have taken an extraordinary step because of extraordinary circumstances. The President has nominated for the Supreme Court William Rehnquist, a man we know as a dedicated opponent of individual liberties. Under our system of government, the Supreme Court is the nation's ultimate interpreter of the Constitution and protector of individual liberties. We believe that it would be a betrayal of the principles of our Constitution to entrust their interpretation to a person who has devoted himself to undermining those principles.

"We know William Rehnquist as an advocate of dragnet arrests, as an opponent of racial integration, as a champion of executive authority to engage in electronic eavesdropping and political surveillance, as a campaigner for pre-trial incarceration and as an engineer of the Justice Department's programs to abrogate the rights of persons accused of crime. In short, we know Mr. Rehnquist as a person committed to the notion that in every clash between civil liberty and state power, it is civil liberty that should be sacrificed. We believe that his commitment to state power at the expense of individual liberty makes William Rehnquist unfit to sit on the U.S. Supreme Court."

LEADERSHIP CONFERENCE ON CIVIL RIGHTS,
Washington, D.C., December 7, 1971.

DEAR SENATOR: As I'm sure you know, the Leadership Conference on Civil Rights opposes the nomination of William H. Rehnquist to the U.S. Supreme Court.

There is no better spokesman for our point of view than Mr. Rehnquist himself. His statements on issues of civil rights and civil liberties, as set forth in the enclosed pamphlet, persuade us that he cannot meet President Nixon's own high standard for a Supreme Court Justice—one whose "sole obligation is to the Constitution and the American people."

We hope you will read the pamphlet. We hope you will agree with us that no one can support Mr. Rehnquist who believes, as we do, that the Supreme Court must remain a strong force for social change and social progress within our democratic system. And when the time comes to vote, we urge you to vote against his confirmation.

Sincerely yours,

ROY WILKINS, *Chairman.*

A RIPON POLICY ANALYSIS, THE WEAK CONSTITUTION OF A "LEGAL GIANT"

The Senate faces severe limitations in resisting a President determined to remake the Supreme Court. The President has the initiative, and as in nuclear strategy, the advantage is with the offense. The President can merely keep submitting names; the Senate must mobilize its somewhat cumbersome machinery and political resources to investigate, disqualify and reject each one. Now, moreover, in the age of MIRV, when the President may launch as many as six bombs at once—or fill the air with chaff and decoys—the role of the defense is further complicated. It is somewhat difficult to muster a struggle against a man like William Rehnquist when lined up behind him are men like Robert Byrd and women like Sylvia Bacon and when the President maintains his nominations have something to do with "respect for the law" or reducing crime.

Still we believe it is just as well that we know what we are doing. Approval of William Rehnquist's nomination will for the first time give credence to what has until recently seemed an alarmist fear: that we are moving into an era of repression, in which the U.S. democracy gives up its most noble enterprise—the maintenance of a free and open society.

A scenario may be envisaged. The Communist party and other political action organizations that can be alleged to advocate revolution would be black-listed and outlawed. Wiretapping and other even more sophisticated modes of individual surveillance would be extended without judicial review. All but the most flagrant acts of discrimination and collusion against blacks would be permitted. The courts would return to the unedifying business of poring over pornography, and arbitrarily incarcerating improvident writers, photographers, and bookstore proprietors. The "third-degree"—extorted confessions and the like—would be effectively authorized. Ever larger numbers of dissenters and other nonconformists who affront the police or marginally violate the law would be imprisoned for long periods. Police brutality and lawlessness, on the other hand, would be condoned. At a time when the government provides an ever larger proportion of available jobs, the firing of dissenters from federal employment would be legitimized. And finally the Executive, in illicit tandem with the judiciary, would reduce the legislative branch to inconsequence on vital matters of war and peace and to irrelevance in the always elastic realm of "national security." And, of course, the real problems of crime and instability in our society would persist.

Such developments are not, of course, inevitable. They will occur only if the Supreme Court abandons its role as ultimate guarantor of the Constitution and the legislative branch refuses to recognize the new responsibilities such a judicial abdication would impose on the Congress.

But the entire scenario of repression consists of measures that Rehnquist, on the record, has strongly and explicitly invited; and most of them are not strongly opposed by the other three Nixon appointees. So even if, in view of the President's determination to transform the Court, it proves tactically necessary for the Senate to accept Rehnquist, we want to register our opinion that he is Nixon's most dangerous nominee yet. Younger and smarter than the others, he will have a longer and more deleterious impact on our political and social order.

There has been much nonsense written in recent weeks on Rehnquist's good character and legal expertise, as if these qualities alone justify confirmation. In fulfilling its Constitutional responsibility for advice and consent, however, the Senate does not stand like the Bar Association's Committee on the Judiciary, as a mere judge of ethical and professional credentials. The Senate must also consider the impact of such potential appointments on the balance between the executive and legislative branches and on the direction of America over the next decades.

POWELL ENDORSED

Applying such standards to the current Supreme Court nominees, the Ripon Society supports, with some reservations, the confirmation of Richmond attorney Lewis Powell, a former President of the ABA. Although his writings do not display a staunch concern with preserving individual liberties, his persistent advocacy of legal services for the poor, his mediating role in Virginia school integration controversies, and his continuing reputation for fairness allay many of our fears. We are further reassured by his recent rejection of Rehnquist's view that the Executive has an inherent right to wiretap without judicial review in cases involving the national security. While Powell might strike the balance between individual liberties and governmental powers at a somewhat different point than we would prefer, he nevertheless recognizes the crucial limits on governmental authority. He is essentially a man of the law rather than a man of the Right.

William Rehnquist, on the other hand, has remorselessly allowed his political prejudices to supersede legal precedent. Unlike Lewis Powell's career of moderate judicial conservatism, Rehnquist's record does not show a consistent and scrupulous application of legal principles; rather it shows a consistent and unabashed manipulation of legal rhetoric in the service of right wing social and political objectives. His voluminous public statements and his private comments of

which we are aware, show him to be a thoroughgoing authoritarian, a nearly absolute believer in executive supremacy over the legislature, and a slack reconstructionist of the constitution.

Rehnquist's authoritarian bent is not tempered by judicial conservatism. Unlike such believers in judicial restraint as the late Justice Felix Frankfurter and former Justice John Marshall Harlan, Rehnquist is a militant judicial activist, who explicitly rejects the doctrine of *stare decisis*. Writing in the Harvard Law Record in 1959 Rehnquist stated: "It is high time that those critical of the present Court recognize with the late Charles Hughes that for 175 years the Constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases 'due process of law' or 'equal protection of the laws,' then men sympathetic to such desires must sit upon the high court."

In a letter that he wrote in 1959 Rehnquist, then in private practice in Phoenix, made clear the "different interpretation" of the Constitution he had in mind: "a judicial philosophy which consistently applied would reach a conservative result."

The kind of "conservative" result which Rehnquist would seek is diametrically opposed to the American conservative tradition of vigorously opposing the extension of governmental powers.

To justify the Justice Department's policy of encouraging indiscriminate mass arrests of Mayday demonstrators and bystanders (with the charges against them filled in randomly by police who had often never seen the accused or the crime), and of having thousands of patently spurious cases litigated with virtually no convictions, Rehnquist invented after the fact the doctrine of "qualified martial law."

Now even if one believes the Capitol was in direct jeopardy on Mayday, the Rehnquist rationale is legally slovenly. Rehnquist would have us believe that government can commit countless violations and then sanction them by some flip post-facto improvisation.

Rehnquist was also a major strategist in the preparation of the controversial "no knock" and "preventive detention" provisions of the D.C. Crime Bill. He has strongly asserted a governmental right to fire employees, even if covered by civil service, when they question Administration War policies. Furthermore he has maintained that the executive has the right to engage in wiretapping and other electronic surveillance without court supervision as long as it claims a "national security" justification. If we contend that such unaccountable government powers might become a threat to individual liberty and privacy, Rehnquist tells us to rely on the "self restraint" of the Executive—which might he conceivable if we could forget that in recent years the Attorney General's arbiter on such matters was one William Rehnquist.

A REMARKABLE FACT

In only one area in all his career has Rehnquist shown any opposition to the extension of governmental powers. While an attorney in Phoenix he was a vocal and insistent opponent of legislation to outlaw racial discrimination in public accommodations. It is a truly remarkable fact, worthy of contemplation by the Senate, that nowhere in his extensive writings has he displayed a keen concern for any individual liberty except what he quaintly calls the "traditional freedom" to discriminate against blacks.

Rehnquist now says he has reconsidered his attitude toward the public accommodations ordinance of 1964; that is understandable since even Barry Goldwater endorsed it seven years ago and it has worked smoothly, contrary to Rehnquist's lugubrious expectations. Before we rejoice too readily, however, we should note that he has only endorsed the local ordinance, not the Civil Rights Bill of 1964, and that in 1965 and 1967, virtually alone among prominent Arizonans he opposed other civil rights legislation.

It would be easy to compile an equally disturbing record of Rehnquist's views on the role of the Senate in foreign policy. An exponent of what Senator Mathias calls the theory of the Optional Congress, he has seemed eager to eliminate what few powers Congress has managed to retain in this era of executive supremacy in the international realm. Suffice it to say that he has consistently and erroneously maintained that the President has the power under the Constitution to commit U.S. troops to war across national boundaries without seeking Congressional approval, and that possessing this power, the President scarcely needs any others.

In nearly all of his public statements and in a number of private comments, Rehnquist has revealed himself as a brilliant authoritarian ideologue who sees the law or the Constitution as mere instruments for imposing his beliefs on the body politic. It may in fact be questioned whether a man who, like Rehnquist, defines a conservative judicial philosophy as an approach "that consistently applied reaches a conservative [political] result" can be correctly said to have a judicial philosophy at all.

For this reason, the Ripon Society believes that his elevation to the nation's highest court would be a dangerous mistake. If one is to have excessive judicial activism it is far safer to have it at the expense of the executive rather than in concert with an already exorbitant Presidency. This concern is greater than ever today, when the expanding technology of personal surveillance evokes with renewed menace the Orwellian vision of 1984 (when Rehnquist will be 59).

The Senate is especially bound to consider the philosophies of Supreme Court appointees when a President publicly enunciates a policy of choosing nominees largely because of their political leanings. Unlike most other Presidents of the twentieth century, President Nixon has made it clear that the principal qualification for his nominees is concurrence with his Administration's policies, especially in civil liberties. The Senate should exercise close scrutiny over nominees of such a politicized Presidential selection process. And if we really must have extremists on the court, may they be "in the defense of liberty."

DOES WILLIAM REHNQUIST MEET THE HIGH STANDARDS EXPECTED OF THE SUPREME COURT?

Asked what he thought of William A. Rehnquist as a prospective justice for the U.S. Supreme Court, this was the reply of John P. Frank, a noted expert on the Constitution and the Court and a friend of Mr. Rehnquist's for many years in Phoenix, Arizona:

"He will represent the Goldwater view on the Supreme Court. Bill has been an intellectual force for reaction. I do not believe he will put manacles back on the slaves, but I'm sure from his point of view it will be more than a pause . . . there will be backward movement.

"In terms of race relations I would expect him to be retrograde. He honestly doesn't believe in civil rights and will oppose them.

"On criminal matters he will be a supporter of police methods in the extreme. On free speech, Bill will be restrictive. On loyalty programs, McCarthyism, he'll be 100 per cent in favor."

In spite of this grim estimate and his feeling that "it is a deplorable appointment," Mr. Frank still thought Mr. Rehnquist should be confirmed for the Supreme Court.

He subscribes, apparently, to the current notion that a man's ability as a lawyer and his legal views are two separate things, that it is somehow unfair to inquire into a nominee's personal views on the law when considering him for the Court.

Yet President Nixon and Mr. Rehnquist have both said a nominee's views—his judicial philoshophy—should be part of an inquiry into his fitness for the highest judicial appointment in the land.

When President Nixon announced the Rehnquist nomination on October 21, he said judicial philosophy was one of the major considerations governing his choice. And Mr. Rehnquist, in a Harvard Law Review article he wrote in 1959, urged that the Senate restore "its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him . . ."

We agree with Mr. Nixon and Mr. Rehnquist. For us, the crucial question is this: To what extent would Mr. Rehnquist's philosophy of the law hinder him in trying to meet President Nixon's high criterion—that a Supreme Court Justice's "sole obligation is to the Constitution and to the American people"?

I—THE REHNQUIST RECORD ON CIVIL RIGHTS

Mr. Nixon's statement admits no exceptions. So it is fair to ask if Mr. Rehnquist is prepared to assume an obligation to all of the American people and not just to some of them.

What gives that question particular point are the first substantial public expressions of his views on civil rights when he was a lawyer in Phoenix during the 1960s.

PEOPLE AND PRIVATE PROPERTY

In 1964, Phoenix was about to pass a public accommodations law, a local ordinance requiring stores, restaurants and other places of public accommodation to serve all members of the public without regard to race, color, religion or national origin.

It was June 15, about five months after the U.S. House of Representatives had passed, by overwhelming vote, a civil rights law with a public accommodations section similar to the one Phoenix was considering; it was five days after two-thirds of the members of the U.S. Senate had broken a filibuster and signified their readiness to adopt the same provision. Yet William Rehnquist went before the city council to argue against the local ordinance.

He spoke, he said, only for himself; and indeed he was virtually alone in his opposition. Even Senator Barry Goldwater was in favor of the local law.

But Mr. Rehnquist called it "an assault on the institution [of private property]." The council went on to pass the ordinance unanimously. Still dissatisfied, Mr. Rehnquist wrote to the local paper. The ordinance, he said, in a letter to the Arizona Republic, "summarily does away with the historic right of the owner of a drug store, lunch counter or theater to choose his own customers.

"By a wave of the legislative wand, hitherto private businesses are made public facilities, which are open to all persons regardless of the owner's wishes."

He questioned "whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places . . ." In his view, it placed "a separate indignity" on the proprietor in order to correct the "indignity" society had placed upon "the Negro."

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

Asked at the Senate Judiciary Committee hearing on his nomination on November 8, if he still felt that way, Mr. Rehnquist replied, "I think probably not. The ordinance really worked well in Phoenix.

"It was readily accepted and I think I have come to realize since, more than I did at

the time, the strong concern that minorities have for the recognition of these rights." Since that "time" was in the wake of the Montgomery bus boycott, the Freedom Rides, the protests and mass jailings in Birmingham, the March on Washington and the demonstrated readiness of thousands of Negroes to die for equality, one wonders what more was needed to make Mr. Rehnquist aware of a "strong concern."

PEOPLE AND SCHOOLS

In 1967, when Phoenix School Superintendent Seymour sought to desegregate the city's schools, saying "we are and must be concerned with achieving an integrated society," Mr. Rehnquist wrote again to the local paper taking issue with that statement. "We are no more dedicated to an 'integrated' society than we are to a 'segregated' society," he said.

Those seeking to end segregated schools, he thought, "assert a claim for special privileges for this minority, the members of which, in many cases, may not even want the privileges which the social theorists urge be extended to them."

It is hard not to hear an echo here of the old Dixiecrat argument that Negroes in the South would have been content with their lot were it not for "outside agitators." Thirteen years after the U.S. Supreme Court had declared racially segregated schools to be unconstitutional Mr. Rehnquist was still arguing for the right to keep school children separate by race.

PEOPLE AND THE POLLS

Mr. Rehnquist's views on voting rights were left in murky obscurity by the Senate Judiciary Committee. The Southwest Area Conference of the NAACP asserts he took part in a local campaign of "harassment and intimidation" to keep monorities from the polls.

Four citizens of Arizona have presented affidavits swearing that Rehnquest was a Republican challenger at the polls in 1964 and was "harassing unneoessarily several people at the polls . . . attempting to make them recite portions of the Constitution and refused to let them vote until they were able to comply with his request." They further assert that when one of them, a cripple, remonstrated with him, Mr. Rehnquist engaged in a physical struggle.

Although Mr. Rehnquist made a general denial in writing of being at the polls in 1964, his Senate supporters refused to allow him to be recalled and questioned about the details of the charges. Further, a fifth citizen of Arizona presented an affidavit that Mr. Rehnquist "planned and executed the strategy designed to reduce the number of poor black and poor Mexican American voters" and "trained young white lawyers and others to invade each black or predominantly black precinct in Phoenix on election day."

While Mr. Rebnquist again made a general denial in writing of this allegation, he admitted his chairmanship of the responsible committee which actually carried out these unconstitutional practices. Again, there was a refusal to recall Mr. Rehnquist and clarify the facts.

THE CARSWELL NOMINATION

When the Washington Post in 1970 opposed the nomination of G. Harrold Carswell to the Supreme Court, citing among its reasons an anti-civil rights record that included a speech in favor of white supremacy, serving as an incorporator of a Florida golf-course to keep it racially segregated, and harsh treatment of civil rights lawyers and plaintiffs who came into his court, as well as decision after decision against civil rights, Mr. Rehnquist came to Carswell's defense.

"Your editorial clearly implies," he wrote, "that to the extent the judge falls short of your civil rights standards he does so because of an anti-Negro, anti-civil rights animus, rather than because of a judicial philosophy which consistently applied would reach a conservative result . . ."

Judge Carswell's decisions in civil rights cases, he insisted, "are traceable to an overall constitutional conservatism, rather than to any animus directed only at civil rights cases or civil rights litigants." This identification with Carswell's anti-civil rights decisions is, perhaps, a portent of things to come from Mr. Rehnquist.

The nominee's expressed views on public accommodations laws and school desegregation, his relationship to incidents of voter harassment in Arizona, his identification with Judge Carswell make credible Arizona State Senator Cloves Campbell's assertion that in 1964 Mr. Rehnquist told him he "was opposed to all civil rights laws."

Certainly Mr. Rehnquist's denial should be tested before the Senate Judiciary Committee with Senator Campbell present.

II—THE REHNQUIST RECORD ON CIVIL LIBERTIES

If it is difficult to see any deep sense of obligation to all the American people in his record on civil rights, it is just as hard to discern any obligation to a strict construction of the Constitution and the Bill of Rights in his record on civil liberties.

Mr. Rehnquist observed the Supreme Court at first hand as a law clerk to Justice Robert Jackson in 1952 and 1953. He came away from that experience with an abiding hostility to the Warren Court and its interpretation of constitutional issues.

In an article written in 1957 for the U.S. News and World Report, he condemned the liberal point of view of the Court, which he said was characterized by "extreme solicitude for the claims of Communists and other criminal defendants."

He expounded that theme in greater detail in an article he wrote a year later for the Bar Association Journal observing in his opening sentence, "Communists, former Communists, and others of like political philosophy scored significant victories during the October, 1956 Term of the Supreme Court of the United States, culminating in the historic decisions of June 17, 1957."

Commenting on that sentence in an article in the New York Times (Nov. 22, 1971), William V. Shannon had this to say about the rulings Mr. Rehnquist saw as "significant victories" for Communists, "Those were landmark civil liberties decisions involving a loyalty-security firing in the State Department, the rights of witnesses before Congressional and state legislative committees and a free-speech case.

"Two of them were written by Justice Harlan, a distinguished conservative. Was Mr. Harlan 'soft on Communism'?" (It is ironic to note that Mr. Rehnquist is being nominated to fill Mr. Harlan's seat.)

Here is a further sampling of Mr. Rehnquist's views on major civil liberties issues:

ON GOVERNMENT SURVEILLANCE

Asked by Senator Sam Ervin (D., N.C.), "Does a serious constitutional question arise when a government agency places people under surveillance for exercising their First Amendment rights to speak and assemble?" Mr. Rehnquist said, "No."

ON FREEDOM OF SPEECH

Mr. Rehnquist does not see it as a right of federal workers. "The government as an employer has a legitimate and constitutionally recognized interest in limiting public criticism on the part of its employees even though that same government as sovereign, has no similar constitutionally valid claim to limit dissent on the part of its citizens."

ON DEMONSTRATORS

In a letter to the Washington Post (Feb. 14, 1970), Mr. Rehnquist railed against "further expansion of the constitutional rights of criminal defendants, or pornographers and of demonstrators," lumping all three together without discrimination.

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

ON MAY DAY ARRESTS

In a speech to a state university in North Carolina, two days after the May Day demonstrations, Mr. Rehnquist defended the mass arrests of thousands of innocent persons as the exercise of "qualified martial law"—a most dangerous and repressive doctrine in the hands of the police.

Mr. Rehnquist denied using the phrase in connection with the May Day incidents. But, if he were not applying the term as he says, why did he use it in a speech about May Day and why did he let the press uniformly interpret it that way until after he was nominated to the Supreme Court?

ON RIGHTS OF ACCUSED

When Mr. Rehnquist reads the Constitution it is invariably to the disadvantage of the accused. He favors pre-trial detention, saying in defense of the D.C. Crime Law, that there is a "social need to detain those persons who pose a serious threat to the public safety. . . ."

He would like to modify the "exclusionary rule" which "now prevents the use against a criminal defendant of evidence which is found to have been obtained in violation of his constitutional rights."

He favors restricting the application of habeas corpus after trial and, referring to a decision by Justice Harlan earlier this year, sees arresting a man without proper warrant and without probable cause as no more than a technical violation of the Fourth Amendment.

All of this suggests a readiness on Mr. Rehnquist's part to tailor the Constitution to his views that hardly fits the usual notion of a strict constructionist.

III. GOVERNMENT VERSUS THE RIGHTS OF THE PEOPLE

In Mr. Rehnquist's view, big government knows best. On several occasions he has defended extreme use of governmental powers against citizens.

1. WIRETAPPING

He has defended governmental wiretapping under court order in criminal cases and without court order in national security cases. "Is the invasion of privacy entailed hy wiretapping too high a price to pay for a successful method of attacking tbis and similar types of crime? I think not, given the safeguards which attend its use in the United States." But the only safeguard he mentions is the discretion of the government.

2. INVASION OF CAMBODIA

Mr. Rehnquist has defended Mr. Nixon's invasion of Cambodia last summer as a proper use of the President's authority as Commander-in-Chief. He maintained that under the Constitution the President can order the invasion of another country—even a neutral one—if he feels the invasion is necessary to protect American troops.

This plea for unlimited Presidential power is as dangerous as it is unprecedented. When he wrote the opinion overruling President Truman's seizure of the steel mills during the Korean War, Mr. Justice Jackson, whom Mr. Rehnquist once served as a law clerk, rejected the contention that under the commander-in-chief clause of the Constitution, the President has power to do "anything, anywhere that can be done with an army or navy." Yet Mr. Rehnquist, ironically, has in effect advanced that notion in his statements supporting the Cambodian invasion.

3. SUBVERSIVE ACTIVITIES CONTROL BOARD

The Board was almost defunct until Mr. Rehnquist took the lead in enlarging its powers, on the assumption that the government can give additional duties to any agency created by Congress without the express consent of Congress. Now the SACB can designate as subversive any offending organization of citizens.

IV—A LACK OF CANDOR

On several occasions during the Senate committee session in which he testified on his nomination, Mr. Rehnquist was less than candid in his responses.

1. Pressed to explain his views on certain civil liberties issues, he declined to do so, saying it would violate the attorney-client relationship with Attorney General John Mitchell and the President. Nineteen members of the Catholic University Law Faculty attacked this position in a letter to Senator James Eastland (D., Miss.), Chairman of the Senate Judiciary Committee.

They say, "no nominee may justify withholding from the Committee which must initially pass upon his qualifications and disposition for handling this political power 'in legal form' a frank expression of his political and legal philosophy. The attorney-client privilege is not the attorney's.

"It is for the protection of, and belongs to, the client. It is peculiarly inappropriate for a government attorney to invoke the privilege with respect to advice he has given to government servants (whether President, Attorney General or Deputy Marshal). His client is the people, and not the President. There is no such privilege, which any nominee was so bold as to claim before, against the Senate's right to know in fulfilling its responsibility to the same people."

2. Asked during the nomination hearings to say what he had done for civil rights, Mr. Rehnquist could think of only two things—he had represented some indigents during the time he practiced law in Phoenix and he had served on the Legal Aid Board there.

But attorneys know that when they are designated by the court to represent indigents they must accept the assignment; there is no voluntary choice involved. As for the Legal Aid Board, Mr. Rehnquist served on it by virtue of his being an ex officio member of the Legal Aid Society where he represented the Bar Association.

3. Mr. Rehnquist has failed to clarify his connections with Arizonians for America. Written interrogatories to Mr. Rehnquist invited a response to the *St. Louis Post Dispatch* article of November 17, 1971, detailing Mr. Rehnquist's connections with this right wing group.

No response was forthcoming beyond the denial of membership and a failure to recollect one meeting; but a denial of membership is not a denial of connections with or participation in an organization and the record demands clarification.

4. Asked about his role in the Administration's attempt to stop publication of the Pentagon Papers, Mr. Rehnquist claimed he played a restricted role. After his hearing, in response to written interrogatories from some members of the Senate Judiciary Committee, he revealed that he had called *The Washington Post* and asked them not to print the excerpts.

5. Asked about his role in opposing the desegregation of the Phoenix public schools in 1967, Mr. Rehnquist responded before the Senate Judiciary Committee with an attack on busing. But that was an evasion for the issue in Phoenix in 1967 was not busing, as a means to desegregate the schools, but rather desegregation as a desirable end.

It was on this specific issue that Mr. Rehnquist wrote "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society." It was the goal of desegregation he opposed, not just one means (busing) to that end.

WHAT SORT OF JUSTICE WOULD MR. REHNQUIST MAKE?

On the basis of his views on civil rights and civil liberties, in the light of his championing of the broadest possible powers for the federal government it is difficult to believe that, as a member of the Court, his "sole obligation would be to the Constitution and to the American people."

William Shannon, in his New York Times article, offered this visw of what might be expected:

"The Rehnquist record is not that of a true conservative. It is the record of an aggressive ideologue with combative impulses and strong commitment to a harsh, narrow doctrine concerning government and individual. It would be an ironic turn of events if this Goldwaterite doctrine so overwhelmingly rejected by the voters [in 1964] should be legitimized on the Supreme Court."

WASHINGTON, D.C.,
November 10, 1971.

Hon. BIRCH BAYH,
Committee on the Judiciary,
Washington, D.C.:

The National Legal Aid and Defender Association, by a vote of its 49th annual delegate assembly, held in Denver, Colorado, on November 6, 1971, opposed the nomination of William Rehnquist to the United States Supreme Court. The assembly passed the following resolution:

"Whereas, William Rehnquist has not exhibited an understanding of and dedication to the Bill of Rights of the United States Constitution, and the implications that flow therefrom,

Be it resolved that—

1. The National Legal Aid and Defender Association officially opposes the appointment of William Rehnquist as an associate justice of the United States Supreme Court, and

2. That the staff of the association be directed to send telegrams as quickly as possible to all members of the Senate Judiciary Committee notifying that committee of the NLADA position."

NLADA urges the Senate judiciary committee to oppose Mr. Rehnquist's nomination because of positions taken by the nominee on numerous issues of vital concern to all of our citizens, poor and non-poor alike. Our clients are black, white, yellow, red and brown and they are the poor of this nation. As their advocates, we must insist upon respect for their dignity, whether the issue in which they are involved be civil or criminal.

The nominees statements and views on pretrial detention, due process for defendants in criminal matters, habeas corpus, public accommodations, equal education opportunities, voting rights, first amendment freedoms and his political philosophy are indicative of a fundamental antagonism toward individual freedoms, civil rights and civil liberties.

NLADA, as the spokesman for thousands of legal assistance lawyers throughout the country, public defenders and poverty lawyers alike, calls upon each Senator to vote no on William Rehnquist's nomination.

FRANK JONES,
Executive Director,
National Legal Aid and Defender Assn.

WASHINGTON COUNCIL OF LAWYERS,
Washington, D.C., November 9, 1971.

Hon. JAMES EASTLAND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR EASTLAND: Enclosed for your consideration is a letter expressing the views of the Washington Council of Lawyers with respect to the Senate's consideration of the nomination of William H. Rehnquist as an Associate Justice of the Supreme Court of the United States.

Respectfully yours,

RUSSELL B. STEVENSON,
Interim Chairman.

WASHINGTON COUNCIL OF LAWYERS,
Washington, D.C., November 9, 1971.

DEAR MR. CHAIRMAN: This letter is submitted on behalf of the Washington Council of Lawyers and concerns President Nixon's nomination of William H. Rehnquist to the Supreme Court of the United States.

The Washington Council of Lawyers is a growing organization which consists of approximately three hundred and fifty government and private attorneys in the Nation's Capital who are actively involved in and concerned with the practice of law in Washington and throughout the Nation.

Because the Supreme Court exercises a commanding influence in shaping the substance and procedure of law and law practice, the Council is committed to the view that those who sit on that Court reflect the highest qualities of professional competence, dignity and sensitivity to the ways in which the law is implemented. Accordingly, the Council wishes to share its views on William H. Rehnquist with the Senate Judiciary Committee. It is our belief that these views reflect the opinions of a significant and growing segment within the legal profession and will thereby assist the Committee and the entire Senate in the performance of their constitutional duty to advise and, if appropriate, to consent to the President's nominations for the Supreme Court. It is, therefore, respectfully requested that this letter be included within and made a permanent part of the Committee's records of its hearings on the nomination of Mr. Rehnquist.

After a careful review of Mr. Rehnquist's record, both as a practicing lawyer for almost twenty years and as a government official for almost three years, the Council has concluded that it must oppose the confirmation of Mr. Rehnquist as an Associate Justice of the Supreme Court of the United States.

The Council does not base its opposition to Mr. Rehnquist on professional incompetence or on any ethical questions raised by his public behavior.

Instead, the Council opposes Mr. Rehnquist because of his apparently deep-seated and consistent insensitivity to the individual citizen's constitutional rights, particularly those rights embodied in the Bill of Rights and the Fourteenth Amendment. As will be detailed below, at almost every opportunity Mr. Rehnquist has supported limitations, many of them severe, on individual rights secured by the Constitution to the people of the United States. His arguments reflect an apparent desire to attenuate the individual's constitutional safeguards against governmental action. It is our view that Mr. Rehnquist's position would undermine the individual's constitutional rights in most practical applications. The Council believes, in fact, that Mr. Rehnquist's views might, in time, threaten the very purposes which inspired the adoption of the Bill of Rights and the Fourteenth Amendment.

A careful examination of Mr. Rehnquist's record casts grave doubts on the opinion expressed by the President (and popularized by the news media) that Mr. Rehnquist's legal philosophy represents a "strict-constructionist" approach in interpreting constitutional commands.[1] In the Council's opinion, his legal views approach a radical hostility to the preservation of fragile individual liberties. Far from adhering "strictly" to constitu-

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[1] In fact, in a statement before the Arizona Judicial Conference, Mr. Rehnquist expressed a directly contrary view:

tional limitations on government action, as those limitations were understood when the Bill of Rights and the Fourteenth Amendment were adopted, Mr. Rehnquist has consistently stood for dilution of their impact. The Council therefore believes that Mr. Rehnquist's views are hostile to the preservation of these limitations they were initially conceived and that such hostility from the Supreme Bench would be particularly harmful at a time when the government penetrates and regulates a significant part of the individual citizen's daily life, when the potential for abuse of governmental powers is so high because of technological advances, and when the individual can look only to the Judicial Branch for vindication of rights whose exercise may frequently offend a majority of his countrymen.

The Council agrees with the views recently expressed by Senator Javits[2] and believes that Mr. Rehnquist's hostility to basic constitutional guaranties to the individual is a proper area of inquiry for the Senate and a proper basis for rejecting his nomination to the Supreme Court. This is more than a question of Mr. Rehnquist's having adopted a legal philosophy which conflicts with that of the Council. It is, rather, a question of whether the Court will continue effectively to fulfill its historic role in American life. The Court is charged with ultimate responsibility to protect and serve the subtle but indispensable values of justice, liberty and equality before the law. Mr. Rehnquist's public record suggests that his appointment will impede the Court's ability to perform that function. The Council therefore respectfully requests that the Senate Judiciary Committee recommend that the Senate not consent to the nomination of Mr. Rehnquist to the Supreme Court of the United States.

The Council respectfully directs the Committee's attention to the attached outline of statements by Mr. Rehnquist which, in substantial part, compel the Council to oppose his confirmation. All the information considered by the Council is contained in public records which are available for inspection should the Senate wish to pursue further any point of inquiry raised herein.

Respectfully submitted,
WASHINGTON COUNCIL OF LAWYERS.

APPENDIX

In support of its views, the Council cites the following positions taken by Mr. Rehnquist:

CIVIL RIGHTS

1. In 1964, Mr. Rehnquist opposed the adoption by the Phoenix City Council of a public accommodations ordinance, saying:

"It is as barren of accomplishment in what it gives to the Negro as in what it takes from the proprietor." Letter to the Editor, The Arizona *Republic*, at 6 (June 21, 1964).

2. In 1967, Mr. Rehnquist opposed an integration plan for Phoenix high schools, saying:

". . . we are no more dedicated to an 'integrated' society, than we are to a 'segregated' society." Arizona *Republic*, at 7, col. 1 (Sept. 9, 1967).

GOVERNMENT SURVEILLANCE OF PRIVATE CITIZENS

In 1971, Mr. Rehnquist recommended deemphasis of Constitutional safeguards against governmental electronic snooping, saying:

"I think it quite likely that self-discipline on the part of the Executive Branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering." Statement of Mr. Rehnquist before the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, 92d Cong., 1st Sess. (March 9, 1971).

CRIMINAL LAW

1. In 1971, Mr. Rehnquist expressed the following views before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, 92d Cong., 2d Sess.

(a) He supported abandonment of the exclusionary rule for unconstitutionally-gathered evidence. *Id.* at 7.

(b) He supported abandonment of the rule requiring uniformity of jury verdicts in the Federal courts. *Id.* at 7–8.

(c) He supported restrictions on the availability of *habeas corpus* in cases where a criminal conviction had been obtained on an allegedly unconstitutional basis. *Id.* at 12.

(d) He deplored appellate reversals of criminal convictions "merely" on the basis that a warrant was obtained in violation of the Bill of Rights. *Id.* at 19, 23.

2. In 1971, during the course of his remarks at the American Bar Association Convention in London, Mr. Rehnquist opposed strict construction of the "probable cause" requirement for commencement of governmental investigations, saying

"Quite the contrary, probable cause—for an arrest or specific search—is hopefully to be found at the *conclusion* of an investigation and ought not to be required as a justification for its *commencement*." *Id.* at 12.

He went on to express the view that protection from governmental abuses should be found in the electoral process rather than in the Bill of Rights. *Id.* at 14.

PRESIDENTIAL WAR-MAKING POWERS

In 1970, before the Subcommittee on National Security Policy and Scientific Development of the House Committee on Foreign Affairs, 91st Cong., 2d Sess. (July 1, 1971), Mr. Rehnquist took the following positions:

(a) He opposed "hard and fast" rules to limit Presidential war-making powers. *Id.* at 5.

(b) He relied upon past exertions of independent Presidential war-making power to justify expansion of that power beyond that intended by the Constitution. *Id.* at 7–8.

(c) With respect to this issue, he regarded the Constitution as "flexible" enough to allow Presidential initiative even in the face of contrary Constitutional indications. *Id.* at 13.

CHICAGO COUNCIL OF LAWYERS,
Chicago, Ill., November 24, 1971.

Hon. BIRCH BAYH,
Senate Office Building,
Washington, D.C.

DEAR SENATOR BAYH: Herewith enclosed is a copy of a telegram which the Chicago Council of Lawyers sent today to Senators Percy and Stevenson expressing the Council's opposition to the nomination of William Rehnquist to the United States Supreme Court.

Very truly yours,
ROBERT W. BENNETT.

OPPOSITION TO NOMINATION OF WILLIAM REHNQUIST

The Chicago Council of Lawyers opposes the nomination of William Rehnquist as Associate Justice of the United States Supreme Court.

His record to date does not reflect that dedication to constitutional liberties, to minority rights, and to progressive social change this nation has the right to expect from members of its highest court.

It is with reluctance that we oppose a Supreme Court nominee in part because of his expressed political and social views. As a matter of policy the Council believes that Supreme Court nominees should not be selected or rejected on such grounds provided that the nominee has shown a decent respect for the law and the constitution. We abandon that usual stance here because the President in making his appointments has forsaken it. It is President Nixon who has consistently and openly announced that his nominees were to be selected because of a certain political and social philosophy.

Aided by a quirk of fate which has given him four nominations in less than three years, President Nixon has ignored the precedent of his predecessors of both parties who have nominated men of obvious qualifications and divergent philosophies. Rather he has relentlessly pursued a particular point of view, ignoring qualifications except when forced by the senate or the weight of public indignation. With the nomination of Mr. Rehnquist, we believe the time has come when the senate must cry halt.

In Mr. Rehnquist, the President has found a man who can be counted on as a "hard-liner" on crime, a proponent of over-enhanced governmental and particularly executive power over the individual, and an opponent of any use of the courts as an instrument of responsible social change.

When a particular nominee's public statements demonstrate his embrace of views that pose such grave challenges to traditional American values embodied in the Bill of Rights, the Council feels obligated to state its opposition. Mr. Rehnquist has said the judicial philosophy he prefers is one "which consistently applied would reach a conservative result" (1959 and 1970), N.Y. Times 11/3/71, p. 27; that restoration of the Warren Court's liberal majority would "have the result of . . . further expansion of the constitutional rights of criminal defendants, or pornographers and of demonstrators" (letter to the *Washington Post*, 1970); that a proposed Phoenix, Arizona, open accommodations ordinance, by depriving businessmen of the right to discriminate, would result in giving up "a measure of our traditional freedom," *Washington Post*, 1970 (retracted, at least in part, before the Judiciary Committee, N.Y. Times 11/4/71, p. 66); that courts should have no role in protecting the individual from government surveillance, N.Y. Times 11/3/71, p. 27; and that "qualified martial law" existed at the time of the Mayday mass arrests in Washington this year, N.Y. Times 11/3/71, p. 27.

Whatever sort of justice Mr. Rehnquist might be, he is unlikely to be the "judicial conservative" Mr. Nixon claims to want—at least as that term has been used to describe men such as Justices Frankfurter and Harlan.

Before the Judiciary Committee, he has been reported as saying that *stare decisis* has less weight where decisions are of recent origin, decided by close votes and not approved in subsequent rulings. N.Y. Times 11/4/71, p. 66. Justice Harlan is probably shuddering at such views.

The Council recognizes that Mr. Rehnquist's career at the bar is not without intellectual competence. Should his nomination be approved, as expected, it is to be hoped his judgments would be free of the unfortunate prejudices he has evidenced thus far.

The fact that such a hope need be articulated is reason enough to oppose the nomination.

ROBERT W. BENNETT,
President,
Chicago Council of Lawyers.

STATEMENT OF NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE

The board of directors of the National Catholic Conference for Interracial Justice has condemned the Supreme Court nomination of William Rehnquist.

Walter Hubbard, Seattle, Chairman of the Board said, "we believe that a man who open-

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"The constitutional language is sufficiently broad to permit a latitude of judicial interpretation to meet the circumstances and needs of our society at any given time." Arizona Judicial Conference, Tempe, Arizona, at 7 (Dec. 4, 1970).

[2] 117 Cong. Rec. S16601, S16602 (daily ed., Oct. 20, 1971).

ly states that he did not realize that minority Americans feel strongly about having equal access to public accommodations, is not qualified to represent these Americans on our highest Court."

Walter Hubbard stated that in the judgement of his board, "William Rehnquist fails to meet one of the most essential qualifications for a Supreme Court justice. "This qualification," said Hubbard is that "a Supreme Court justice should hold in highest priority, the human rights of all Americans, since any or all of them may be affected for decades by the decisions handed down from the Supreme Court of the American people."

"William Rehnquist," said Hubbard "utterly fails to meet this most essential qualification."

The National Catholic Conference for Interracial Justice is a lay body formed a decade ago to work nationally for racial and social justice through local Catholic Interracial Councils and diocesan Human Relations organizations as well as through national programs operated out of the Chicago headquarters.

STATEMENT ON THE NOMINATION OF WILLIAM H. REHNQUIST TO THE SUPREME COURT OF THE UNITED STATES

(Prepared by Walter T. Hubbard, Sr., Chairman for the Board of Directors of the National Catholic Conference for Interracial Justice.)

The Board of Directors of the National Catholic Conference for Interracial Justice hereby expresses its grave concern over possible confirmation of William H. Rehnquist to the Supreme Court of the United States of America. The Board believes that three qualifications are essential for a nominee to represent the people of the United States at the summit of justice and judicial power in our nation. These qualifications are as follows:

1. the nominee should not be only technically competent both as to legal background and judicial temperment, but also should have demonstrated an excellence and a brilliance which would qualify her or him to serve on the nation's highest court.

2. the nominee should have a balanced judicial philosophy which would not innately bias him or her in favor of any particular ideology, group or segment in American society.

3. the nominee should hold in highest priority the human rights of all Americans, since any or all of them may be affected for decades by the decisions handed down from the Supreme Court to the American people.

The Board of Directors of the National Catholic Conference for Interracial Justice will not now speak to the first qualifications listed above. However, we do seriously question his ability to meet the third qualification.

We believe strongly that a man who openly states that he did not realize that minority Americans feel strongly about having equal access to public accommodations, is not qualified to represent these Americans on our nation's highest court.

To insure the legal rights of minority Americans requires a Supreme Court Justice to recognize and protect the rights of all Americans; their hopes, their wants, their needs, their capacity to suffer and their desire for equal justice under the law. It is our conviction that Mr. Rehnquist has not demonstrated a capacity of dealing with these human issues.

In accordance with the recent statements of the American Catholic bishops and the recommendations of the just concluded World Synod of Roman Catholic bishops on World Justice and Peace, the Board of Directors of the National Catholic Conference for Interracial Justice calls on all Americans, particularly Roman Catholics, to oppose vigorously the nomination of William H. Rehnquist to the Supreme Court.

Mr. FANNIN. Mr. President, on behalf of the distinguished senior Senator from Utah (Mr. BENNETT), who is absent because of illness, I ask unanimous consent to have printed in the RECORD a statement by him on the qualifications of William Rehnquist to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Without objection, it is so ordered.

STATEMENT BY SENATOR BENNETT

In considering the nomination of William Rehnquist to the Supreme Court the Senate is confronted by a very basic question. The question appears to be one of whether or not the Senate is called upon to judge the philosophy of a nominee before he can be confirmed. There is no question about the legal qualifications of William Rehnquist. His academic record at Stanford Law School provided an excellent preview of the high degree of skill and expertise he would later demonstrate in his practice of law. His being number one in his class also indicates that his ability was recognized by his instructors. Associate Justice of the Supreme Court Jackson also recognized the abilities of William Rehnquist and selected him to serve as a clerk in his Supreme Court office. This experience served as excellent training and background for the work Rehnquist was later to engage in at the Department of Justice. When President Nixon called William Rehnquist "The President's Lawyer," he was clearly expressing to the American people his recognition of the talented legal work done by Mr. Rehnquist.

Obviously, the legal record compiled by the nominee reflects the high level of legal competence which should be expected of men who sit on the Supreme Court. So there can be no question about Mr. Rehnquist's legal qualifications.

What then appears to be the major source of controversy concerning this nomination? We are all well aware of the answer to that question. William Rehnquist has been attacked since his nomination not for his legal qualifications, because they are impeccable, but rather because his philosophy differs from that of some members of this body. Civil Rights leaders paraded before the Senate Judiciary Committee attempting to discredit William Rehnquist because he had not followed their particular philosophy. While I would never question the right of these organizations to oppose any nomination, I think it is significant to note that not once were they able to produce any evidence which would provide any justification for not confirming William Rehnquist. As far as I have been able to determine William Rehnquist has never knowingly done anything that would violate the Constitutional rights granted to individuals.

Mr. President, I believe it has been shown on numerous occasions that William Rehnquist is legally qualified to serve on the Supreme Court. I do not believe it is the role of the Senate to pass on the judicial philosophy of nominees as long as they meet the high standards of the Supreme Court. For this reason I believe that President Nixon has selected an outstanding man for the Supreme Court, and I urge that William Rehnquist's nomination be confirmed by the Senate without further delay.

Mr. HRUSKA. Mr. President, a desperate and unfair game is being played in this Chamber by some of my colleagues with regard to the nomination of William Rehnquist. One of our morning newspapers headlines this morning "Controversy Deepens Over Rehnquist Memo." This Senator respectfully submits that the "controversy" exists only in the minds of those who have no solid evidence to oppose confirmation of this nomination. A close examination of the facts—an endeavor too little present during this debate—will put this matter into perspective.

First, Mr. President, a national magazine published a story in its edition this week stating that Mr. Rehnquist in 1952 wrote a memo to Mr. Justice Jackson arguing that in the school desegregation cases the 1896 doctrine of "separate but equal" stated in Plessy against Ferguson should be upheld. No attempt was made by anyone to contact Mr. Rehnquist to verify these facts before the publication was made.

Second, as soon as the news magazine was distributed and continuing throughout Monday, Tuesday, and Wednesday morning numerous Members of this body and the press corps repeatedly asked Mr. Rehnquist to make a statement concerning the memo. On this floor the Senator from Indiana said the memorandum was "shocking" and that the nominee in the memo "stated his personal opinion that Plessy against Ferguson was rightly decided and should be reaffirmed." He also added that "I would think that the Senate would be up in arms" over the memo.

Third, in response to these untrue and unfounded statements and in response to the repeated requests from the press, Mr. Rehnquist on Wednesday sent a letter to the chairman of the Committee on the Judiciary explaining the circumstances surrounding the writing of the memo. This letter and subsequent communications from his fellow law clerk, Donald Cronson, clearly prove that the memo was not a statement of Mr. Rehnquist's views on the school desegregation cases, but rather a working paper prepared for the Justice at his special direction. Let me quote from Rehnquist's letter, "He" and here Rehnquist is referring to Justice Jackson, "expressed concern that the conference should have the benefit of all of the arguments in support of the "separate but equal" doctrine, as well as those against its constitutionality." Cronson has indicated that he and Rehnquist had previously prepared a memorandum to the Justice indicating the legal arguments in favor of overruling Plessy against Ferguson. I ask in this connection that an article in today's New York Times be printed at this point in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the New York Times, Dec. 10, 1971]

EX-COLLEAGUE SAYS REHNQUIST OPPOSED SEGREGATION

(By Anthony Lewis)

LONDON.—A former colleague of William H. Rehnquist said tonight that in 1952 Mr. Rehnquist was personally opposed to the legal doctrine of racial segregation.

Donald Cronson, who in 1952 was a law clerk to Supreme Court Justice Robert H. Jackson, along with Mr. Rehnquist, spoke out in the controversy over Mr. Rehnquist's nomination to the Supreme Court.

The latest phase of that controversy has turned on a memorandum bearing Mr. Rehnquist's initials, directed to Justice Jackson, concluding that the doctrine of segregation laid down by the Supreme Court in 1896 should be reaffirmed.

"Both of us," Mr. Cronson said, "personally thought at the time that the 1896 decision, Plessy v. Ferguson, was wrong. We first wrote a memorandum to that effect.

"It is 20 years ago, but I think I still have a copy of that memorandum. Then, afterwards, I think Justice Jackson asked us to prepare a second making the other argument.

"I had a desk right next to Bill's. My guess is that I physically prepared the first memorandum and he the second, but we worked together on both. In what I have read about the second I can recognize some of my purple prose. It was just part of the job."

INTERVIEWED BY PHONE

Earlier today, Mr. Cronson, an oil company executive in Europe, sent a cable to Mr. Rehnquist from London about his recollections. He then left for his home in Gstaad, Switzerland, and he was interviewed there by telephone.

"To this day," Mr. Cronson said, "I am not exactly sure what Justice Jackson's views were—and if I were, I would not say. I think this whole business is completely improper. Such memoranda from law clerks to a Supreme Court Justice should never be published."

The Supreme Court considered the school segregation issue in 1952 and 1953 before finally deciding unanimously on May 17, 1954, to overrule the Plessy case and declared racial segregation unconstitutional. Justice Jackson was part of that unanimous Court.

Mr. HRUSKA. Mr. President, I feel I would be derelict in my responsibilities as a Senator if I did not attempt to obtain the arguments on both sides of issues that come before us. Unless one does know both sides to the questions under consideration by the Senate, I feel he cannot vote in an intelligent manner. In all memorandums from my staff I ask that both sides of the issues be presented. I would hope that the same standard would prevail in the offices of my colleagues.

So should the same hold true on the Supreme Court. The President appoints and the Senate confirms only men whom we believe will be fair—and by that term we mean individuals who will listen to both sides of the argument presented to them. It was in pursuit of this goal that Justice Jackson asked to have these memos written. If fairness were the standard being used by the opponents of this nomination all of the memos written to the Justice on this issue would have been published rather than a selected one. Or better yet, none at all. There is no pretense that either memo represented Justice Jackson's views. But he requested both. He spoke for himself in the opinion proper.

This entire incident affirms my feeling that no internal memorandums should be published for they can present only a partial and often very misleading picture of the facts. This is the view Don Cronson holds. It should be noted it was also the view of the late Justice Black, who directed that his memorandums be burned upon his decease. And Mr. Donald Cronson, Mr. Rehnquist's companion law clerk to Justice Jackson, stated:

I think this whole business is improper. Such memoranda from law clerks to a Supreme Court should never be published.

See New York Times article by Anthony Lewis, today's edition.

Fourth, Mr. President, now that Mr. Rehnquist has been forced to reply to the untrue statements made in this body, he is criticized for doing so.

In response to a question from the Senator from Rhode Island (Mr. PASTORE), the Senator from Indiana indicated that he did not believe the statements made in the letter. He further stated:

I think it is fair to ask: Why do we go through Monday, Tuesday, and almost through Wednesday before we received an explanation, an explanation which I think, if anyone would read it carefully, raises questions in my mind. I am dubious about its veracity.

Would the Senator have believed the letter had he received it on Monday? I doubt it since the effect of the letter has been to knock down another of the strawmen raised by the opponents of this nomination. And why, if the nominee was not earnestly trying to reconstruct events of 19 years ago, would he had waited 3 days to reply?

Finally, Mr. Rehnquist has been criticized for discussing his relationship with Mr. Justice Jackson in this letter. Parenthetically, let me say that Mr. Rehnquist is very sensitive to the privacy of his relationship with the Justice as he indicated in his article in U.S. News & World Report in 1957. It must have been very painful for him to have to pierce that veil, even to a very limited extent, to defend himself against the untruths hurled at him from this body. This rightness of his decision and his recollection of the facts has now been testified to by his fellow law clerk, Donald Cronson.

Mr. Justice Jackson needs no defending in this forum. His record as a great Justice and a great defender of civil rights and civil liberties is well known. Mr. Rehnquist's letter only reveals again how careful he was to arm himself with the facts on both sides of an argument before going into conference with his fellow Justices. Mr. Justice Jackson's view as to the rightness of Plessy against Ferguson is clear for all to know. He joined his fellow Justices in unanimously striking down that precedent in 1954 when he cast his vote in Brown against Board of Education. That is the final outcome of all of this tempest; that is the law of the land which this nominee has indicated he supports for its "rightness from the standpoint of fundamental fairness."

Those, Mr. President, are the facts. They point without any detour to a case of gross misinterpretation of the record, the attitudes, the philosophy, and the motives of this nominee. Those who would oppose him, as they have a legitimate right to do, are clutching at the most flimsy pieces of nonevidence and hearsay to build a case. They have failed.

Mr. BELLMON. Mr. President, since the consideration of the Rehnquist appointment began, I have listened with interest to the statements made and read much of the testimony which has been offered. I can understand the misgivings certain members of the Senate have expressed regarding Mr. Rehnquist's political philosophy, but I am mystified to understand the basis for these feelings.

The junior Senator from Oklahoma is not a lawyer. I make no pretense of competing with my more learned colleagues in debating this appointment from the legal viewpoint. However, for the past several months I have had a close working, as well as social, relationship with Mr. Rehnquist. I wish to reassure the other Members, who may not have known him earlier. If I were selecting a lawyer to handle my own affairs, Mr. Rehnquist is one who I would be pleased to entrust with any matter of great concern to me. He seems to possess those desirable traits of intelligence, humility, objectivity, and fairness, that, in sum, amount to judicial temperament.

In reading the objections of the Rehnquist appointment, I have found many charges which simply do not square with the man, as I know him. In our dealings together, I have found Bill Rehnquist to be not only intelligent and well informed, but also, a sensitive, concerned, and compassionate individual. I am thoroughly convinced that, as a member of the highest court in the land, he will continue to display those desirable human qualities which a Justice of our highest court should have.

I have no doubt that Bill Rehnquist can and will view matters which come before him objectively. I feel he will ascertain the facts fully and make decisions based upon a mature and scholarly understanding of the Constitution. I believe his presence on the Supreme Court will add prestige and dignity to that body and that his decisions will advance the cause of justice, under law, in this country. I am proud to call him my friend and to cast my vote for his confirmation.

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 belief 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 en-

gaged 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 Judiciary, 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.

The PRESIDING OFFICER. Who yields time?

Mr. BAYH. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

ORDER OF BUSINESS

Mr. JAVITS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. TAFT). Without objection, it is so ordered.

Mr. JAVITS. Mr. President, with the permission of the distinguished minority leader, I ask unanimous consent, as in legislative session, that I may proceed for 3 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The remarks of Mr. JAVITS when he introduced S. 2987 are printed in the morning business section of the RECORD under Statements on Introduced Bills and Joint Resolutions.)

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Berry, one of its reading clerks, announced that the House had agreed to the amendments of the Senate to the bill (H.R. 3749) for the relief of Richard C. Walker.

The message also announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 11341) to provide additional revenue for the District of Columbia, and for other purposes.

NOMINATION OF WILLIAM H. REHNQUIST

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Associate Justice of the Supreme Court of the United States.

Mr. GOLDWATER. Mr. President, in agreeing unanimously to reach a vote this afternoon at 5 on the nomination of William Rehnquist, the Senate has taken a step of fairness toward the nominee which I, for one, believe has been lacking in much of the debate by the opponents of Mr. Rehnquist up to now. In these closing moments of the debate, I think it is important for each of us to reflect on how the character and nature of the discussion we conduct might affect the personal feelings of the individual who is the subject of our examination. We should pause to consider whether the words and charges which we use on the Senate floor and with the press can unfairly damage the reputation of another honorable human being and cause cruel effects on the lives of the individual and his family and friends.

Mr. President, I have stated on the Senate floor on one occasion already during the current debate my opinion that a part of the discussion had exceeded the bounds of reasonable debate. We have witnessed the critics of Mr. Rehnquist nitpicking at his every utterance at the recent hearing by the Judiciary Committee, and distorting and taking out of context some past statements he has made on issues involving human rights. He has been even attacked for holding a view of callous disregard for minority rights

because of a memorandum he prepared at the direction of the Justice for whom he was a law clerk. But anyone who knows anything at all about the law knows that a lawyer, and particularly a Justice of the Supreme Court, has to brief himself on both sides of whatever legal question it is he is then considering. I am told one of the first things that any law student is taught upon entering law school is to always prepare himself on all sides of the legal issue he is confronting so that he will not be surprised or unprepared in any case he may later be handling. Of course, this is exactly what Justice Jackson appears to have been trying to do; but, nevertheless, we find the opponents of Mr. Rehnquist automatically jumping to the conclusion that any paper he might have written for Justice Jackson as a law clerk represents his own personal views:

Then, too, we have seen the judgment made by a few Senators who tell us that everything Mr. Rehnquist stated or wrote as an employee of the executive branch necessarily represents his own individual position on each and every one of these matters. His critics seek to break through the usual and honorable attorney-client relationship and demand that he give his personal opinion of every argument he has made while testifying before Congress relative to the position of the executive branch on legislative proposals before us or while he was preparing legal briefs offered in court on certain issues involving the Justice Department or the executive branch.

Even though Mr. Rehnquist has never said one way or the other whether any of his declarations as an employee of the Department of Justice represent his personal views, and indeed has stated it would be improper for him to do so, his testimony and writings as a Government official are deemed by his opponents to be his own beliefs in every instance. One Senator, for example, who takes this position accuses the nominee of holding a very expansive view of the powers of the President in the field of foreign relations and the making of war. And yet this same Senator, at a time when a President of his party was in office, complained that the U.S. Constitution had become outmoded and was imposing unnecessary restrictions on the Nation's Chief Executive. I can understand why this Senator today might be sensitive to interpretations of the relative powers of the President and Congress in view of the apparent change of views on his own part, but I cannot understand how one can fairly decide to vote against a nominee because that nominee has, as an advocate for his employer, taken the same position that one himself has taken in the recent past.

Nor can I understand the refusal of Senators to accept or even to read the words of the nominee in the hearings record which rebut and completely answer the false accusations being thrown up about him. One Senator stated that "a very critically important point" affecting his judgment on this nomination is the nominee's alleged role in the arrest and prosecution of May Day demonstrators this year and his defense of the Government's actions on the grounds of qualified martial law. Again, Mr. President, I am not surprised that some Senators might be disturbed at the newspaper reports discussing what the nominee is supposed to have said about the May Day incident. However, all these reports of Mr. Rehnquist's position have now been exposed as being utterly and completely untrue.

During the recent testimony of the nominee at the hearings before the Judiciary Committee, he unequivocally denied that he had ever announced a position that it was proper to use the doctrine of qualified martial law on May Day. Mr. Rehnquist told the committee that, in the only speech he had given on this subject, he had made it quite clear that this doctrine had not been invoked in Washington and that it would not have been justified had it been imposed. The actual text of Mr. Rehnquist's public address on the May Day situation verifies this. Thus, it is open on the public record that what Mr. Rehnquist actually said was that neither "martial law" nor "qualified martial law" was used on May Day and it would have been wrong to use it. Even so, one Senator has stood on the floor to say that his vote against the nominee will be based in significant part on Mr. Rehnquist's defense of the Government's action on the doctrine of martial law.

Furthermore, Mr. Rehnquist has made it absolutely clear that he had no role at all in the arrest procedures. In fact, at the hearing it was admitted and recognized by both the nominee and by one of the Senators questioning him, the Senator from Massachusetts (Mr. KENNEDY), that the decision to abandon field arrest forms was a decision taken in the field by the Metropolitan Police and was one with which the Justice Department did not have any involvement at all.

Also, Mr. President, I have previously deplored the unfair challenges the opponents of Mr. Rehnquist have made against early views he is alleged to have expressed in the field of public accommodations and school integration. I have explained in detail how Mr. Rehnquist's views have been grossly distorted and how he has currently announced his strong attachment and personal commitment to the protection of individual liberties and equal rights. In addition, on Monday of this week I offered proof on the Senate floor showing that to my personal knowledge the allegations about Mr. Rehnquist having intimidated minority group voters were wrong. And I am very happy to acknowledge at this time that this was not used against the nominee.

Mr. President, I ask that, whenever the Senate undertakes to examine and discuss the qualifications of a nominee for appointment to any official position, we do so always on the highest level possible of decency and respect for human sensitivities. We must always keep in front of us the knowledge that by unjustly condemning persons whose names and reputations we are exploring we might not only permanently injure the personal lives of those individuals without reason, but we might well discourage many honorable and intelligent and conscientious citizens from ever desiring to allow their names to be placed in consideration for Government service.

Mr. President, the manner of our conduct in this body relative to those persons whom we are considering can have a very large impact on the kind of men and women who this Nation will be able to obtain for positions of responsibility today and in the future, and also that we and the whole country should constantly keep this broad and important consideration in front of us, and act accordingly.

Mr. President, in closing, I merely want to say that it will be an extreme pleasure for me to vote for this man, not because he is a fellow Arizonan whom I have known all the years he has practiced in my State, but also because I feel that, in the years lying ahead of this relatively young man, he will become one of the greatest jurists of all time. I have extreme confidence in him. I know him to be dedicated to the place where he lives, to be a churchman, a member of my church, who has served the church well both at home and here in Washington. I know that I speak for myself and for my senior colleague, Senator FANNIN, when I speak because Senator FANNIN and I were about the first ones to recommend this gentleman for the job.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. GOLDWATER. I do not have any time.

Mr. BAYH. Mr. President, I yield myself time, if necessary.

Mr. President, I perhaps may be sensitive to the use of words, but this is not the first time the Senator from Indiana has heard the Senator from Arizona describe certain incidents, or lack thereof, relative to what happened at certain precincts in his home State.

I note here first, that the other evening he said specifically that what was said on the floor of the Senate with reference to certain allegations were untrue.

I note here in a letter to the editor of the Washington Post the other morning that he said:

> The time is long past due that the lie be put to the repeated observations of people who should know better relative to the supposed action of Mr. Rehnquist in preventing a person from voting.
>
> Contrary to what Mr. Mitchell, Senator Bayh, Mr. Rauh and others might contend, this supposed event did not take place as they describe. Mr. Rehnquist has so stated many times and furthermore, Mr. Editor, I was there so I can speak with considerably more authority than any of the supposed experts can. Let's develop the history of this whole situation.

Could the Senator from Arizona point to one instance in which the Senator from Indiana has accused the nominee of voting harassment?

Mr. GOLDWATER. I think I have just complimented the Senator from Indiana when I said that it was gracious on his part that he did not bring it up, and he told me he would not. It appeared in his mimeographed paper when we first opened up. I think it was in paragraph (d).

Mr. BAYH. I want the Senator to read paragraph (d).

Mr. GOLDWATER. I was there.

Mr. BAYH. I want the Senator from Arizona to read paragraph (d). He said he was in Arizona and that there was no voting harassment. The Senator from Indiana looked at the FBI report. I read

from a letter written to the Senator from Arizona from a Judge Hardy of Arizona. The Senator from Arizona said he may have voted for Judge Hardy, and the judge said that there was voting harassment.

The question is whether Mr. Rehnquist participated in it. The Senator from Indiana does not know about that. If the Senator from Arizona has any evidence that the Senator from Indiana has said that Mr. Rehnquist personally harassed voters, tell us, or stop saying that we were lying about it.

Mr. GOLDWATER. As I said, the Senator from Indiana told me last Monday, or whenever it was, that he would not bring this up. I am happy that he did not.

Also, I might mention that the minority views, starting on page 41 of the committee report have about three pages of memorandum related to this supposed incident. That is the thing I complain about and the thing I complained about in the letter I wrote to the Washington Post. It was not true. Mr. Rehnquist was not involved in any disorders or actions that took place there. I do not think anybody in Phoenix, at least the police, or anybody else, will say that he was. I tried to explain——

Mr. BAYH. I want to say——

Mr. GOLDWATER. We appoint poll watchers in Arizona and I am sure that Indiana has them. The purpose of poll watchers is to prevent any wrong taking place at the polls. Mr. Rehnquist was not involved in that.

Mr. BAYH. I appreciate the answer. Perhaps I am a little sensitive. I have never like being accused of telling a lie.

Yet in the Washington Post I see a letter in which the Senator from Arizona suggests the Senator from Indiana and other gentlemen have made such charges. But he has been unable to point to one example in which I did this. The minority of the Committee on the Judiciary felt it was our responsibility to disclose all the evidence, and the evidence includes eight affidavits, one from Mr. Rehnquist, in which he said he did not participate personally in voting harassment, and seven from constituents of the Senator from Arizona who said he did.

Despite the affidavits, and the Senator from Arizona to the contrary, I invite his attention to the minority views where, after pointing out the evidence, we conclude:

> Instead, it appears that the committee lacks either the motivation or machinery to conduct the type of fact finding which is needed to uncover which side of this dispute is mistaken. Therefore, each Senator will have to decide for himself what weight—if any—to give either the charges or the blanket denial.

That does not sound not like the allegation which the Senator from Arizona, with all respect, made on three occasions, now. I am sensitive about his stretching what is stated in the record and attributing it to the Senator from Indiana.

Mr. GOLDWATER. We have a saying, "cuidado." It means look out.

That is why I wrote the letter, and the letter was published. I wanted to give warning that if an effort was being made to include this in the debate, I would have to take personal exception to it, as I outlined in the letter, and I have not changed my mind a bit.

Mr. BAYH. In other words, the Senator still feels that the Senator from Indiana lied about it.

Mr. GOLDWATER. I do not think I said the Senator lied about it. For a better description, the Senator was totally uninformed and did not take the trouble to ask those of us who were there to see what was going on.

Mr. BAYH. I know the Senator from Arizona is a man of many talents. I wonder if he has the capacity to be present at every precinct about which allegations were made.

Indeed one of the judges in Arizona, the judge who the Senator from Arizona was quite filled with praise for the other day, Judge Hardy, who is a judge in Maricopa County, said specifically:

> 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 waiting to vote and asking for their names. There is no doubt in my mind that these tactics of harassment, intimidation and indiscriminate challenging were highly improper and violative of the spirit of free elections.

Mr. GOLDWATER. I think the Senator will find Mr. Rehnquist was not involved in these alleged actions at all. Having lived in Arizona all my life, and having been a member of the minority party all my life, I can tell the Senator that I would be the last to say that everything we do in our State would meet with the approval of a Sunday school teacher. We try to see that things are done properly. Democrats do that, too. I do not like to see people vote who are not entitled to vote.

Mr. BAYH. Let me ask the Senator this question. I fear we are not talking about the same thing.

Mr. GOLDWATER. I think we are.

Mr. BAYH. I think the Senator from Arizona is talking about the normal protection that is to be accorded voting procedures. The Senator has already said in the RECORD yesterday that he gives great credence to Judge Hardy and believes that he is an honest man. Judge Hardy said this was going on:

> In some precincts every black or Mexican person 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 waiting their turn to vote to grow tired of waiting and leave without voting.

Is that what the Senator from Arizona feels is necessary to have a safe and honest election? Does the Senator feel that it is important to do what Judge Hardy said was being done, where pictures were being taken and there was an effort to harass and intimidate?

Mr. GOLDWATER. If the Senator will read further he will find that Judge Hardy talked to Bill Rehnquist, and he stated to the judge that he was disheartened—that might not be the word, but he did not like what was reported to be going on, and Judge Hardy believed Mr. Rehnquist was sincere. That is how my attention was called to this. When this took place I was called to headquarters and told about it by the lawyers committee that assisted in giving advice in every election. If I recall correctly, I asked if they could corroborate that there had been any violence. To my recollection, the answer was there had not been. The police were there, and the police generally are roaming around polling places in those particular areas.

Mr. BAYH. I would say to my colleague that he has been very patient to permit me to question him. It seems no matter how I ask the question the answer is the same. He feels I have not been telling the truth. He says on the one hand I have not been telling the truth and then he says I did not make the allegations about Mr. Rehnquist's personal involvement, but in the newspaper he clearly said I did.

Certainly, the Senator from Arizona is entitled to think what he wants about me but it is inconsistent for him to say there was no harassment and that he and Rehnquist were all concerned that harassment did exist, as described in Judge Hardy's letter.

Mr. GOLDWATER. I am talking about Bill Rehnquist.

Mr. BAYH. I am glad to yield such time to the Senator as he wants.

Mr. GOLDWATER. I just close by indicating to my friend that, if that be the case, we were talking about Mr. Rehnquist, and not the Republican Party or the Democratic Party or anything else.

Mr. BAYH. The record will show that my friend said categorically the other evening that there was no harassment anywhere in Arizona, and if he thinks that, he has to differ with Judge Hardy.

Mr. JACKSON. Mr. President, the Senate has already heard much about Mr. Rehnquist's record in both public and private life. There are many aspects of that record which merit discussion. But I am convinced that Mr. Rehnquist's record on civil liberties, in and of itself, disqualifies him from service as an Associate Justice of the Supreme Court.

At a time when the encroaching powers of Government threaten civil liberties as never before, Mr. Rehnquist seems not to appreciate what the Bill of Rights means in America. Whatever his views may be in other areas, he is an unequivocal advocate of "big brother government" when it comes to balancing the interests of Government against individual rights. His views on such subjects as wiretapping and Government surveillance leave little doubt of his willingness to guard the security of Government at the expense of the security and civil liberties of the individual.

Mr. Rehnquist's nomination must be judged not only in light of the Supreme Court's role as a protector and interpreter of the Constitution, but also in light of its role as a balancing force against an excessive exercise of power by the other branches of Government. I cannot vote to confirm a man who, however qualified in other respects, seems not to understand the fundamental necessity of protecting human rights and individual liberties in America.

Mr. HOLLINGS. Mr. President, I would like to explain why I disagree with those of Mr. Rehnquist's opponents who have claimed that he believes in untrammeled executive power gained at the expense of both Congress and the courts. These claims that the nominee favors unchecked executive power can be supported only by distortions and extensions of positions he advocated for the administration and the Department of Justice in the course of his duties as Assistant Attorney General. Even if one does not consider that when making these statements Mr. Rehnquist was an advocate for the administration, and as such was bound to make all rational and responsible arguments available to his clients, the statements relied on by his critics do not support any such conclusion. Because his statements in the area of wiretapping and surveillance have been chiefly relied on to support these charges, I would like to discuss positions advocated by Mr. Rehnquist in those areas. I conclude from his statements that far from believing in unconstitutional extensions of executive power in this area, he firmly believes in the full complement of powers given the Congress and the courts by our Constitution.

It has been charged that Mr. Rehnquist advocated the position that the only restraints upon executive branch wiretapping should be self-restraint. This is absolutely untrue. He has always recognized that the first amendment, the fourth amendment, and the 1968 Crime Act place restraints on wiretapping by the executive branch.

The question to which he was addressing himself at the hearings before Senator ERVIN'S subcommittee was whether additional statutory restrictions, beyond those imposed by the 1968 act, should be imposed by Congress. And even on that he noted that the Department of Justice might well support carefully drawn legislation to correct specific abuses. At the hearings on his confirmation, Mr. Rehnquist made the following remarks:

I doubt that you can find any statement, Senator, in which I have suggested that the Government should be given carte blanche authority to bug or wiretap. I recently made a statement at a forum in the New York School for Social Research in New York, attended by Mr. Neir of the Civil Liberties Union and Mr. Katzenbach, that I thought the Government had every reason to be satisfied with the limitations in the Omnibus Crime Act of 1968.

Far from arguing that Congress could not curtail executive power in this area, Mr. Rehnquist stated at the hearings:

Congress has it within its power anytime it chooses to regulate the use of investigatory personnel on the part of the Executive Branch. It has the power as it did in the Omnibus Crime Act of 1968 of saying that Federal personnel shall wiretap only under certain rather strictly defined standards.

The only area in which Mr. Rehnquist advocated use of wiretaps without prior warrant from a magistrate is in the area of national security wiretaps, and that position is fully in accord with the provisions of the 1968 Crime Act which specifically exempted national security wiretaps from its warrant provision. It should also be noted that all administrations since Franklin Roosevelt's have taken this position.

Also in the wiretapping area, it is important to remember that Mr. Rehnquist advised that the so-called inherent executive power argument should be abandoned by the Government in the national security wiretap case. One implication of this theory was that the executive and not the courts would determine the propriety of such taps. The Government now takes the position that the courts should determine the propriety of such taps under the reasonableness requirements on the fourth amendment.

In the surveillance area, too, it has been suggested that Mr. Rehnquist supports unchecked use of executive branch personnel for public surveillance and information gathering. At the hearings Mr. Rehnquist made clear that Congress can restrict the use of such personnel by the executive branch at any time it chooses. Moreover, if there is any element of harassment of chilling effect on free expression, a question of fact may be presented for court determination under the Bill of Rights:

He also stated before Senator ERVIN'S subcommittee:

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

. . . the only legitimate use of surveillance [is] was either in the effort to apprehend or solve a crime or prevent the commission of a crime . . . surveillance has no proper role whatsoever in the area where it is simply dissent rather than an effort to apprehend a criminal.

It has also been suggested that in the area of the rights of the accused Mr. Rehnquist believes that fewer restraints should exist on executive branch law enforcement personnel, that the protections of the Bill of Rights should be removed. The following quote, from a speech he gave in my neighborhood State of North Carolina last spring, shows he fully believes in the role of the courts in providing protection to individuals accused of crime:

Finally, I hope you can see from some of this discussion that no reasoned opinion can invariably insist that courts resolve all of these [Fourth Amendment] issues in favor of the prosecution or all of them in favor of the criminal defendant. The issues are so complex and so important to all of us that it is wrong to think that either side invariably has the white hats. Ultimately, decision is made by the balancing of the need of society for protection against crime against the need of the accused defendant for a fair trial and just result. Both of these values stand so high in the scale of most of us that none would want to say that one should automatically prevail at the expense of the other.

I hope I have shown by those remarks that the charges that Mr. Rehnquist is something akin to a "totalitarian" are plain, unvarnished nonsense. No one who knows him could believe the charges and these statements which he made both before and during the hearings on his confirmation document that personal judgment. He believes the Congress has extensive supervisory powers over the use of executive branch investigatory personnel, both exercisable and already exercised in the 1968 Crime Act. Moreover, he believes that under our constitutional scheme the courts should and will review the use of investigatory personnel under the fourth amendment and other provisions of the Bill of Rights.

Mr. EAGLETON. Mr. President, we have before us the nomination of William Rehnquist as an Associate Justice of the Supreme Court.

Once again the Senate is called upon to give its advice and consent to a Supreme Court nominee—a process made more difficult by reason of the fact that Senators disagree as to precisely what criteria should be used in evaluating a Supreme Court nominee.

It appears there are two general schools of thought on the appropriate exercise of the Senate's power to advise and consent, or to withhold consent.

One school, perhaps the majority school, would require a Senator to learn the full range and evolution of a nominee's thought and philosophy and to accept the nominee only if the nominee's thought and philosophy comported substantially and in significant overall measure with the individual Senator's thought and philosophy.[1]

The other approach defines the role of a Senator more narrowly. After a Senator inquires into the "three I's" of the nominee—industry, intelligence, and integrity—he then determines whether the nominee's philosophy is within the fair and debatable range of legitimate judicial thought and, if it is, votes to affirm. Under this theory, a Senator need not necessarily be in substantial agreement with the nominee's philosophy.[2]

I adhere to the latter approach. In connection with the Haynsworth nomination, I stated it as follows:

The Senate has the right and the duty to consider the views of Supreme Court nominees on vital national issues. However, we should not seek a uniformity of opinion on the Court, and I believe a nominee should be rejected on this ground only if his views are so extreme as to place him outside the mainstream of American political and legal discourse. (Congressional Record, vol. 115, pt. 21, p. 28211.)[3]

I am the more assured in this belief because relatively few judicial careers on the Supreme Court have been delineated in advance with any high degree of accuracy, either by a nominee's supporters or by his opponents.

Applying this guideline to Mr. Rehnquist, I find his "three I's"—industry, intelligence, and integrity—to be unquestioned.[4]

His philosophy has been questioned, indeed challenged, by some—the most strenuous challenges coming in the areas of civil rights and civil liberties.

As to civil rights, it is said of Mr. Rehnquist that he is insensitive or indifferent or hostile to the cause of equal justice. Reading Mr. Rehnquist's views as reflected in his various utterances and writings, I am frank to conclude that his views and my views are at variance.

Footnotes at end of article.

Once again, our quest is not an identity or conformity of philosophy between nominee and Senator. Rather, we ask, are his views so patently irregular as to be outside the rationally debatable judicial mainstream?

There are two of Mr. Rehnquist's civil rights statements which are most frequently cited as being so irregular as to be disqualifying.

At page 25 of the Bayh-Hart-Kennedy-Tunney minority report, and again at page 39 of their minority memorandum, reference is made to Mr. Rehnquist's statement "we are no more dedicated to an integrated society than we are to a segregated society."

This statement was taken in part from a letter to the editor written by Mr. Rehnquist in 1967 which letter dealt with certain actions taken by the Phoenix superintendent of schools, a Mr. Seymour. The full paragraph from which the few words were extracted reads as follows:

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

One should first note that a semicolon, not a period, comes after the word "society" and that the words following the semicolon cast a somewhat different light on Mr. Rehnquist's views.

Reading the totality of the paragraph in the total context of the letter, it appears that Mr. Rehnquist was espousing recognized constitutional doctrine, namely, that the Constitution prohibits governmentally imposed segregation, but does not require governmentally imposed integration. Or, to put it in yet another way, the Constitution prohibits de jure segregation by governmental act, but it does not prohibit de facto segregation resulting from nongovernmentally induced living habits and patterns.

It is interesting to note that at the time of the historic Civil Rights Act of 1964, Senator HUMPHREY and Senator Dirksen recognized this principle of law and incorporated a provision in that act prohibiting the use of Federal power to bus students "in order to achieve such racial balance."[5] No one can seriously challenge Senator HUMPHREY's fealty to equality of opportunity, yet Mr. Rehnquist's articulation of similar views is labeled "extreme."[6]

The second Rehnquist civil rights statement which has been strenuously challenged was contained in a 1952 memorandum written by Mr. Rehnquist to Justice Robert Jackson at a time when Rehnquist was serving as Jackson's law clerk.

Two sentences from the statement read as follows:

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's *American Dilemna*.

Mr. Rehnquist has explained the origin of the memorandum in that it was prepared by Rehnquist at the request of Justice Jackson and was intended to be a rough draft of Justice Jackson's views.[7]

Turning now to the field of civil liberties, Mr. Rehnquist has been strenuously challenged for his role as an advocate of broader governmental intrusion into the private lives of citizens. For example, Mr. Rehnquist supports the broadened use of wiretapping and eavesdropping, even in the face of some loss of individual privacy, as not too high a price to pay to stop crime.

The late Justice Hugo Black, recognized as one of the greatest champions of the Bill of Rights, shared views similar to those of Mr. Rehnquist on the question of wiretrapping and eavesdropping.[8]

Personally, I disagree with Mr. Rehnquist's and Justice Black's views on this subject, but I do not find the espousal of their views to be so clearly inconsistent with constitutional democracy as to be disqualifying.

In conclusion, let me reiterate that my philosophical and jurisprudential views are at variance with those expressed by Mr. Rehnquist, just as my views have on occasion been at variance with other Supreme Court Justices, past and present.

However, it is my opinion that Mr. Rehnquist's views, although different from mine, are not so extreme as to place him outside the fair and debatable mainstream of American political and legal discourse.

The ideological differences in America today, I am happy to believe, are not so profound as to be unbridgeable by men of intelligence and integrity. But they are large enough so that they can be exacerbated by doctrinaire rigidity and dogmatic disputes in an attempt to prescribe an ideological mold for the Supreme Court. From that can come only harm to the Court and thus to the country.

Therefore, I will vote to confirm Mr. Rehnquist's nomination.

FOOTNOTES

[1] Senator Sam Ervin expressed this viewpoint in the debate on the nomination of Justice Thurgood Marshall:

". . . It is not only important for a Senator to determine whether the nominee has sufficient knowledge of the law or sufficient legal experience, but also to determine whether he is able and willing to exercise that judicial self-restraint which is implicit in the judicial process when that process is properly understood and applied. By this, I mean whether or not he will base his decisions upon what the Constitution says rather than upon what he thinks the Constitution ought to have said. And so I think that the question of the philosophy and the power of self-restraint of a nominee constitutes the most important consideration." (Judiciary Committee hearings on the nomination of Justice Thurgood Marshall, July 1967, 90th Congress, 1st Session, p. 180)

Interestingly, Mr. Rehnquist himself vigorously adheres to this "school" calling for a sweeping analysis of the whole range of a nominee's philosophy. See November 11, 1971 New York Times, page C47, wherein is reprinted a 1959 Harvard Law Record article by Mr. Rehnquist:

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

". . . It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the Constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases 'due process of law' or 'equal protection of the laws,' then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to 'inquire of men on their way to the Supreme Court something of their views on these questions'."

[2] Senator Edward Kennedy touched on this position during the Thurgood Marshall debate:

"I believe it is recognized by most Senators that we are not charged with the responsibility of approving a man to be Associate Justice of the Supreme Court only if his views always coincide with our own. We are not seeking a nominee for the Supreme Court who will express the majority view of the Senate on every given issue; or on a given issue of fundamental importance. We are really interested in knowing whether the nominee has the background, experience, qualifications, temperament, and integrity to handle this most sensitive, important, and responsible job." (Congressional Record, vol. 113, pt. 18, p. 24647.)

[3] *Congressional Record*, vol. 115, pt. 21, p. 28211. See article by Tom Wicker in the November 11, 1971 New York Times, page C47, wherein he wrote:

"On the other hand, to make that judgment solely on the basis of his political views (which, after all, may change) is dangerous business. It presumes some kind of rightful political orthodoxy; it would tend to politicize the courts according to the temporary political coloration of Congress; it could punish some individuals for their ideas and frighten others out of having any.

"Moreover, it is bound to lead to retaliation, as it did when Republicans and conservatives defeated President Johnson's nomination of Justice Fortas to be Chief Justice, at least partialy on political grounds. Paying off that score had a good deal to do with Judge Haynsworth's subsequent rejection.

"It may be argued that Mr. Nixon should not have handed Senators this dilemma by appointing an activist political figure to a nonpolitical court; but the precedents are ample, and the Senate is likely to compound the damage if it denies Mr. Rehnquist his Court seat solely because of his political views."

Wicker reiterated his position in the December 5, 1971 New York Times, page E11, where he wrote:

"On balance, with full awareness that Mr. Rehnquist's views on the Bill of Rights seem antilibertarian, and despite weighty arguments from many who disagree, it still is 'dangerous business' to reject him for his political views. Is it seriously to be asserted that conservative—even arch-conservative—views disqualify a man for service on the Supreme Court? If so, then what prevents some other Senate from disqualifying a man for strongly liberal views or for being a 'new leftist' or a 'neo-isolationist' or some other stereotype?"

Another interesting piece written on the Rehnquist nomination is one by Anthony Lewis in the November 15, 1971 New York Times, page C41, wherein he wrote:

"From this it follows that a President should be allowed ample ideological scope in choosing a Supreme Court justice. There are limits—a racist would be disqualified—but they are broad. And so, many Senators who

entirely disagree with Mr. Rehnquist's right-wing ideas will nevertheless properly vote for his confirmation."

Finally, on this point, I have received a letter, dated 11/29/71, from Professor Walter Gellhorn of Columbia University School of Law which eloquently sets forth this point of view. Professor Gellhorn, a widely recognized constitutional scholar, writes as follows:

"Discussion concerning the qualifications of Mr. Rehnquist to be a Supreme Court Justice has, I think, strayed beyond suitable limits in an important respect. Some of those who have urged the Senate not to consent to his appointment have done so because they assert he has strong views, contrary to their own, concerning constitutional issues which may come before the Court in future years. This is, in my judgment, an inappropriate basis for objecting to the Rehnquist nomination. If a nominee's acceptability were indeed largely determined by this measurement, the only unchallengeable nominees in times to come would be persons whose past careers had been colorless or, at any rate, had provided small opportunity to consider the Constitution and its application to contemporary problems.

"The proper question to be raised, in my belief, is not whether a nominee will assuredly strive in future instances to reach a result desired by the questioner. It is whether the nominee has the capability and the will to arrive at conclusions in a suitably judicious way, applying intellect and training to the resolution of concrete issues. If a nominee were demonstrably inclined to disregard the Constitution whenever it ran counter to his personnel views, of course he would be ill suited to be a member of the Supreme Court. But if his honest appraisal of constitutional doctrines in the context of particular cases proves to be different from another's, this should not be regarded as determinative of his fitness to be a Justice. The Supreme Court has nine members. If a single wise response could resolve all constitutional controversies, only one judge would suffice. The Court is not weakened by a multiple and diverse membership when all its members are able and willing to consider cases in the light of pertinent law rather than personal predilection.

"What I myself know along with what I have heard elsewhere about Mr. Rehnquist, convinces me that he would not approach judicial tasks as an advocate or as a dogmatist. He would, on the contrary, bring an able mind and a scrupulous judgment to bear on the matters submitted for decision. Policy positions espoused at other times and in non-judicial contexts should not be regarded as foreclosing objectivity in constitutional adjudication. The Senate, when it acts on the pending nomination, should not mistakenly attempt to evaluate a hypothetical future voting record in hypothetical future cases. If Mr. Rehnquist is confirmed, I am confident that he will serve as a dispassionate and conscientious Justice, whether or not I happen to agree with his judgments in every instance.

WALTER GELLHORN".

[4] Even those who oppose Mr. Rehnquist's nomination pay great tribute to his keen intellect and considerable legal skills. In fact, in some strange sort of way his intellect seems to frighten some of his critics. See article by Joseph Kraft in the December 9, 1971 Washington Post, page A23.

[5] In support of the provision of the 1964 Civil Rights Act which prohibited the federal government and federal courts from busing children "in order to achieve such racial balance," Senator Humphrey said the following:

"Mr. President, the Constitution declares segregation by law to be unconstitutional, but it does not require integration in all situations. I believe this point has been made very well in the courts, and I understand that other Senators will cite the particular cases.

"I shall quote from the case of Bell against School City of Gary, Ind., in which the Federal court of appeals cited the following language from a special three judge district court in Kansas:

'Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.' Brown v. Board of Education, D.C. 139 F. Supps. 468, 470.

'In Briggs v. Elliott (EDSC), 132 F. Supp. 776, 777, the Court said: "The Constitution, in other words, does not require integration. It merely forbids discrimination." '

"In other words, an overt act by law which demands segregation is unconstitutional. That was the ruling of the historic Brown case of 1954.

"If school district boundaries are determined without any consideration of race or color, there is no affirmative duty under the Constitution to alter these boundaries so that a particular racial balance in the schools will result. Senators should distinguish between segregation which results from an overt or affirmative act by the State or the local school board and de facto segregation which results from neighborhood residence patterns. This is a matter better left to the courts and to the localities to resolve as each community deems wisest. It is not a consideration of the present bill." (Congressional Record, vol. 110, pt. 10, pp. 13820–13821.)

[6] As to Mr. Rehnquist's "extreme" positions, see article by Robert Bartley in December 6, 1971 Wall Street Journal, page 12, entitled "Rehnquist and Critics: Who's Extreme?"

[7] The Rehnquist 1952-to-Jackson memorandum, analyzed in its totality, makes interesting reading. It sets forth the rationale for the doctrine of judicial abstention and does so in a manner remarkably similar to the position of Judge Learned Hand in his esteemed Oliver Wendell Holmes Lectures at Harvard University in 1958. (See "The Bill of Rights"—The Oliver Wendell Holmes Lectures—by Learned Hand, Harvard University Press—1962.)

In fact, one could label Rehnquist's 1952 memo as a precis of the Hand lectures written six years in advance. Judge Hand and Supreme Court Justices like Holmes, Brandeis, and Frankfurter were exponents of the concept of judicial abstention or restraint. Former Chief Justice Warren and Justice Douglas espouse the concept of judicial activism or intervention. Needless to say, either concept is well within the debatable jurisprudential mainstream.

Plessy vs. Ferguson aside, I take it that Mr. Rehnquist would generally subscribe to the Learned Hand precept that the power of the Supreme Court to annul a duly enacted statute is a very limited one to be "confined to occasions when the statute or order was outside the grant power to the grantee, and should not include a review of how the power has been exercised." (See aforementioned Holmes Lectures at page 66.)

[8] See *Berger v. New York*, 388 U.S. 41, 73 (1966) wherein Justice Black wrote as follows:

"Since eavesdrop evidence obtained by individuals is admissible and helpful I can perceive no permissible reason for courts to reject it, even when obtained surreptitiously by machines, electronics or otherwise. Certainly evidence picked up and recorded on a machine is not less trustworthy. In both perception and retention a machine is more accurate than a human listener. The machine does not have to depend on a defective memory to repeat what was said in its presence for it repeats the very words uttered."

Mr. President, in the various footnotes to my speech, I have cited some newspaper articles as well as the 1952 Rehnquist-to-Jackson memorandum. I ask unanimous consent that the following items be printed at this point and in this sequence in the RECORD.

In elaboration of footnote (2), the November 11, 1971, Wickler article from the New York Times; the December 5, 1971, Wicker article from the New York Times; the November 15, 1971, Lewis article from the New York Times.

In elaboration of footnote (4), the December 9, 1971 Kraft article in the Washington Post.

In elaboration of footnote (6), the December 6, 1971 Bartley article in the Wall Street Journal.

In elaboration of footnote (7), the full text of the 1952 Rehnquist-to-Jackson memorandum.

There being no objection, the articles were ordered to be printed in the RECORD, as follows:

[From the New York Times, Nov. 11, 1971]

THE REHNQUIST DILEMMA

(By Tom Wicker)

The spectacle of Senator Edward Kennedy defending the reputation of William Rehnquist against allegations by Joseph Rauh of the A.D.A. suggests the painful dilemma in which liberals and civil libertarians have been placed by Mr. Rehnquist's nomination to the Supreme Court.

This nomination is not like that of Clement Haynsworth, whom President Nixon earlier tried to put on the Court. Judge Haynsworth was not confirmed by the Senate on the ostensible ground that his record on the bench showed a lack of perception of possible conflict-of-interest situations.

Nor is the Rehnquist case similar to that of Mr. Nixon's other rejected nominee, G. Harrold Carswell. Judge Carswell was found to have made misstatements to a Senate committee, and his confirmation hearings disclosed a glaring lack of qualification for the Supreme Court.

The Rehnquist matter is not even like that of Lewis Powell, whom Mr. Nixon has also named to the Court.

Mr. Powell is a pillar of the Southern establishment, a good credential in the Senate; he is 64 years old and his tenure on the Court will be limited by that; he is not expected by most observers to become a powerful leader within the Court.

Mr. Rehnquist is a horse of a very different color. At 47, he can look forward to a long and active tenure on the bench. Moreover, his record is that of a hard-working and vigorous champion of conservative political causes, both in Arizona and within the Nixon Administration. Persons in and out of the Administration who know his work credit him with superior intellect and skill in the law.

Thus Mr. Rehnquist on the Court is altogether likely to bec me a driving force for the principles he espouses. There are those who believe that as the years go along he will be a more formidable leader than Chief Justice Burger in the conservative wing of the Court—a wing that may already be in the majority on some issues and will almost surely become dominant if Mr. Nixon wins another term in the White House.

It is no wonder, then, that liberals and libertarians are desperately casting about for means of defeating the Rehnquist nomination in the Senate. Mr. Rehnquist's record of oppcsition to civil rights measures, his strong advocacy of state powers that would threaten Bill of Rights guarantees—at least what many people passionately believe to be guarantees—his youth and his ohvious lead-

ership qualities might alter the course of the Supreme Court for decades to come.

But the hard fact is that no one has as yet produced any evidence of the kind of ethical tangles that ruined Judge Haynsworth's chances—and before that led to the resignation of Abe Fortas from the Court; nor has anyone been able to identify misstatements like those that sank Judge Carswell, let alone a lack of legal or intellectual qualifications.

It was, in fact, on the matter of Mr. Rehnquist's integrity that Senator Kennedy rebuked Mr. Rauh. The latter had suggested that the nominee had been less than candid in denying ever having been a member of the John Birch Society. The Senator could hardly be sympathetic to a man of Mr. Rehnquist's views, but he insisted that the nominee's basic integrity was unchallenged.

So the real question before the Senate is whether it can, or should, reject Mr. Rehnquist solely because of his political views. On the one hand, the writers of the Constitution, in giving the Senate the power to confirm or reject Presidential nominees to the judiciary, clearly meant the legislative branch to play a substantive role with the executive branch in this process. The Senate has the right, therefore, to judge for itself the qualifications of a man to sit on the Supreme Court.

On the other hand, to make that judgment solely on the basis of his political views (which, after all, may change) is dangerous business. It presumes some kind of rightful political orthodoxy; it would tend to politicize the courts according to the temporary political coloration of Congress; it could punish some individuals for their ideas and frighten others out of having any.

Moreover, it is bound to lead to retaliation, as it did when Republicans and conservative Democrats defeated President Johnson's nomination of Justice Fortas to be Chief Justice, at least partially on political grounds. Paying off that score had a good deal to do with Judge Haynsworth's subsequent rejection.

It may be argued that Mr. Nixon should not have handed Senators this dilemma by appointing an activist political figure to a nonpolitical court; but the precedents are ample, and the Senate is likely to compound the damage if it denies Mr. Rehnquist his Court seat solely because of his political views.

[From the New York Times, Dec. 5, 1971]

IN RE REHNQUIST

(By Tom Wicker)

WASHINGTON.—The Senate apparently will confirm Lewis Powell next week as an Associate Justice of the Supreme Court. After that, it will either face up to or delay the far more controversial and difficult matter of William Rehnquist, President Nixon's other nominee to the Court.

As it now appears, Mr. Rehnquist will be confirmed, too, unless those who oppose him are determined enough and able to put together something like the filibuster that, in 1968, prevented confirmation of Abe Fortas as Chief Justice.

This is at least a long-shot possibility because of Mr. Rehnquist's comparative youth (47) and his reputation as a skilled, active and intent champion of strongly conservative causes. Liberals fear he may become for many years the vigorous leader of a reactionary Court, but their dilemma is that no ethical or professional charges sufficient to warrant Mr. Rehnquist's rejection have so far been proved.

That means that the battle has to be fought, if at all, on the tricky ground of Mr. Rehnquist's political views—whether it is called his "judicial philosophy" or his "constitutional approach." The view was put forward in this space on Nov. 11 that this kind of opposition was "dangerous business"—that it suggested the existence of a kind of political orthodoxy, would tend to politicize the Court, would punish some people for their ideas while frightening others out of having any and would lead inevitably to political retaliation.

On balance, with full awareness that Mr. Rehnquist's views on the Bill of Rights seem antilibertarian, and despite weighty arguments from many who disagree, it still is "dangerous business" to reject him for his political views. Is it seriously to be asserted that conservative—even arch-conservative—views disqualify a man for service on the Supreme Court? If so, then what prevents some other Senate from disqualifying a man for strongly liberal views or for being a "new leftist" or a "neo-isolationist" or some other stereotype?

This is not to deny that the Senate has a duty to consider the qualifications of a nominee to sit upon the Court. Or that among the qualifications it ought to consider is his general political, constitutional and judicial view of things. Judge Carswell, for instance, was judged to be lacking in intellectual and legal competence, a judgment that could be solidly documented.

But can it be shown that Mr. Rehnquist lacks fidelity to the Constitution? No, only that in his view it allows more power to the state and less to the individual than many other Americans believe to be the case.

Can it be shown that Mr. Rehnquist's views are factually in error or substantively wrong? No, it is a matter of interpretation, and it is late in the day for liberals to start asserting that the Constitution is an absolute document not subject to interpretation or differing ideas. It is, in fact, the prime duty of the Supreme Court to decide what the Constitution means, on given subjects at given times in history.

Nor is the political aspect of the Rehnquist nomination an open-and-shut affair. No doubt Mr. Rehnquist will be a formidable conservative force on the Court (although that remains a supposition that only time can justify). Even so, the damage he might do to liberal causes could well be less than the political consequences of a third rejected Nixon nominee, a third defeated conservative, in a Senate dominated by liberal Democrats. Just as the Court itself must sometimes practice "judicial restraint," so it may be that the Senate ought to practice some political restraint. This, of course, is a value judgment that each Senator must make for himself.

That also is true of the really crucial question about Mr. Rehnquist, which can best be explained by reference to Mr. Powell. Those who know the Virginia lawyer, a former American Bar Association president, concede that his views in many ways are as conservative as those of Mr. Rehnquist—and that fact was documented in an article by Mr. Powell recently reprinted on this page.

But Mr. Powell, it is said, is an experienced and fair-minded man of judicial temperament who, in deciding legal and constitutional questions, will put aside any personal or political preferences and prejudices that can't be squared with the law and the facts of a case. He might, for instance, generally approve wiretapping as a law enforcement tool—yet be willing to rule against it when, in some particular case, the facts showed that the law and the Constitution had been violated.

It is to be hoped that that is true—of Mr. Powell and of any nominee, liberal or conservative. Whether or not it is true of William Rehnquist is the vital question about his nomination, and one that each Senator must judge for himself. If Mr. Rehnquist can put his personal views aside when they can't be fairly justified by the law and the facts, then those views should not be the deciding factor; but if any Senator feels that Mr. Rehnquist, or any other nominee, could not so discipline himself intellectually, voting to reject him would surely be a duty.

[From the New York Times, Nov. 15, 1971]

AFTER REHNQUIST

(By Anthony Lewis)

LONDON.—The problem now troubling American liberals in the nomination of William H. Rehnquist to the Supreme Court was foreseen years ago by Judge Learned Hand. In his Holmes Lectures at Harvard he said:

"In so far as it is made part of the duties of judges to take sides in political controversies, their known or expected convictions or predilections will, and indeed should, be at least one determinant in their appointment."

Judge Hand was not using the word "political" in its narrow partisan sense. If our judges are to decide controversial national issues in the guise of lawsuits, he was saying, then they will be chosen in part for their ideology.

It is difficult for liberals to deny the premise. They know that for years they cheered the Supreme Court on as it advanced values of which they approved. Now a conservative President wants judges with different values. Is it logical to deny him that power, or even democratic? After all, the Presidential appointing power is the only means of seeing that the Court even distantly reflects the changing outlook of the country—as it must.

From this it follows that a President should be allowed ample ideological scope in choosing a Supreme Court justice. There are limits—a racist would be disqualified—but they are broad. And so, many Senators who entirely disagree with Mr. Rehnquist's right-wing ideas will nevertheless properly vote for his confirmation.

But a more basic issue will remain—the one that really interested Judge Hand. That is the issue of the appropriate limits on the judicial function. Should judges be dealing with heated social and economic controversies? Or should they limit themselves to tamer matters of more traditional law?

In recent years it has gone out of fashion to ask such questions. Mr. Justice Frankfurter's plea for judicial self-restraint seems long ago and far away. Few seem to remember the terrible lesson of the 1920's and 1930's, when self-willed judges almost destroyed the Supreme Court.

Instead we have what could be called the neo-realist view. It was put with candor in 1958, the same year as Judge Hand's lectures, by Prof. Charles L. Black of Yale:

"We are told that we must be very careful not to favor judicial vigor in supporting civil liberties, because if we do we'll be setting a bad precedent. Later on, we may get a bench of [conservative] judges . . . [but] suppose the present Court were to shrink from vigorous judicial action to protect civil liberties. Would that prevent a Court composed of latter-day McReynoldses and Butlers from following their own views?

Professor Black's rhetorical question expects a negative answer, but it is not so clear that restraint on the part of a liberal Court would have no effect when the pendulum swings. Certainly Brandeis, the greatest intellect who ever sat on the Supreme Court, thought otherwise. Again and again he held back from results that he personally desired because he thought he would encourage other judges to push their views in other cases.

Of course there is no convenient formula to set the limits on the judicial function. Every judge will have his own deep instincts about the values essential to the American system. Brandeis deferred to most legislative judgments, however foolish they appeared, but not when it came to freedom of speech or privacy: He thought they were too fundamental to the whole constitutional scheme.

The justices of the Warren Court did not decide the great cases as they did out of sheer perversity, as some of the sillier critics seem to think; they were carrying out what they perceived to be their duty. If they had changed their minds because they anticipated adverse reaction, they might have been said to lack courage.

The Warren Court is to be criticized not for its motives but, occasionally, for its judgment. It overreached from time to time. For me the outstanding example was the *Miranda* case: A narrow majority, without convincing basis in history or expert consensus, read a particular code of police procedure into the general language of the Constitution.

Judicial intervention on fundamental issues is most clearly justified when there is no other remedy for a situation that threatens the national fabric—when the path of political change is blocked. That was the case with racial segregation and legislative districting; it was not the case with *Miranda*.

Judge Hand would have excluded all such matters from the courts, but that remedy would be too drastic. We have long since come to rely on the Supreme Court as an essential medium of change in our rigid constitutional structure. What we can ask of the judges is modesty, a quality required not only by man's imperfection but by the fragile nature of the judicial institution.

[From the Washington Post, Dec. 9, 1971]

REHNQUIST: TOP MIND

(By Joseph Kraft)

Justice Holmes, on being asked what he thought of the intellectual abilities of another judge, once replied: "I never thought of him in that connection." And there lies the nub of the powerful, positive case that can be made for Senate confirmation of President Nixon's latest nominee for the Supreme Court, William Rehnquist.

For years now hardly anybody has thought of the Supreme Court as performing an intellectual function. Mr. Rehnquist, far more than any other recent nominee, has the calibre to restore intellectual distinction to the Court.

To understand why, it is necessary to say a word about the role of the Court in the country. The country is dominated by the million and one daily actions of an energetic population largely unconstrained in its capacity to buy and sell, move and dream, educate and obscure, build and tear down.

Given the nearly universal disposition toward almost constant action, it is ludicrous to think of tyranny being imposed on this country from above by some establishment eager to freeze the status quo or turn back the clock.

The central political problem of a populist country is to preserve some modicum of elite values—respect for achievement; toleration for difference of outlook; regularity of procedure. Partly by original design, but even more by the chance accretions of history, the Supreme Court has come to be the defender of those values—the elitist institution in a populist country.

Unfortunately for the Court, certain political decisions were thrust upon it by the deadlock that developed between Executive and Legislature during the post-war period. In the fields of civil rights and legislative reapportionment, the Court felt obliged—understandably considering that all other avenues seemed closed—to make rulings that might much more appropriately been the work of the President and the Congress.

In the heady atmosphere engendered by those decisions, the Court headed by Chief Justice Earl Warren became result-oriented. In case after case, it was increasingly hard to discover the inner logic of decision-making. Blacks seemed to be favored because they were blacks, baseball because it was a good clean American eport, anti-trust plaintiffs because they were against economic monsters.

President Nixon's efforts to correct the imbalance have been fumbling to the point of casting doubt on the sincerity of his claim to want "strict constructionists." His preferred candidates have been right-wingers, so little distinguished that the Senate and the American Bar Association have constrained him to throw them back in the pond.

Mr. Rehnquist is something else. He has not shown sensitivity to the needs of people in trouble, and he has said some hardline—and to me silly-sounding—things about the influence of Supreme Court clerks and the softness of judges towards communism. Some of these comments may be what ambitious juniors are required to say in order to get ahead in the Republican Party of Barry Goldwater and the Justice Department of John Mitchell. Still, I suppose they represent a genuine right-wing conviction.

But Mr. Rehnquist also has a mind of the highest candle-power. His comments in the Judiciary Committee hearings have been unfailingly lucid and discriminating. He has been "hesitant"—a favorite word—when unsure of the fine details of a problem.

Even one of his staunchest opponents, Sen. Edward Kennedy, described him as "a man with a quick, sharp intellect, who quotes Byron, Burke, and Tennyson, who never splits an infinitive, who uses the subjunctive at least once in every speech, who cringes when he sees an English work created from a Greek prefix and a Latin suffix."

Only it happens that the qualities that Senator Kennedy is pleased to dismiss so crudely express a critical aspect of the Court's present work. The Court does not now need more liberals, more conservatives, or more middle-of-the-roaders. There are enough of those to assure that nothing drastic is going to happen in civil rights or criminal law.

What the Court needs is more brains. Mr. Rehnquist has them—more abundantly perhaps than any present member. And by uplifting the quality of the Court in general, he will do far more than any particular decision in any particular case can do to advance the values thoughtful men hold dear.

[From the Wall Street Journal, Dec. 6, 1971]

REHNQUIST AND CRITICS: WHO'S EXTREME?

(By Robert L. Bartley)

WASHINGTON.—The most powerful impression to emerge from the microscopic public analysis of the life and works of Supreme Court nominee William H. Rehnquist is that his critics are pretty desperate. At one point the arguments and innuendos offered by critical witnesses proved too much even for the most critical Senators, and Sen. Edward Kennedy upbraided the witnesses for creating "an atmosphere which I think is rather poisonous."

Now the critical members on the Senate Judiciary Committee—Sens. Bayh, Hart, Kennedy and Tunney—have filed their minority report setting out the responsible case against the nomination. As Sen. Kennedy's remark suggests, it judiciously avoids the less substantial allegations that have appeared in the press in recent weeks. There is, for example, no suggestion that Mr. Rehnquist is guilty until proven innocent of membership in extremist organizations because his name appears on a list compiled by a little old lady and willed to someone else.

'OUTSIDE THE MAINSTREAM'

The minority report, rather, focuses mostly on Mr. Rehnquist's views on certain issues, and as such is an intriguing document. It volunteers that there is no question about Mr. Rehnquist's qualifications in terms of legal standing or personal integrity. On the widely debated question of whether the Senate should consider a nominee's judicial philosophy, it makes the case that indeed the Senate should.

The minority, of course, argues that on this third test Mr. Rehnquist flunks. It says he "has failed to show a demonstrated commitment to the fundamental human rights of the Bill of Rights, and to the guarantees of equality under the law." While not every detail of a nominee's philosophy ought to bear on his Senate confirmation, it suggests, so extreme a deviation should. At one point the text puts it simply: The nominee "is outside the mainstream of American thought and should not be confirmed."

A fascinating proposition, this. How can someone with legal standing and personal integrity fit to grace the Supreme Court be that far out of the mainstream? What would be the opinions of a man who is such a pillar of the bar and still fails to understand the Bill of Rights?

So it is with no little anticipation that one turns to the issues discussed in the minority report to find just which of Mr. Rehnquist's opinions bar him from the Court service. One expects not merely that he will have debatable opinions on debatable topics. Certainly the four Senators disagree on many things with Lewis F. Powell Jr., the other Supreme Court nominee before the Senate, but they voted to approve him. So in Mr. Rehnquist's case one expects more extreme opinions, those further out of the mainstream on the right, say, than Justice William O. Douglas is on the left.

As sort of a benchmark, recall Justice Douglas' popular book arguing, "We must realize that today's establishment is the new George III. Whether it will continue to adhere to his tactics, we do not know. If it does, the redress, honored in tradition, is also revolution." What right-wing outrages has Mr. Rehnquist uttered, one wonders, that are further from the mainstream than *that*?

As the confirmation hearings started, the best bet for that sort of outrage seemed to lie in the Justice Department position on wiretapping. As the department's chief legal adviser, Mr. Rehnquist must bear no small responsibility for that position, and the department has argued that the Executive Branch has an "inherent right" to wiretap without court order in national security cases. This is tantamount to an assertion that neither Congress nor the courts can control executive wiretapping, and certainly does suggest an insensitivity to the spirit of the Bill of Rights.

Alas for Mr. Rehnquist's critics, though, it turns out that on his advice the Justice Department has dropped the "inherent right" argument in current briefs before the Supreme Court. It now merely argues that in the particular instances of the case, the tap in question was not an "unreasonable" search barred by the Fourth Amendment. He says that the effect of the change is "to recognize that the courts would decide whether or not this practice amounted to an unreasonable search."

Mr. Rehnquist declined to give his personal views, as opposed to the Justice Department position, but he did defend the department's current arguments on the grounds that there are substantial legal questions unresolved, and the Executive is obligated to make its side of the case. "Five preceding administrations have all taken the position that the national security type of surveillance is permissible . . . one Justice of the Supreme Court has expressed the view that the power does exist, two have expressed the view that it does not exist . . . one has expressed the view that it is an open question . . . the government is entirely justified in presenting the matter to the court for its determination."

WIRETAPPING OF RADICALS

This did not satisfy the four critical Senators. They noted that the current issues are

somewhat different from those of preceding administrations, not least because the current argument is about wiretapping not of foreign agents but of domestic radicals. The change in the department's position is "more cosmetic than real," they argued, because it is still defending wiretapping rules that would not "provide an adequate restraining effect on the Executive Branch, an adequate deterrent to protect the right of privacy."

For those who may find this particular dispute a matter not of extremist opinions but of reasonable men differing, the minority also delves into Mr. Rehnquist's widely quoted opinion on government surveillance of individuals, that is, not wiretapping but the recording of their activities in public places. In warning against overly restricting such surveillance, he once said, "I think it quite likely that self-restraint on the part of the Executive Branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering."

During the hearings, Mr. Rehnquist noted that in his remark he was addressing the question of whether new legislation is needed in addition to the Bill or Rights and laws already on the books, and that the remark must be understood in that context. In colloquy at the time, he conceded that widespread surveillance should be "condemned," and that an individual might already have legal recourse against a government tail. But in considering the argument that surveillance is unconstitutional because it has a "chilling effect" on freedom of expression, he said any such effect is a question not of constitutional law but of fact. And, "those activities didn't prevent, you know, two hundred, two hundred fifty thousand people from coming to Washington on at least one or two occasions to, you know, exercise their First Amendment rights, to protest the war policies of the President . . ."

The minority report argues that even if 250,000 appeared, others may have been deterred by surveillance. It agrees that the committee's majority report correctly describes Mr. Rehnquist's attitude: "Information-gathering activity may raise first amendment questions if it is proven that citizens are * * * minority argues that this is precisely the problem, "the difficulty of providing a specific chilling effect is obvious, and the notion that a First Amendment question isn't even *raised* until it is 'proven that citizens are *actually* deterred from speaking out' (emphasis in original) is alarming."

But if Mr. Rehnquist's opinions here are outrageously extreme, it would seem, so are the opinions of the majority of the Senate Judiciary Committee. Similarly if his defense of the constitutionality of such laws as "no-knock" raids and "preventive detention" in the District of Columbia are out of the mainstream, the mainstream does not include the majority of both houses of Congress. So what mostly remains is the question of Mr. Rehnquist's attitudes on the racial issue.

The minority report does not make too much of allegations that Mr. Rehnquist harassed black voters when he was involved in Republican voter challenging teams in Phoenix, but it also does not dismiss them as the majority did. Some of his black opponents have come up with affidavits charging he was personally involved in harassment, and his supporters have come up with a defense of his challenging activities and attitude by a sometime counterpart on the Phoenix Democratic challenging team. The minority report says, "Each Senator will have to decide for himself what weight—if any—to give etiher the charges or the blanket denial."

On the nominee's general racial attitudes, the majority record also came up with a letter from the principal of the elementary school Mr. Rehnquist'a children attended in Phoenix. "Mr. Rehnquist became known to me when I was a teacher here at Kenilworth School. He had moved his family into Phoenix Elementary School District from one of the outlying suburban, and predominantly middle socio-economic, school districts. He wanted his children to have experience and associations with children from minority groups, as well as with the different socio-economic groups."

The minority report argues that "Mr. Rehnquist's record fails to demonstrate any strong affirmative commitment to civil rights, to equal justice for all citizens, let alone a level of commitment which would rebut the strong evidence of insensitivity to such rights." The evidence the report discusses at greatest length is a letter Mr. Rehnquist wrote to The Arizona Republic in 1967, responding to remarks on school integration by Phoenix School Superintendent Howard Seymour.

The minority report says, "The truly alarming aspect of the 1967 letter, however, is Mr. Rehnquist's statement, 13 years after Brown v. Board of Education that 'We are no more dedicated to an "integrated" society than we are to a "segregated" society' . . . Yet at least since the Supreme Court declared that 'separate is inherently unequal,' this nation has not been neutral as between integration and segregation; it stands squarely in favor of the former. And if Mr. Rehnquist does not agree, he is outside the mainstream of American thought and should not be confirmed."

A FREE SOCIETY

The statement in the original letter that must be located with respect to the mainstream runs, "Mr. Seymour declares that we 'are and must be concerned with achieving an integrated society.' . . . But I think many would take issue with his statement on the merits, and would feel that we are no more dedicated to an "integrated" society than we are to a 'segregated' society; that we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities."

Mr. Rehnquist's extremist position on civil rights, then, turns out to be nothing more than the familiar proposition that the Constitution is color-blind. On surveillance he believes that at this moment the scales are not tipped in such a way that dissent is "chilled." On wiretapping he believes the government side of the national security question deserves its day in court. These opinions, the minority report suggests, are so outrageous the nominee should be defeated.

As the Senate debates the nomination, it seems, it will have to decide more than whether it's proper to weigh a nominee's philosophy. It also needs to weigh whether words like "extreme" and "out of the mainstream" better describe Mr. Rehnquist's philosophy, or the position his critics have been forced to take to oppose him.

A RANDOM THOUGHT ON THE SEGREGATION CASES

One-hundred fifty years ago this court held that it was the ultimate judge of the restrictions which the Constitution imposed on the various branches of the national and state government. Marbury vs Madison. This was presumably on the basis that there are standards to be applied other than the personal predilections of the justices.

As applied to questions of interstate or state-federal relations, as well as to interdepartmental disputes within the federal government, this doctrine of judicial review has worked well. Where theoretically coordinate bodies of government are disputing, the Court is well suited to its role as arbiter. This is because these problems involve much less emotionally charged subject matter than do those discussed below. In effect, they determine the skeletal relations of the governments to each other without influencing the substantive business of those governments.

As applied to relations between the individual and the state, the system has worked much less well. The Constitution, of course, deals with individual rights, particularly in the first 10 and the 14th Amendments. But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. Fletcher vs Peck, in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. Scott vs Sanford was the result of Taney's effort to protect slaveholders from legislative interference.

After the Civil War, business interest came to dominate the court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. Championed first by Field, then by Peckham and Brewer, the high-water mark of the trend in protecting corporations against legislative influence was probably Lochner vs N.Y. To the majority opinion in that case, Holmes replied that the 14th Amendment did not enact Herbert Spencer's social statics. Other cases coming later in a similar vein were Adkins vs Children's Hospital, Hammer vs Dagenhart, Tyson vs Banton, Ribnik vs McBride. But eventually the court called a halt to this reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

To the argument made by Thurgood (Marshall), not John Marshall, that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present court is unable to profit by this example, it must be prepared to see its word fade in time, too, as embodying only the sentiments of a transient majority of nine men.

In these cases now before the court, the court is, as Davis suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the court need never reach; for regardless of the justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction. If this Court, because its members individually are "liberal" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy vs. Ferguson* was right and should be re-affirmed. If the 14th Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's *American Dilemma*.

Mr. WILLIAMS. Mr. President, I would like at this time to announce to the Senate that I shall cast my vote against the nomination of William Rehnquist to be

an Associate Justice of the Supreme Court.

I have absolutely no quarrel with the credentials of William Rehnquist as an attorney. He has shown himself to be an excellent lawyer and has had a notable career in the legal profession. There appears to be no question about his personal and financial dealings. What concerns me deeply, however, is Mr. Rehnquist's marked and persisitent insensitivity to the individual and human rights of the American people.

I have taken a good deal of time in the past several weeks to personally review all of the evidence presented regarding the appointment of Mr. Rehnquist to the High Court. I have carefully examined the transcript of the hearings on his nomination. I have studied a large number of the available papers which have been written by the nominee. And as a result of this review, I feel confident of my position that William Rehnquist lacks the necessary commitment to the fundamental values of our constitutional democracy—values which I feel are an absolute requisite for the elevation of any man to be a Supreme Court Justice.

There is no more important principle underlying our system of government than the concept that every individual should be able to live in our society with the assurance that he will be protected from unwarranted intrusions by the Government, and that every individual should be equal under the law. This was the rationale behind the adoption of the first 10 amendments to the U.S. Constitution. It was the purpose for the enactment of the 13th, 14th, and 15th amendments.

I find it disappointing that Mr. Rehnquist seems to be unable to demonstrate an unequivocal commitment to these constitutional safeguards. And I think that it would be a tragedy for us to approve a man for the Court who would work against the very principles which it was created to preserve.

Mr. Rehnquist has a record which shows that he would rather discount civil liberties when they come into conflict with governmental authority. This is demonstrated by the opinions which he wrote—and would not disassociate himself from—in regard to surveillance, wiretapping, inherent Executive power, preventive detention, no-knock search and seizure procedures, and more.

Mr. Rehnquist has a record which shows a strong disregard for the individual rights of the minorities of this country. Only 7 years ago, as the Congress of the United States reaffirmed its commitments to the right of any individual to make use of public accommodations on an equal basis, the nominee offered his personal opposition to a Phoenix, Ariz., public accommodations ordinance. Only 5 years ago, Mr. Rehnquist worked to delete key provisions of a model state antidiscrimination act which would have permitted employers to adopt voluntary hiring plans for minorities who had been the victims of past discrimination and which would have forbidden blockbusting techniques in the sale of housing to minorities. Only 4 years ago, Mr. Rehnquist took it upon himself to resist efforts by the city of Phoenix to promote integration of its school system. He stated in a letter to the editor of the Phoenix, Ariz., Sun that—

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

Mr. President, William Rehnquist has not convincingly demonstrated that he has changed any of his previously held views in these matters. In response to intensive questioning by members of the Judiciary Committee he consistently stated that while the question of "judicial philosophy" was a proper and vital area of inquiry of any nominee to the Supreme Court, he was unable to provide those Senators with many clues as to his personal viewpoints on the grounds that he might be abusing his "lawyer-client relationship" with the Attorney General and the President. I for one do not understand where this claimed protection arises under the law. And even if it does exist, Mr. Rehnquist has indicated in his testimony that the views which he advocated as Assistant Attorney General were not so repugnant to him that he would feel compelled to resign his position, because of this advocacy. These were views which, for example, condoned the abandonment of due process arrest procedures during May Day demonstrations in Washington, which justified the extention of the Executive power to conduct wiretaps without judicial review whenever the Government believes there is a domestic threat to the national security, and which supported the Government's right to undertake unrestrained surveillance activities with regard to individual citizens. Thus, to the extent that we can determine his personal philosophy about these vital matters, I find an extreme lack of compassion and good judgment which, in my view, must be an integral part of a nominee's attitude toward fundamental liberties inherent in the structure of American Government.

Any man who can state, with regard to the question of surveillance of private citizens, that "I do not believe, therefore, that there should be any judicially enforceable limitations on the gathering of this kind of public information by the executive branch of the Government" should not be confirmed by the Senate of the United States to hold a position on the Supreme Court.

It is for these reasons that I shall cast my vote against William Rehnquist.

Mr. TOWER. Mr. President, I am pleased to rise in support of the nomination of Mr. William H. Rehnquist to be an Associate Justice of the U.S. Supreme Court. Mr. Rehnquist will bring with him to the Court an outstanding academic record as well as great experience both in the practice and implementation of the law. Bill Rehnquist was born in Milwaukee, Wis. in 1924, and grew up in the nearby community of Shorewood. After graduation from high school, he enlisted in the U.S. Army where he reached the rank of sergeant while serving in the Air Corps. After receiving an honorable discharge, he attended Stanford University and was graduated in 1948 "with great distinction." In 1950, he was awarded a master of arts degree in history from Harvard University and in the same year entered Stanford Law School, from which he graduated in 1952 with the rank of No. 1 in his class. These qualifications show that Bill Rehnquist is a capable and dedicated student. This ability and desire to work hard and to study the situation in depth should acquit him well as a member of the high court.

Mr. Rehnquist has been just as successful since he completed his formal education. After graduation, he became the law clerk of then Justice Robert H. Jackson, a position he held until June 1953. He then went to Phoenix, Ariz., where he practiced law quite successfully until 1969, when he assumed his present duties as assistant attorney general.

While practicing law in Phoenix, Mr. Rehnquist was much honored by his colleagues. He served as president and a member of the board of directors of the Maricopa County Bar Association in Phoenix. He also served as chairman of the Arizona State Bar Continuing Legal Education Committee, and from 1963 until 1969 was a member of the National Conference of Commissioners of Uniform State Laws. In short, both academically and professionally Mr. Rehnquist's career and contributions to the practice of law were at all times of the highest order and in the finest legal traditions of this Nation.

Mr. President, we have all been aware of the attempt by some to discredit Mr. Rehnquist through a campaign of whisper and innuendo. There have been intimations that he was not sensitive enough on one issue or another, that he was somehow against our American liberties. No substantiation of these charges has been provided, no completely unrebutted statements stand for us to examine. Yet, some would have us believe that this man is somehow against those things which we all hold dear. I think that in dismissing these charges we need only refer to the statement of Mr. Martin F. Richman who was at one time a law clerk to former Chief Justice Earl Warren and formerly Deputy Assistant Attorney General in the previous administration, when he said:

> The key question here, in my opinion, is whether as a Justice, Mr. Rehnquist will bring to the decision of the cases not only his own views, however long held and well thought out, but an open mind. Will he approach each case on the basis of the facts in the records, the briefings by counsel, the arguments of his Brethren in conference, and his best judgment of all the available legal materials. In short, will he act like a Judge?
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> Based on my experience with him my own answer is in the affirmative. . . . I am confident that his votes will be based on the merits of the cases, that his opinions will illuminate the issues, and he will make a constructive contribution to the on-going work of the Court in the development of our law.

Also, we have Mr. Rehnquist's own view, stated long ago, that what is truly important in these United States is that we have a "free society."

Mr. President, I believe that President Nixon has made a very fine choice in selecting Bill Rehnquist to be an Associate Justice of the U.S. Supreme Court. It is my hope and belief that he will serve with

distinction for many years on the Court and that he will help shape law in America. I trust that he will help restore a balance to the Court as it is considering the rights of society when also considering the rights of the accused. I intend to vote for confirmation, and I urge my colleagues to do likewise.

Mr. MILLER. Mr. President, I shall vote for confirmation of William H. Rehnquist to be an Associate Justice of the Supreme Court of the United States. The majority report of the Senate Judiciary Committee well meets the points raised in opposition to his appointment. I understand the concern which opponents to the nomination have expressed, but I believe they have carried their search for evidence to substantiate their arguments to such extremes that practically no nominee could measure up to their satisfaction unless he either had never participated in public life or fit precisely with their own mold of philosophy. This cannot be the test for confirmation by the Senate.

Mr. STEVENSON. Mr. President, the Constitution gives the President the power to "nominate and by and with the advice and consent of the Senate—appoint" the members of the Supreme Court. That language reflects a compromise between those framers of the Constitution who held that the President should have the power to appoint members of the Court and those who believed that power should be left to the Senate. It clearly indicates an active role by the Senate, a role acted out in our history and supported by the most eminent authorities on the Constitution. I find little dispute over the proposition that the Senate should exercise its active role by inquiring into the judicial and political philosophies of nominees to the Court. After all, the Court acts not only as the arbiter of private disputes and individual rights under the Constitution and the laws of the Congress, but also as the arbiter of conflicting claims to power by the Congress and the executive branch of the Federal Government. Mr. Nixon has manifested his right to make the philosophy of nominees an issue. The Senate has that right, too.

However plain the right may be, its exercise is not easy for either the Executive or the Senate.

Mr. Rehnquist is not my choice for the Supreme Court. His political philosophy is not mine. And if I believed the charges of indifference to human rights and abuses of executive power were supported by the evidence I would not consent to his nomination.

The charges against Mr. Rehnquist affect not his character, his intellect or professional standing, but his philosophy. The Senate has a right and a duty to consider them seriously. I have considered them at length and wish there had been more time for Senate debate. I have studied the record before the Senate Judiciary Committee. I have read Mr. Rehnquist's testimony and speeches. I have consulted the opinions of many who know and have worked with Mr. Rehnquist, and I have talked with him myself.

It would not be easy under any circumstances to assay Mr. Rehnquist's commitment to the human rights guaranteed by the Constitution. It would not be easy to assess his attitudes toward the responsibilities of the High Court for guaranteeing not only the rights of individuals, but also the rights of the Congress against the ever more pervasive powers of the Executive. What would have been difficult in the best of circumstances has become more so. The polarities of race and politics in the Nation have been reflected in the debate over the political philosophy of Mr. Rehnquist. Charges that he interfered with blacks exercising their franchise in 1964 are disproved, but have nonetheless inflamed the issue.

Mr. Rehnquist's statements as an advocate in public and private life have been confused with his own beliefs—and those beliefs have been difficult to divine, because of the client-lawyer privilege which he has invoked before the Judiciary Committee. His indisposition to prejudge issues likely to arise before the Supreme Court has, however understandably, made the inquiry still more difficult.

His views in some cases have been modified with the passage of time and in others offset by stated views which the debate tends to ignore.

His statements have been taken out of context in a few cases. None was more disturbing to me than his statement in 1967 that—

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

But even that harsh statement was followed by the not altogether consistent statement that—

> We are instead dedicated to a free society in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual liberties.

Such statements are capable of more interpretations than his opponents concede.

Mr. Rehnquist has at times in the past been blind to the rights and interests of minorities, admittedly so in 1964 when he opposed a public accommodations ordinance for Phoenix. But he, like many others, has changed his views since then. Twenty years ago he wrote the now famous memorandum to Justice Jackson supporting Plessy against Ferguson. But I believe him when he says it did not reflect his views. If the evidence makes anything clear, it is that Mr. Rehnquist is a man of integrity.

The "new barbarians" referred to in a 1969 speech were carefully defined as a small minority which cared nothing for our system of government. He carefully excepted the civil disobedience of a Thoreau in a self-governing society and the civil disobedience of a Gandhi in an autocratic society from his general condemnations of lawlessness. I am more concerned that he could perceive "new barbarians" as a threat to the security of our Government, so serious as to justify surveillance of activities protected by the first amendment. At what precise point he recognizes a judicially protected right I cannot say, except that he would as a Justice go further than his statements as an Assistant Attorney General would indicate—or his opponents concede. As in most cases, he adheres to a firm notion of judicial restraint and invites legislative protection, while deploring Executive threats to free speech.

It is charged that he perceives few constitutional limits to the Executive's power to conduct war. Here his views are most difficult to ascertain because they are stated as an advocate for the Executive. Even so, there is little evidence to sustain the charges. I cannot quarrel with his statement that it would invade the powers of the Commander in Chief for Congress to forbid an assault on Hamburger Hill.

Mr. Rehnquist never defended blockbusting; he did in 1966 before the Uniform State Law Commissioners wrongly support a first amendment right of property purchasers to make honest statements of fact about property values in socially changing neighborhoods. He is an advocate of preventive detention, but argues that society is now protected from dangerous individuals before trial by excessive bail requirements. He argues that preventive detention will protect society at the same time it affords the accused more protection than the constitutional prohibition against excessive bail does now.

The temper of the times and the incompleteness of the evidence make it hard to judge the man—far harder for the public at this point than for a Senator. We in the Senate have heard the debate and the evidence. Senator BAYH wisely sought more debate, but failed against the opposition of the Rehnquist supporters. The public hears the accusations and, too seldom, the defenses. Public attention focuses upon the debate at about the time Mr. Rehnquist is effectively deprived of a chance to defend himself.

The history of attempts in the Senate and by the President to judge men of undoubted character and intellect by philosophical tests casts further doubt upon their efficacy. Justice Warren surprised his sponsor. The Senate was wrong to reject Judge Parker in 1930. None guessed that Felix Frankfurter, the political liberal, would become the judicial conservative on the Court.

Mr. Rehnquist may be an "extreme conservative," but he is not an extremist. I find nothing in the record to indicate that he would bring to the Court his past role as an advocate or political activist. The evidence points the other way. He believes in judicial restraint. And I cannot fault him for that any more than I could Justice Frankfurter or Justice Jackson—both of whom he professes to admire.

I claim no divine insights to the character of the man, nor any clear perception of all the issues to reach him on the Court. My belief is simply that once a nominee's philosophical views are found within the mainstream of American tradition, the character and the intellect of the man are about all we as Senators can confidently judge. I believe that Mr. Rehnquist would bring an inquiring and reflective mind to the Court and that

before him logic, the facts and the Constitution would prevail. I believe that he reveres the law and the Court. Aware that such judgments are difficult at best, I believe that he will bring method, and in his work, excellence to an institution which, as much as any other, will exalt or demean the law of the land.

We cannot be certain. I have tried to weigh my faith in human nature and, in this instance, a human abundantly endowed with character and intellect, against the risk that his judicial opinions will reflect a narrow view of the Court s role as a guarantor of individual rights. He probably will leave to the Congress the primary responsibility for advancing the frontiers of human dignity. I expect him to follow in the tradition of Frankfurter and Harlan, more sensitive now than before his ordeal, to the expectations and the rights of minorities.

Our role in the Senate is limited. To "advise and consent," we have now only the power to reject. Judges Haynsworth and Carswell were rejected; so were others whose nominations were apparently contemplated but never transmitted to the Senate; namely, Mrs. Lillie and Mr. Friday. Our choice is not between Mr. Rehnquist and a better man. It is to reject, or not to reject.

Mr. Nixon's commitment to judicial and political conservatism has been made painfully evident by his word and deed. His future nominees like those in the past will be judicial and political conservatives. Their philosophies may be more cautiously expressed, but they neither have been, nor will be, markedly different from Mr. Rehnquist's. What may be different, markedly, is character and intellect—excellence in the law. It is a compliment to Mr. Powell and to Mr. Rehnquist that they were not Mr. Nixon's first choices. But that is not to say that the President has exhausted the Nation's supply of mediocrities.

Each case must be judged on its own merits, but the risk of not consenting is greater than the risk of consenting. I fear the trials of other nominees in the future, liberals as well as conservatives, for their beliefs.

I do not want to see Mr. Rehnquist rejected for freely and brilliantly expressing opinions withheld by other more cautious, and therefore successful, nominees. Those opinions upon close examination are not outside the mainstream of judicial thought. They reflect a narrow view of the judicial function and a broad view of the legislative function. Mr. Rehnquist does not oppose integration. He moved his family from an outlying area to the center of Phoenix so his children could attend an integrated school. He has reaffirmed his support for Brown against Board of Education. He condemned the excessive use of force at Kent State. With very few exceptions his teachers and the individuals who have worked with him and know him best believe in his fitness for the Court. He has manifested his concern for the legal rights of the poor through his service in a county legal aid program.

Essentially he holds to the view that the active promotion of interests, be they of corporate special interests or of the poor and downtrodden, is a function for the Congress and not the Court. I can wish that he supported a more positive judicial approach for the latter than the former. But I cannot say that his view is unfit to be represented on the Court.

We have looked in recent years to the Court for the expansion of human rights. We may be creatures of that recent experience. The future could be different. The Congress could be stirred by an awakened social conscience in the land and a newly enfranchised generation, by the young and by women, blacks and the poor, to expand upon those guarantees. I do not want to see the Congress restrained by the Court. Mr. Rehnquist's judicial conservatism dictates judicial nonintervention. He has been as critical of the McReynolds Court as of the Warren Court.

This is the most difficult decision I have had to make as a Senator. I have received more pressure and advice on this question than upon any other, almost all of it opposed to Mr. Rehnquist. But I must decide in favor of Mr. Rehnquist, because of his demonstrated excellence in the law, his unquestioned integrity and an intellect which I am convinced would not permit a mechanistic or political approach to the issues before the Court. We are not prophets. I must take the risk of being wrong. And I will be bitterly disappointed if my faith in Justice Rehnquist is proved unfounded.

Mr. McGOVERN. Mr. President, in the exercise of our responsibility to deny or confirm nominations to the High Court, we have six times been called to scrutinize the choices of President Nixon. At least twice we have been spared this task by the timely intervention of the American Bar Association. During the controversy that led to the resignation of Justice Fortas, Mr. Nixon said that if he were President of the United States, he would appoint men of the caliber of Oliver Wendell Holmes or Louis Brandeis. The President, we know, is under pressure from the right wing of his party. Plans are apparently underway to oppose the President's renomination with an ultra-conservative candidate.

It is plausible to believe that the President has chosen to deploy the Supreme Court against discontent in his own party? The President has inherited a historic opportunity to shape the Supreme Court for a generation. Now, it may be that the President would genuinely like to construct the Court in such a way as to impede change for another generation. Or it may be that his motives are more related to his own current political problems. In any event, the next 20 years will be vital ones in the history of this country. We are going to have to meet and try to overcome problems of the economy, of pollution, of war, of race, of poverty, of crushing taxation of the middle class, of decayed cities, of crime, of penal reform, of fundamental freedoms. The Justice whom we are to confirm, together with other Justices now on the Court, will have a tremendous power to aid or to hinder attempts to solve these problems. To know the roadblocks to progress that can be thrown up by recalcitrant judges, one need only remember that Warren G. Harding appointed three judges who tried to stop social welfare legislation and two of them were instrumental in almost wrecking Franklin Roosevelt's New Deal.

What kind of man or woman, then, should be appointed at this critical juncture in our history? Mr. Nixon has made no secret of his intention to shape the Supreme Court to his heart's desire for the next 20 years. His desire, of course, is so-called strict construction of the Constitution. In its accepted historical legal sense, strict construction means that the powers of Government should not be construed so broadly as to enable Government to infringe the fundamental freedoms of the people. But, Mr. Nixon and Mr. Mitchell use strict construction in exactly the opposite sense. They use it to mean that the people's freedoms should be narrowly construed so that the Government will have the power to infringe on what have been thought to be fundamental liberties of individuals. Thus, Mr. Nixon and Mr. Mitchell want Justices who will approve electronic bugging of citizens without court orders, who will stop the press from revealing governmental duplicity, who will let Government break into people's houses, who will let the Executive send men to war without congressional authorization, who will let the Executive impound and refuse to spend funds which Congress has appropriated to help ameliorate the ills suffered by millions of citizens, and who will let the Executive refuse to give Congress information on what is being done with the taxpayers' money in regard to military affairs and foreign affairs. In William Rehnquist they have apparently found just such a Justice.

Mr. Nixon already has a Supreme Court which largely agrees with his inverted view of strict construction. Two of the Justices from the Eisenhower and Kennedy era are basically counted in the so-called conservative camp although they occasionally vote the other way. The two Nixon appointees presently serving, and presumably the third appointee confirmed last week, have already shown themselves to be firmly in Mr. Nixon's camp on most issues. There is thus a possibility that six Justices will be on Mr. Nixon's side of strict construction. And if the health of two other of the presently sitting Justices does not hold out, Mr. Nixon may be able to count eight Justices for his view of the Constitution.

It seems to me, therefore, that the time has come once again to speak of balance on the High Court. When Mr. Nixon was running for President in 1968, he spoke of balance on the Court. He said he thought the Court was tilted too much in one direction and that there should be a more even distribution of Justices. But now the President is sending up trial balloons which clearly indicate that, rather than trying to achieve balance on the Court, he may try to pack the Court for the next generation with men of one persuasion. He may try to tie the hands of a whole generation until 1990 or 1995 by nominating men who hold to the ideas he holds in 1971.

It is a serious business to tie the hands of a generation. Legislation to meet the needs of the country does not come easily. It is the product of enormous sweat and toil in Congress and the White House. But despite the great legislative efforts which will be made to solve the problems of the Nation, Mr. Nixon's appointees will have it in their hands to knock down the efforts to better society, just as the four horsemen of the 1930's Court knocked down efforts to get this country out of the depression and give the common man a fair break.

So I come back to the question of what kind of man or woman should be nominated to the Court. Obviously the nominees should be men or women of the highest intellectual and legal abilities. They should be persons who in their life have shown compassion for the unfortunate, for those who work bitterly hard but make little money, who have shown that they sympathize with those of minority races and with the problems of hard-working middle class citizens. And it is highly important that the nominees not be persons who have already shown that their minds are closed on critical issues facing the Nation and that their minds are closed to the problems of the poor or the downtrodden or those of a different race. Mr. Nixon should nominate people who will bring balance to the Court rather than packing it with those of a single persuasion.

We now know enough about Mr. Rehnquist to conclude that he would not meet these criteria. I am not certain even that Mr. Rehnquist meets all of the criteria laid down by the President presenting his nomination. Senators will recall that the President spoke of "judicial philosophy" as a major consideration in putting forward Mr. Powell and Mr. Rehnquist. The President said:

> By "judicial philosophy" I do not mean agreeing with the President on every issue. It would be a total repudiation of our constitutional system if judges on the Supreme Court, or any other Federal Court, for that matter, were like puppets on a string pulled by the President who appointed them." And later: "As far as judicial philosophy is concerned, it is my belief that it is the duty of a judge to interpret the Constitution and not to place himself above the Constitution or outside the Constitution.

The President proceeded to announce a sound principle when he said a Supreme Court Justice should not "twist or bend the Constitution in order to perpetuate his personal political or social views."

Then he promptly sank his own doctrine.

Mr. Rehnquist has made a career with this administration of torturing the Constitution to suit the political strategies and ideological quirks of his bosses in the Justice Department and the White House.

He is the principle architect of the premise that the President, as Commander in Chief of the Armed Forces, has virtually limitless powers to involve this country in war. Needing only to perceive a threat to American troops somewhere—as in Cambodia last year—the President can launch an invasion without so much as a glance toward Capitol Hill. Under the same doctrine Mr. Nixon could invade China tomorrow, and the Soviet Union the day after.

Mr. Nixon may see such thinking as an "exceptional" qualification for the Supreme Court. I do not.

Mr. Rehnquist has been equally forthcoming on the right of the American people to be secure in their private thoughts and actions. They have no such right, he says. On the contrary it is the Government which has rights—to snoop and spy on its own citizens unhampered by inconvenient constitutional limits. We can rely on the self-restraint of the executive to avoid abuse. One wonders why we need a Bill of Rights at all.

Mr. Nixon may regard such thinking as the mark of one of "the very best lawyers in the Nation." I do not.

On the rights of the accused, Mr. Rehnquist sees a need for adjustment in the landmark Miranda decision. As I understand it that precedent created no new substantive rights at all. It does no more than assure that the poor, uninformed accused must know as much about the Constitution's explicit protections as the well-to-do fellow who has an attorney on retainer to tell him. Clearly there is scarce room for doubt of Mr. Rehnquist's meaning when he tells us that "law and order must be preserved, at whatever cost to individual liberties and rights."

Mr. Nixon may see such thinking as a means of restoring "that delicate balance between the rights of society and the rights of defendants accused of crimes against society." I do not.

As the President's lawyer's lawyer, Mr. Rehnquist played a dominant role in developing the mass arrest strategy employed during the May Day disturbances in Washington. Under his "limited martial law" doctrine some 13,000 people were arrested, most without specific charges, most without any possibility that they could even be identified by the arresting officer, many whose only apparent crime was that they happened to be on the streets of the Nation's Capital.

One standard of measuring Supreme Court nominees with judicial experience has been to assess the number of times they have been reversed on appeal. Considering failures to prosecute, dismissals and appeals, the latest estimate I have is that Mr. Rehnquist has been reversed at least 12,000 times on cases growing out of the May Day affair alone.

Mr. Nixon may see such a record as inspiring respect for the "institution of the Supreme Court," by adding "distinction and excellent to the highest degree." I do not.

I reject the view that the Senate's only responsibility on Supreme Court nominations is to evaluate academic credentials and success in the practice of law. We have a higher obligation to both the Constitution and to the American public.

I further reject the notion that Mr. Rehnquist deserves speedy confirmation because he does not have the same weaknesses as Mr. Nixon's prior rejected nominees or of his most recent trial balloons. Certainly right-wing extremism is no less dangerous when it is brightly put.

Perhaps no one has so clearly forecast the danger posed by Mr. Rehnquist to our Constitution as has I. F. Stone in the most recent issue of his biweekly. Incidentally, I have found his bi-weekly to be one of the most scrupulously researched and informative of the publications which seek to monitor the activities of our Government. Mr. Stone's courage, intelligence and hunger for the truth are matchless. I am sure that I join many in Government and outside, who lament the fact that Mr. Stone has seen fit to discontinue this particular facet of his work. But it does make his contribution to our present debate all the more appropriate. I ask unanimous consent that I. F. Stone's Bi-Weekly, November 29, 1971, entitled, "What Rehnquist Saw as a Black Day in the Court," be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From I. F. Stone's Bi-Weekly, Nov. 29, 1971]

WHAT REHNQUIST SAW AS A BLACK DAY IN THE COURT

By the standards of civil libertarians, June 17, 1957, was one of the greatest days in the history of the U.S. Supreme Court. By the standards of William H. Rehnquist it was the worst. An examination of the decisions the Court handed down that day indicates the kind of "conservatism" he would bring to the Court. One of his attacks on the Warren Court was an article he wrote for the *American Bar Association Journal* (44ABAJ229) in 1958. It began "Communists, former Communists and others of like political philosophy scored significant victories during the October 1956 term of the Supreme Court, culminating in the historic decisions of June 17, 1957." Joseph L. Rauh, Jr. calling attention in his testimony on Rehnquist before the Senate Judiciary Committee to the four historic decisions handed down by the Court that day in the field of civil liberties. Mr. Justice Harlan, the great conservative whom Rehnquist has been named to succeed, wrote two of those decisions and concurred in the other two. He must certainly be surprised, on his hospital sick bed, to hear them described as victories for Communists rather than for strict construction of the Bill of Rights.

It is a pity that a clash between Rauh and Senator Kennedy over Rehnquist's affidavit of non-membership in the Birch Society distracted attention from Rauh's exposition of those four cases. To compare these decisions with Rehnquist's description is to see how far to the right are his political preconceptions. Only one of them dealt with Communists at all. That was the Yates decision (354 U.S. 298) where Mr. Justice Harlan reversed the conviction of the California Communist leaders and held that advocacy of revolutionary doctrine was protected by the First amendment unless accompanied by advocacy of action. This decision was, to all intents and purposes, the deathblow to the Smith Act, our first peacetime sedition statute since the Alien and Sedition laws of John Adams. The other decision by Harlan was a landmark case in the field of loyalty and security. It ended (354 U.S. 123) the long and shameful harassment of John Stewart Service inspired by the China lobby, and it ordered his restoration to the State Department.

Two other decisions that day were also setbacks to the witch hunt of the 50s. *Watkins v. U.S.* (354 US 295), which Rauh argued for the defense, was the first major setback to the Un-American Activities Committee. The Court reversed the contempt conviction

of an Auto Workers' official. Warren (with Harlan and Frankfurter) held that Congress had no power of "exposure for exposure's sake." The fourth case, *Sweezy v. New Hampshire* (354 US 239) was a victory for academic freedom against a State witch hunt. Warren and the majority ruled as they did in Watkins but Harlan and Frankfurter took a stronger position, voting for reversal on First Amendment grounds. Paul Sweezy, an editor of *Monthly Review*, is an independent Marxist of international reputation. These are the decisions Rehnquist found so deplorable.

THE BROWN DECISION: HIS NO. 1 TARGET

Rehnquist's twin passions in his attacks of the late 50s on the Court were the witch hunt and school segregation. Much attention has been focussed on the article he wrote for the *Harvard Law Record* of October 8, 1959 urging the Senate to restore "its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him." Less attention has been given the animus he displayed in that article against the historic Brown decision for school integration. Rehnquist protested that in confirming Mr. Justice Whittaker, the Senate had failed to inquire what he 'thought about the Supreme Court and segregation or about the Supreme Court and Communism."

As recently as Feb. 14, 1970 Rehnquist defended Carswell's anti-integration record and sneered in a letter to the *Washington Post* that it was attempting to set up "a rather detailed catechism of civil rights decisions" as "the equivalent of subscription to the Nicene creed for the early Christians." But he wanted a catechism-in-reverse to make sure that nominees were hostile to school integration.

It is ironic that Rehnquist, who argued little more than a decade ago for the fullest inquiry into the political opinions of Court nominees, should have resisted inquiry into his own in the hearings on his nomination. He declined to give his opinion on the constitutionality of the Mansfield amendment, on the power of Congress to cut off funds for war, on the circumstances under which newspapers may be subjected to prior restraint, i.e. censorship, on whether he thought individual freedoms more important than property rights, on what constitutes reasonable search and seizure, on what bail is excessive, on what school boards should do instead of busing when taxes cannot be increased to provide quality education.

At times, as on wire-tapping, preventive detention, no-knock police entry, FBI surveillance of demonstrations, bugging, and the equal rights amendment, Rehnquist came up with a new doctrine for evasion. He claimed the right to silence because of a client-attorney relationship with the government on these issues. This evoked a letter from 19 of the 26 members of the Catholic University Law School to the Judiciary Committee in which they asserted, "The attorney-client privilege is not the attorney's. It is for the protection of, and belongs to, the client." They argued furthermore that Rehnquist's client as a Justice Department official was "the people and not the President." They said no nominee before had ever made such a claim "against the Senate's right to know." Certainly Rehnquist never advocated any such doctrine when he wanted to block or reverse the liberal rulings of the Warren court by stricter Senate inquiry into the beliefs of Court nominees. His nomination and Powell's are two major steps toward the conversion of the Court into a citadel of reactionary jurisprudence.

Mr. McGOVERN. Mr. President, with Mr. Stone's article as background, let me turn to a fuller analysis of some of the episodes in the Rehnquist record which make his nomination to the highest court in the land so ill advised.

I. CIVIL LIBERTIES

No man can be worthy of appointment to the Supreme Court who has demonstrated such misunderstanding of the Bill of Rights as William Rehnquist. His is a record of contempt toward the very heart of this free society, the notion that individual freedom and expression is the foundation of America. Whereas the Bill of Rights is based on protection of individual freedom against the encroachments of Government, Mr. Rehnquist has consistently sought to narrow that freedom and increase those encroachments to the point where this Government would have a free hand to suppress its people. And the dismal Rehnquist record dates not from the start of his involvement in this administration, but from the beginning of his legal career.

In 1957 Mr. Rehnquist denounced the Chief Justice appointed by Mr. Nixon's mentor, the late President Eisenhower, one Earl Warren, on the ground that he and his Court showed "extreme solicitude" for the claims of Communists and other criminal defendants. He also objected to the Court's rulings in support of Government regulations of business. This accusation was made in an article, Who Writes Decisions of the Supreme Court? which appeared in U.S. News & World Report, December 13, 1957. Interestingly, Mr. Rehnquist apparently has no trouble with government regulation of human freedom. That undoubtedly squares with his notion, expressed before the historic decision in Brown against Board of Education that the Constitution, and the American people, value property more than they do people. His views in that instance were reversed by a unanimous Supreme Court.

Later Mr. Rehnquist attacked the Court because it saw fit to permit applicants for the bar to take examinations despite the political beliefs they held. What is more instructive than the denunciation is the manner in which this nominee saw fit to make it. He had to attack Mr. Justice Black for having warmhearted aberrations which became constitutional transgressions when embodied in the decision. He further accused Mr. Justice Black of having ideological sympathies with the defendants, one an admitted Communist. It is surely a sorry event to elevate to the highest Court one who shows contempt for that Court and its members.

Mr. Rehnquist's defense of wiretapping without court order against suspected domestic subversives, even though the Congress and the courts have not approved such behavior, is but another example of this nominee's readiness to resort to impermissible techniques to control groups or people he deems subversive. In view of his position on Mr. Justice Black, can any one doubt that almost no American would be free from wiretapping should Mr. Rehnquist's view prevail on the Supreme Court.

As the nominee's colloquy with Senator ERVIN demonstrates—hearings before the Senate Subcommittee on Constitutional Rights, "Constitutional and Statutory Sources of Investigative Authority in the Executive Branch of Government," 92d Congress, first session, March 9, 1971 (unprinted)—he is equally of the view that the Government has the right to maintain surveillance on its citizens almost without limitation.

Of course, Mr. Rehnquist's narrow regard for the rights of our citizens extends with equal force to his willingness to deny even the most fundamental freedoms to our public employees. Thus, on the theory that the balance between the right of a public employee to speak and the effective operation of government must be weighed in favor of the latter, he seems to miss the point that, in a free society, the truth will out only when all citizens are free to speak the truth, consistent only with those laws the Congress has seen fit to enact and not consistent with Mr. Rehnquist's view of effective government. His fear of insubordination may be a result of the present administration's ability to keep the confidence of some of its own employees, let alone the American people, but that fear hardly justifies destroying the rights of our public employees.

No incident in recent memory was so fraught with potential destruction of our Constitution then the Department of Justice's response to the May Day demonstrations. That the Department of Justice, and the President's lawyer's lawyer could be the architects of a policy deliberately designed to violate the rights of innocent citizens on a mass basis, is clear warning of what we can expect from Mr. Rehnquist if he is appointed to the Court. That the administration and Mr. Rehnquist were fully prepared not only to incarcerate innocent people under what we all know to have been intolerable conditions is perhaps another signpost on the wall that Mr. Rehnquist views order and property as far more important in life than individual dignity. And let nobody doubt that hundreds of innocent citizens were arrested in dragnet fashion on May Day. For the government of the District of Columbia has dismissed hundreds of cases because they could prove no wrong doing.

The picture which emerges from the record is not that of a man simply holding a different philosophy than some of us hold, but of a man careless and hostile toward the very document it would be his duty to follow, willing to sacrifice at every turn the rights of our people for order, property, and other values which are meaningless if we have lost our faith in the vast majority of our law-abiding citizens, whatever be their political beliefs. And the mass arrests on May Day for which Mr. Rehnquist deserves so much of the blame, are dramatic examples of what we can expect on that day in history when this Nation sacrifices individual freedom to the distorted, twisted view of our country which Mr. Rehnquist has.

II. CIVIL RIGHTS

No one reading Mr. Rehnquist's vigorous opposition to the Supreme Court involving itself in the issue of school segregation and following his record through his hostility to passing public accommodations laws just a few years ago, com-

bined with an understanding of his views on civil liberties can doubt for a moment that Mr. Rehnquist's lack of regard for essential first freedoms is compounded if an individual's skin happens to be some other color than white.

While this nominee stands ever ready to invest the power and resources of Government in the fight to keep people and groups with unpopular views under surveillance, he would have the courts and the Congress stay out of the fight to insure a better life for those less fortunate in this society. That his overriding love of property poisons his ability to be a fair man is no more dramatically shown than in his denunciation in June 1964, of the Phoenix public accommodation suggestion. He opposed that ordinance on the ground that it told you who could come on your property—not, mind you, ones private home, but rather a movie theater, a public stadium, a restaurant, a hotel. That he could hold such views so recently is not surprising because it confirms his devotion to property first enunciated over the school desegregation cases. And no one ought to be fooled that he is essentially less hostile today to the rights of our black citizens. For each of us ought to remember that the view he holds of civil liberties and the rights of individuals was at least partly embodied in the District of Columbia no-knock laws directed against a community with a population of 70 percent black. Moreover, the fight for freedom by our black citizens was in full force in the early part of the 1960's. Many of us were actively seeking new laws—including public accommodations—at the same time that Mr. Rehnquist chose to stand opposed. He cannot claim naivete, he cannot claim lack of knowledge, and I do not think we would try to do so. And in 1966, he showed hostility toward national antidiscrimination laws, including in the area of employment, as a representative to the national Conference of Commissioners on Uniform State Laws. If these efforts were not sufficient to convince people where Mr. Rehnquist stood on civil rights, in 1967 the nominee had the audacity to assert that, 13 years after Brown against Board of Education and 4 years after this Congress passed the most far-reaching civil rights bill in our history, that "we are no more dedicated to an integrated society than we are to a segregated society." Such a statement so obviously places Mr. Rehnquist outside the mainstream of our thought, so outside the expressed law of the land, that he cannot be entrusted with the hallowed duty of enforcing that very law. His defense of Mr. Nixon's nomination of Judge Carswell on the ground that Carswell's hostility to civil rights was borne not of antiblack or anticivil rights animus, but of constitutional conservatism, is a portent of what we can expect from Mr. Rehnquist. Everything in his record, every major public issue in which he has been involved, in and out of government, has been on the side of those who would ignore the law, who would obfuscate, hinder, delay and who would seek to overturn and destroy the hard earned judicial successes of our minorities. That is not the record of a man who can be trusted on the highest court of the land.

I ask unanimous consent to have printed in the RECORD a letter published in the Washington Post of December 4, written by Joseph L. Rauh, Jr., and Clarence Mitchell, legislative chairman, Leadership Conference on Civil Rights.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

[From the Washington Post, Dec. 4, 1971]

FOR AN EXAMINATION OF MR. REHNQUIST'S CIVIL LIBERTIES RECORD

Your editorial "The Senate, the Court and the Nominee—II," which appeared on Sunday, Nov. 28, should be read by every member of the United States Senate. It is hard to believe that any true supporter of civil liberties could vote for the Rehnquist nomination to the court, after considering the points that you discussed.

Senator Fannin's "rebuttal" (Letter, Dec. 2) only reinforces the Post editorial. By quoting banal generalities, Senator Fannin concedes that the specifics of Mr. Rehnquist's anti-Bill of Rights views cannot stand the light of day. For example, Senator Fannin quotes a Rehnquist statement favoring a free press, but doesn't mention his efforts to pressure The Washington Post not to print the Pentagon Papers. Senator Fannin quotes Mr. Rehnquist in favor of the Fourth Amendment, but does not mention his position that wiretapping for "domestic subversion" without even a court order is a reasonable and legal search and seizure. He quotes Mr. Rehnquist in favor of a fair trial, but fails to mention his support for preventive detention, his opposition to the exclusionary rule and his belief in restricting the use of habeas corpus.

Weak as is Mr. Fannin's defense of Mr. Rehnquist in the area of civil liberties, he makes no defense whatever of the Rehnquist civil rights record. Nor could he. This record is such that no thoughtful black person could expect a fair trial in any court where Mr. Rehnquist would be the judge. The extent of his participation in schemes to deny Negroes the right to vote is incredible.

Over the years, there has been only one area of civil rights legislation where conservatives, liberals and even some of the Deep South members of the Senate and House could reach agreement. That is the right to vote. Thus, because of his personal and organizational involvement in denying Negroes the right to vote in Arizona, Mr. Rehnquist is out of step even with many segregationists who welcome voting by colored Americans.

Mr. Rehnquist's participation in attempts to bar voters from casting their ballots took two forms. First, he personally was present in some precincts when unconscionable attempts were made to prevent elderly and timid black citizens from voting. He says he was there to halt abuses by others. In contradiction there are witnesses who have signed sworn affidavits alleging that it was Mr. Rehnquist, himself, who was interfering with the voters. Neither the White House nor the United States Department of Justice has dared to let Mr. Rehnquist return to the Senate Judiciary Committee to answer these charges in person. Also, Sen. James Eastland (D.-Miss). has asserted that FBI reports do not mention that Mr. Rehnquist was personally trying to prevent anyone from voting. If these reports by the FBI are so exculpatory, why do Senator Eastland and the Department of Justice ask us to take their word for what is in these documents? Surely, the investigation of complaints of voting discrimination can stand public scrutiny. As long as these reports are not made public, there is a strong suspicion that a full revelation of what these reports contain would show that Mr. Rehnquist was more than a foot soldier in the Arizona army that was mobilized in the 1960's to reduce the number of Negro and Mexican-American voters.

The second aspect of the Rehnquist operation on voting is very troublesome. It will be remembered that in 1964 the Congress passed a law prohibiting the giving of oral literacy tests, unless the Attorney General gave a special exemption. Even the Rehnquist supporters admit that there were extensive efforts in Arizona to give so-called tests to Negro voters by asking them to read or recite parts of the United States Constitution. This campaign was so well organized, so widespread and so obstructive that one observer of what was going on said, "It is a wonder someone didn't get killed." Mr. Rehnquist's role in this campaign has been given various descriptions. Sometimes he is pictured as the benign lawyer who was opposed to what was happening. Sometimes he is cast in the part of a relief man who dropped in to the polling places to give others a rest period. One report credited him with being in charge of "ballot security." Whatever may have been his rank or serial number, one thing is clear. He was deeply involved in a scheme which, on its face, seems to have been a violation of federal law.

The public has a right to know just what Mr. Rehnquist was doing. Did he get the program started? Did he advise the troops that trying to make would-be voters pass oral literacy tests was illegal? Did he sanction the sending of letters warning people that they might get arrested for voting? These and many other questions have not been answered in an open hearing. As long as Mr. Rehnquist, or the Justice Department or the White House take the position there will be no more appearances by Mr. Rehnquist one can only conclude that there is something ugly and possibly shocking that is being concealed; something, so enormously embarrassing, that it would show Mr. Rehnquist should not have been nominated in the first place.

The Post editorial expresses the opinion that Mr. Rehnquist's horizons on civil rights may have broadened and may broaden even more. It is difficult for a black man to be optimistic on that point. It must be remembered that Judge Haynsworth also was said to have undergone constructive changes in his civil rights viewpoint. Yet, he wrote the opinion in *Tillman* v. *Wheaton-Haven Recreation Association*, decided on Oct. 27, 1971, which held that neither the Civil Rights Act of 1866 nor the Civil Rights Act of 1964 gave relief to Negroes who were denied use of a swimming pool. It is noteworthy that Judge Butzner in his dissent said that the Haynsworth decision was a "marked departure from authoritative precedent." Judge Carswell was also pictured as one who had changed his racial views for the better. Few can forget that, after his nomination was defeated in the Senate, the real Judge Carswell emerged as an anti-civil rights candidate in the 1970 Florida Senate race. It is unlikely that Mr. Rehnquist is any different from the other two nominees who were rejected. Sooner or later, the same old Rehnquist, who opposed public accommodations law, will rise and attempt to block progress in civil rights.

Unfortunately, there are some members of the Senate who find it hard to vote against a nominee solely because of his negative views on civil rights. For there, the issue of civil liberties may seem more respectable as ground for opposition to the nominee. However, let no one be deceived about the importance of civil rights in this matter. The Rehnquist position on civil rights, even standing alone, is sufficient to make him unworthy of being on the court.

Mr. McGOVERN. Mr. President, perhaps no one speaks better against confirming Mr. Rehnquist's confirmation

than Mr. Rehnquist himself. I am speaking, of course, of Mr. Rehnquist's vigorously argued and appalling memorandum to Mr. Justice Jackson written in 1952 on the impending school desegregation cases: All of us have at one time or another held positions which we have come to see as wrong or untenable, but the important point is that nothing in Mr. Rehnquist's subsequent record or actions suggests that he has, in fact, come to admit the errors which led to his advice to the Justice. I think we should all ask, as we listen to Mr. Rehnquist's own words, whether this is the type of opinion we would inflict on a generation of Court decisions: I ask unanimous consent that Mr. Rehnquist's memorandum, "A Random Thought on the School Segregation Cases," be printed at this point in the RECORD.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

A RANDOM THOUGHT ON THE SEGREGATION CASES

One-hundred fifty years ago this Court held that it was the ultimate judge of the restrictions which the Constitution imposed on the various branches of the national and state government. *Marbury v. Madison*. This was presumably on the basis that there are standards to be applied other than the personal predilections of the Justices.

As applied to questions of inter-state or state-federal relations, as well as to interdepartmental disputes within the federal government, this doctrine of judicial review has worked well. Where theoretically co-ordinate bodies of government are disputing, the Court is well suited to its role as arbiter. This is because these problems involve much less emotionally charged subject matter than do those discussed below. In effect, they determine the skeletal relations of the governments to each other without influencing the substantive business of those governments.

As applied to relations between the individual and the state, the system has worked much less well. The Constitution, of course, deals with individual rights, particularly in the First Ten and the Fourteenth Amendments. But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. *Fletcher* v. *Peck*, in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. *Scott* v. *Sanford* was the result of Taney's effort to protect slaveholders from legislative interference.

After the Civil War, business interests came to dominate the Court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. Championed first by Field, then by Peckham and Brewer, the high water mark of the trend in protecting corporations against legislative influence was probably *Lochner* v. *NY*. To the majority opinion in that case, Holmes replied that the Fourteenth Amendment did not enact Herbert Spencer's Social Statics. Other cases coming later in a similar vein were *Adkins* v. *Children's Hospital, Hammer* v. *Dagenhart, Tyson* v. *Banton, Ribnik* v. *McBride*. But eventually the Court called a halt to this reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

In these cases now before the Court, the Court is, as Davis suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction. If this Court, because its members individually are "liberal" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction. To the argument made by Thurgood, not John Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempt on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy* v. *Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's *American Dilemma*.

Mr. McGOVERN. Mr. President, in his own review of Mr. Rehnquist's sorry record, William V. Shannon wrote an article for the New York Times entitled "No to Rehnquist." I ask unanimous consent that it be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

"NO" TO REHNQUIST

(By William V. Shannon)

In 1964, Senator Barry Goldwater won the Republican Presidential nomination. Governor George Wallace abandoned his putative candidacy. The stage was thus cleared for a united bid for power by the most regressive factions in national politics—the Southern racists and the right wing of the Republican party.

The issues were clearly drawn. Senator Goldwater had voted against the 1964 Civil Rights Act and opposed the whole thrust of the Negro drive for equality. Ten years earlier he had voted against censure for Joe McCarthy and fully endorsed the McCarthyite assault on the civil liberties of Government employes and private persons. Senator Goldwater stood squarely for a "war on crime" and against procedural safeguards that hobbled the police.

"I would remind you that extremism in the defense of liberty is no vice. And let me remind you that moderation in the pursuit of justice is no virtue," said Mr. Goldwater, accepting his nomination.

The nation overwhelmingly rejected this reactionary fanaticism. People in 44 of the fifty states voted "no" to Mr. Goldwater. He was, in Nelson Rockefeller's famous phrase, outside "the mainstream" of modern America.

Four years later, as a consequence of the Nixon victory, the Justice Department was delivered into the hands of the two Goldwaterites. Two of his Arizona protéges—Richard Kleindienst and William Rehnquist—became Deputy Attorney General and Assistant Attorney General, respectively.

As a further consequence, Mr. Rehnquist has now been proposed for one of the two vacancies on the Supreme Court. His bleak record on racial equality, civil liberties and the overweening power of government to coerce private individuals in the name of order and security is wholly consistent with that of his political sponsor.

Mr. Rehnquist publicly opposed the passage of the Phoenix municipal ordinance and the Arizona state law requiring nondiscriminatory racial policies on the part of bus stations, restaurants and other places of public accommodation. That was in 1964–65, extraordinarily late for anyone to refuse to recognize the legitimate claims of Negroes to equal treatment.

Wherever the convenience of the police and the rights of the citizen conflict, Mr. Rehnquist wants to enlarge the power of the police and circumscribe the citizen. He would alter the "exclusionary rule" that prevents prosecutors from making use of illegally obtained evidence. He has argued for the Government's right to tap the phones and electronically "bug" the homes of individuals whom it suspects of "national security" offenses and to do so without a court order. Rather than restrict such dangerous power to cases involving spies for foreign countries, he would apply it to any American citizen without restraint.

Warning against his confirmation as "a dangerous mistake," the Ripon Society, made up of progressive young Republicans, declared in the latest issue of its magazine: "Approval of William Rehnquist's nomination will for the first time give credence to what has until recently seemed an alarmist fear: that we are moving into an era of repression. The entire scenario of repression consists of measures that Rehnquist, on the record, has strongly and explicitly invited."

A man's opinion can change but a mature man's habits of mind rarely change. Ominously, Mr. Rehnquist has a zealot style that borders upon intellectual McCarthyism. After serving as a law clerk to the late Justice Robert Jackson, he gave an unusual interview in which he attacked other Supreme Court law clerks as "left wing" and said that "unconscious slanting of material" influenced the cases on which the Court granted *certiorari*.

Mr. Rehnquist's first political speech in Arizona in 1957 was a scathing attack on the Supreme Court, which included derogatory personal remarks about Chief Justic Earl Warren's professional competence.

The following year he began a bar association journal article with this sentence: "Communists, former Communists, and others of like political philosophy scored significant victories during the October, 1956, term of the Supreme Court, culminating in the historic decisions of June 17, 1957."

Those were landmark civil liberties decisions involving a loyalty-security firing in the State Department, the rights of witnesses before Congressional and state legislative committees and a free-speech case. Two of them were written by Justice Harlan, a distinguished conservative. Was Mr. Harlan "soft on Communism?"

The Rehnquist record is not that of a true conservative. It is the record of an aggressive ideologue with combative impulses and strong commitment to a harsh, narrow doctrine concerning government and individual. It would be an ironic turn of events if this Goldwaterite doctrine so overwhelmingly rejected by the voters should be legitimized on the Supreme Court.

Mr. McGOVERN. Mr. President, I ask unanimous consent that the editorials appearing in the New York Times of De-

cember 8, 1971, and the Des Moines Register be printed in the RECORD.

There being no objection, the items were ordered to be printed in the RECORD, as follows:

[From the New York Times, Dec. 8, 1971]

THE REHNQUIST NOMINATION

With only one dissenting vote, the Senate has confirmed the nomination of Lewis Powell to the Supreme Court. In this decisive manner, the Senate has shown how false was the imputation that it would not approve a Southerner or a conservative. When a nominee is a man of professional stature, wide experience, and a fundamental belief in the basic guarantees of the Constitution, no regional bias or philosophical disagreement bars his way.

It is a source of profound regret that President Nixon's other nominee for the Court is not of the same quality. Instead, by submitting the name of William Rehnquist, the President has once again provoked the turmoil of a confirmation struggle.

The grounds for rejecting Mr. Rehnquist are quite different from those on which the Senate refused to confirm two earlier Nixon nominees. His record does not show either insensitivity to potential conflicts of interest or deficient professional qualifications. Rather, his are the defects of basic insensitivity to racial equality and seriously deficient understanding of the Bill of Rights.

He has repeatedly shown himself opposed to judicial or legislative efforts to eliminate racial discrimination. There was a time decades ago when a nominee with Mr. Rehnquist's opinions would have been confirmed for the Court with hardly a ripple of controversy. But twenty-five years of Supreme Court rulings, Congressional legislation and social upheaval have made him an anachronism. Commitment to equality of treatment and opportunity for all races has become one of the indisputable standards of modern constitutional democracy. Since Mr. Rehnquist is lacking in such a commitment, the Senate if it confirmed him would be voting to turn back the clock.

Mr. Rehnquist's evident lack of sympathy for indivdual liberties also disqualifies him. The Constitution is a libertarian document. The first ten amendments and many other provisions are prohibitions against the exercise of certain kinds of power by the Federal Government and against the arbitrary, excessive, or unreviewed exercise of other powers.

As a political activist and as an Assistant Attorney General, Mr. Rehnquist has relentlessly argued in favor of abridging and diminishing the liberties of the citizen and enhancing the powers of Government—to tap the citizen's phone and "bug" his home and office, to enter his premises without knocking, to use tainted evidence against him, to arrest him in dragnet sweeps, to compel him to testify against himself, to deprive him of his right to practice his profession if he is a radical lawyer.

It is easy and comfortable for the ordinary, law-abiding citizen to assume that these intrusions of governmental authority will never touch his life, but the whole history of human liberty shows that the unpopular dissenter is the first—but rarely the only—victim of arbitrary power.

In voting for the first time in fifty years to oppose a nominee for public office, the national board of directors of the American Civil Liberties Union stated: "We know Mr. Rehnquist as a person committed to the notion that in every clash between civil liberty and state power, it is civil liberty that should be sacrificed."

Free societies are judged by how they treat their racial minorities and by the extent of the liberty they allow the individual citizen. On both counts, Mr. Rehnquist fails to qualify as one of the guardians of a Constitution of free men.

ALIENATING INDIA

President Nixon's declaration of "absolute neutrality" in the Indian-Pakistani conflict fails to conceal Administration policies, which have, in fact, been obviously biased in favor of the Government of President Yahya Khan in Islamabad.

During the eight months of repression in East Pakistan which led to the present international conflict on the subcontinent, Washington's "neutrality" consisted of maintaining silence while Yahya's troops suppressed a freely elected autonomy movement in East Pakistan, were responsible for the death of thousands of Bengalis and forced millions more, mostly Hindus, to flee to India where their presence has posed a growing threat to Indian political, economic and social stability. For many months the Administration actually gave material support to this unconscionable repression by continuing to ship small amounts of military supplies to Islamabad.

Administration officials argued that their public silence and the continuance of aid were designed to strengthen quiet efforts to promote a political settlement in East Pakistan that would bring peace and the return of the refugees. But there is no evidence that President Yahya has tried to reach any accommodation with the imprisoned Sheik Mujibur Rahman and the other elected representatives who command the confidence of the overwhelming majority of Pakistan Bengalis.

Having failed to condemn the repression in East Pakistan or to press for a genuine political solution, the United States has now flatly charged India with "major responsibility" for the resulting international conflict; having waited months to suspend arms aid to Pakistan, the Administration has promptly suspended military and economic aid to India. This is hardly "absolute neutrality"—even though it must be fully recognized that India is by no means guiltless in the actual outbreak or armed conflict, and, despite all the hypocritical and self-serving statements issued from New Delhi almost daily, has been aggressively maneuvering against her northern neighbor. There is plenty of blame to go all the way around.

United States efforts at the United Nations, first in the Security Council and now in the General Assembly, have been aimed at bringing about a simple cease-fire and withdrawal of forces. Urgent and desirable as such action surely is, it cannot be practically effective unless the United Nations and its leading members—especially the United States—are prepared at the same time to recognize and attempt to deal with the root cause of the problem in Pakistan.

MENDING TIES WITH CANADA

Prime Minister Trudeau, a man not usually given to inflated rhetoric, says President Nixon in their White House talks offered him "a fantastically new statement" of United States respect for the political and economic identity of Canada. Mr. Nixon said things to him "unequalled by any other President in speaking about Canada," Mr. Trudeau told a news conference.

If this is true—if Mr. Nixon acts henceforth in the spirit described—Mr. Trudeau's visit has produced the best news to come out of Washington on the foreign policy front in months. A rebuilding of something like the old trust that once existed between Ottawa and Washington could soon arrest the deterioration in relations that has been so evident since the imposition of the American import surcharge last August.

To say this is not to suggest that relations can or should resettle into a familiar pattern that may or may not have existed in a former time. The United States has been slow to recognize that Canada has come of age, ranking tenth among industrial countries and sixth or seventh in per capita trade.

Canada was never simply the tail to the United States kite in world affairs that many Canadians believe; but in the future it probably will try even more foreign policy initiatives such as the recognition of China and the visit of Soviet Premier Kosygin. Canada is likely in the near future to set up some machinery for screening investment from abroad that American capital may find irksome. It is certain to be ever more zealous in conserving Canadian natural resources for home use.

According to Mr. Trudeau, President Nixon is sensitive to these desires, compares them with the determination of Americans at an earlier period to lessen their dependence on foreign investment, and will do his utmost to avoid giving Canadians the feeling that they are regarded as a "colony" by Washington.

We hope subsequent Washington actions will bear out Mr. Trudeau's optimistic interpretations. It is obvious, in any event, that this visit has cleared much bad air and restored sorely needed cordiality to American-Canadian relations at the top level.

[From the Des Moines Register, Nov. 30, 1971]

POWELL AND REHNQUIST

Lewis F. Powell and William H. Rehnquist, President Nixon's nominees to the Supreme Court, easily passed muster in the Senate Judiciary Committee, though doubts were expressed about Rehnquist. Both men are superior to the mediocre nominees submitted to the American Bar Association by the White House and disapproved by the ABA committee. Powell was approved unanimously by the Senate committee, and Rehnquist was accepted by a 12 to 4 vote.

The four negative votes on the latter nomination reflected a growing persuasion among the senators that Rehnquist's views about civil rights questions, especially concerning racial equality, are unjudicial and expedient.

We share the doubts about Rehnquist. He is able, intelligent, honest, but the Senate has the duty to judge him not on these characteristics alone but on his ideas—as Rehnquist himself has argued.

The evidence that he believes in detouring or watering down the guarantees of the Bill of Rights, in order to catch and punish criminals or Communists, ssems quite strong. He has spoken in favor of arbitrary wiretapping by police, "preventive detention" or jailing suspects for long periods without trial. Attorney General John Mitchell's "no knock" raids and similar repressive actions.

Rehnquist has argued that the government has the right to conduct surveillance of any citizen. He thinks that "self-discipline on the part of the executive branch will provide an answer to virtually all the legitimate complaints against excesses of information gathering."

Rehnquist seems to favor a diminution of the powers of the judicial branch in favor of the executive, the willingness to put ends over means.

Moreover, Rehnquist has expressed himself about Supreme Court decisions in ways that indicate he mistrusts the court. He said, for example, that Communists had scored significant victories from decisions of the court. Is there a suggestion that Communists do not have rights? Rehnquist's views on measures to assure equality for Negroes leave similar doubts concerning his dedication to the principle of equality under the law.

We take no stock in the smears concerning Rehnquist's alleged membership in an extremist right wing organization in Arizona, which he denies. Nor are we concerned about the vague and unproved stories about his

supposed harassing of blacks at the polls in Phoenix. We are concerned about his views—not that they are conservative on political issues, but that they fall short of "strict constructionism" of the Constitution on individual rights.

We fervently believe that the Bill of Rights of the Constitution is the foundation of American liberty and of a free society. Devotion to these liberties rises above political conservatism or liberalism, and we would not select a Supreme Court justice who was willing to compromise in this area.

Lewis Powell, on the other hand, we endorse without qualms. He is a staunch conservative—but a conservative in the Southern pattern of Senator Sam Ervin (Dem., N.C.), dedicated to the doctrines of individual freedom and the rights of man. Powell is a highly respected man of the law in the fullest meaning of that term in the American tradition.

DOES WILLIAM REHNQUIST MEET THE HIGH STANDARDS EXPECTED OF THE SUPREME COURT?

Asked what he thought of William H. Rehnquist as a prospective justice for the U.S. Supreme Court, this was the reply of John P. Frank, a noted expert on the Constitution and the Court and a friend of Mr. Rehnquist's for many years in Phoenix, Arizona:

"He will represent the Goldwater view on the Supreme Court. Bill has been an intellectual force for reaction. I do not believe he will put manacles back on the slaves, hut I'm sure from his point of view it will be more than a pause . . . there will be backward movement.

"In terms of race relations I would expect him to be retrograde. He honestly doesn't believe in civil rights and will oppose them.

"On criminal matters he will be a supporter of police methods in the extreme. On free speech, Bill will be restrictive. On loyalty programs, McCarthyism, he'll be 100 per cent in favor."

In spite of this grim estimate and his feeling that "it is a deplorable appointment," Mr. Frank still thought Mr. Rehnquist should be confirmed for the Supreme Court.

He subscribes, apparently, to the current notion that a man's ability as a lawyer and his legal views are two separate things, that it is somehow unfair to inquire into a nominee's personal views on the law when considering him for the Court.

Yet President Nixon and Mr. Rehnquist have both said a nominee's views—his judicial philosophy—should be part of an inquiry into his fitness for the highest judicial appointment in the land.

When President Nixon announced the Rehnquist nomination on October 21, he said judicial philosophy was one of the major considerations governing his choice. And Mr. Rehnquist, in a Harvard Law Review article he wrote in 1959, urged that the Senate restore "its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him . . ."

We agree with Mr. Nixon and Mr. Rehnquist. For us, the crucial question is this: To what extent would Mr. Rehnquist's philosophy of the law hinder him in trying to meet President Nixon's high criterion—that a Supreme Court Justice's "sole obligation is to the Constitution and to the American people"?

I—THE REHNQUIST RECORD ON CIVIL RIGHTS

Mr. Nixon's statement admits no exceptions. So it is fair to ask if Mr. Rehnquist is prepared to assume an obligation to all of the American people and not just to some of them.

What gives that question particular point are the first substantial public expressions of his views on civil rights when he was a lawyer in private practice in Phoenix during the 1960s.

PEOPLE AND PRIVATE PROPERTY

In 1964, Phoenix was about to pass a public accommodations law, a local ordinance requiring stores, restaurants and other places of public accommodation to serve all members of the public without regard to race, color, religion or national origin.

It was June 15, about five months after the U.S. House of Representatives had passed, by overwhelming vote, a civil rights law with a public accommodations section similar to the one Phoenix was considering; it was five days after two-thirds of the members of the U.S. Senate had broken a filibuster and signified their readiness to adopt the same provision. Yet William Rehnquist went before the city council to argue against the local ordinance.

He spoke, he said, only for himself; and indeed he was virtually alone in his opposition. Even Senator Barry Goldwater was in favor of the local law.

But Mr. Rehnquist called it "an assault on the institution [of private property]." The council went on to pass the ordinance unanimously. Still dissatisfied, Mr. Rehnquist wrote to the local paper. The ordinance, he said, in a letter to the Arizona Republic, "summarily does away with the historic right of the owner of a drug store, lunch counter or theater to choose his own customers.

"By a wave of the legislative wand, hitherto private businesses are made public facilities, which are open to all persons, regardless of the owner's wishes."

He questioned "whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places . . ." In his view, it placed "a separate indignity" on the proprietor in order to correct the "indignity" society had placed upon "the Negro."

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

Asked at the Senate Judiciary Committee hearing on his nomination on November 3, if he still felt that way, Mr. Rehnquist replied, "I think probably not. The ordinance really worked well in Phoenix.

"It was readily accepted and I think I have come to realize since, more than I did at the time, the strong concern that minorities have for the recognition of these rights." Since that "time" was in the wake of the Montgomery bus boycott, the Freedom Rides, the protests and mass jailings in Birmingham, the March on Washington and the demonstrated readiness of thousands of Negroes to die for full equality, one wonders what more was needed to make Mr. Rehnquist aware of a "strong concern."

People and the schools

In 1967, when Phoenix School Superintendent Seymour sought to desegregate the city's schools, saying "we are and must be concerned with achieving an integrated society," Mr. Rehnquist wrote again to the local paper taking issue with that statement. "We are no more dedicated to an 'integrated' society than we are to a 'segregated' society," he said.

Those seeking to end segregated schools, he thought, "assert a claim for special privileges for this minority, the members of which, in many cases, may not even want the privileges which the social theorists urge be extended to them."

It is hard not to hear on echo here of the old Dixiecrat argument that Negroes in the South would have been content with their lot were it not for "outside agitators." Thirteen years after the U.S. Supreme Court had declared racially segregated schools to be unconstitutional Mr. Rehnquist was still arguing for the right to keep school children separate by race.

People and the polls

Mr. Rehnquist's views on voting rights were left in murky obscurity by the Senate Judiciary Committee. The Southwest Area Conference of the NAACP asserts he took part in a local campaign of "harassment and intimidation" to keep minorities from the polls.

Four citizens of Arizona have presented affidavits swearing that Rehnquist was a Republican challenger at the polls in 1964 and was "harassing unnecessarily several people at the polls . . . attempting to make them recite portions of the Constitution and refused to let them vote until they were able to comply with his request." They further assert that when one of them, a cripple, remonstrated with him, Mr. Rehnquist engaged in a physical struggle.

Although Mr. Rehnquist made a general denial in writing of being at the polls in 1964, his Senate supporters refused to allow him to be recalled and questioned about the details of the charges. Further, a fifth citizen of Arizona presented an affidavit that Mr. Rehnquist "planned and executed the strategy designed to reduce the number of poor black and poor Mexican American voters" and "trained young white lawyers and others to invade each black or predominantly black precinct in Phoenix on election day."

While Mr. Rehnquist again made a general denial in writing of this allegation, he admitted his chairmanship of the responsible committee which actually carried out these unconstitutional practices. Again, there was a refusal to recall Mr. Rehnquist and clarify the facts.

The Carswell nomination

When the Washington Post in 1970 opposed the nomination of G. Harrold Carswell to the Supreme Court, citing among its reasons an anti-civil rights record that included a speech in favor of white supremacy, serving as an incorporator of a Florida golf-course to keep it racially segregated, and harsh treatment of civil rights lawyers and plaintiffs who came into his court, as well as decision after decision against civil rights, Mr. Rehnquist came to Carswell's defense.

"Your editorial clearly implies," he wrote, "that to the extent the judge falls short of your civil rights standards he does so because of an anti-Negro, anti-civil rights animus, rather than because of a judicial philosophy which consistently applied would reach a conservative result . . ."

Judge Carswell's decisions in civil rights cases, he insisted, "are traceable to an overall constitutional conservatism, rather than to any animus directed only at civil rights cases or civil rights litigants." This identification with Carswell's anti-civil rights decisions is, perhaps, a portent of things to come from Mr. Rehnquist.

The nominee's expressed views on public accommodations laws and school desegregation, his relationship to incidents of voter harassment in Arizona, his identification with Judge Carswell make credible Arizona State Senator Cloves Campbell's assertion that in 1964 Mr. Rehnquist told him he "was opposed to all civil rights laws."

Certainly Mr. Rehnquist's denial should be tested before the Senate Judiciary Committee with Senator Campbell present.

II—THE REHNQUIST RECORD ON CIVIL LIBERTIES

If it is difficult to see any deep sense of obligation to all the American people in his record on civil rights, it is just as hard to discern any obligation to a strict construction of the Constitution and the Bill of Rights in his record on civil liberties.

Mr. Rehnquist observed the Suprsme Court at first hand as a law clerk to Justice Robert Jackson in 1952 and 1953. He came

away from that experience with an abiding hostility to the Warren Court and its interpretation of constitutional issues.

In an article written in 1957 for the U.S. News and World Report, he condemned the liberal point of view of the Court, which he said was characterized by "extreme solicitude for the claims of Communists and other criminal defendants."

He expounded that theme in greater detail in an article he wrote a year later for the Bar Association Journal observing in his opening sentence, "Communists, former Communists, and others of like political philosophy scored significant victories during the October, 1956 Term of the Supreme Court of the United States, culminating in the historic decisions of June 17, 1957."

Commenting on that sentence in an article in the New York Times (Nov. 22, 1971), William V. Shannon had this to say about the rulings Mr. Rehnquist saw as "significant victories" for Communists, "Those were landmark civil liberties decisions involving a loyalty-security firing in the State Department, the rights of witnesses before Congressional and state legislative committees and a free-speech case.

"Two of them were written by Justice Harlan, a distinguished conservative. Was Mr. Harlan 'soft on Communism'?" (It is ironic to note that Mr. Rehnquist is being nominated to fill Mr. Harlan's seat.)

Here is a further sampling of Mr. Rehnquist's views on major civil liberties issues:

On Government surveillance

Asked by Senator Sam Ervin (D., N.C.), "Does a serious constitutional question arise when a government agency places people under surveillance for exercising their First Amendment rights to speak and assemble?" Mr. Rehnquist said, "No."

On freedom of speech

Mr. Rehnquist does not see it as a right of federal workers. "The government as an employer has a legitimate and constitutionally recognized interest in limiting public criticism on the part of its employees even though that same government as sovereign, has no similar constitutionally valid claim to limit dissent on the part of its citizens."

On demonstrators

In a letter to the Washington Post (Feb. 14, 1970), Mr. Rehnquist rallied against "further expansion of the constitutional rights of criminal defendants, or pornographers and of demonstrators," lumping all three together without discrimination.

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

On May Day arrests

In a speech to a state university in North Carolina, two days after the May Day demonstrations, Mr. Rehnquist defended the mass arrests of thousands of innocent persons as the exercise of "qualified martial law"—a most dangerous and repressive doctrine in the hands of the police.

Mr. Rehnquist denied using the phrase in connection with the May Day incidents. But if he were not applying the term as he says, why did he use it in a speech about May Day and why did he let the press uniformly interpret it that way until after he was nominated to the Supreme Court?

On rights of accused

When Mr. Rehnquist reads the Constitution it is invariably to the disadvantage of the accused. He favors pre-trial detention, saying in defense of the D.C. Crime Law, that there is a "social need to detain those persons who pose a serious threat to the public safety . . ."

He would like to modify the "exclusionary rule" which "now prevents the use against a criminal defendant of evidence which is found to have been obtained in violation of his constitutional rights."

He favors restricting the application of habeas corpus after trial and, referring to a decision by Justice Harlan earlier this year, sees arresting a man without proper warrant and with probable cause as no more than a technical violation of the Fourth Amendment.

All of this suggests a readiness on Mr. Rehnquist's part to tailor the Constitution to his views that hardly fits the usual notion of a strict constructionist.

III—GOVERNMENT VERSUS THE RIGHTS OF PEOPLE

In Mr. Rehnquist's view, big government knows best. On several occasions he has defended extreme use of governmental powers against citizens.

Wiretapping

He has defended governmental wiretapping under court order in criminal cases and without court order in national security cases. "Is the invasion of privacy entailed by wiretapping too high a price to pay for a successful method of attacking this and similar types of crime? I think not, given the safeguards which attend its use in the United States." But the only safeguard he mentions is the discretion of the government.

Invasion of Cambodia

Mr. Rehnquist has defended Mr. Nixon's invasion of Cambodia last summer as a proper use of the President's authority as Commander-in-Chief. He maintained that under the Constitution the President can order the invasion of another country—even a neutral one—if he feels the invasion is necessary to protect American troops.

This plea for unlimited Presidential power is as dangerous as it is unprecedented. When he wrote the opinion overruling President Truman's seizure of the steel mills during the Korean War, Mr. Justice Jackson, whom Mr. Rehnquist once served as a law clerk, rejected the contention that under the commander-in-chief clause of the Constitution, the President has power to do "anything, anywhere that can be done with an army or navy." Yet Mr. Rehnquist, ironically, has in effect advanced that notion in his statements supporting the Cambodian invasion.

Subversive activities control board

The Board was almost defunct until Mr. Rehnquist took the lead in enlarging its powers, on the assumption that the government can give additional duties to any agency created by Congress without the express consent of Congress. Now the SACB can designate as subversive any offending organization of citizens.

IV—A LACK OF CANDOR

On several occasions during the Senate committee session in which he testified on his nomination, Mr. Rehnquist was less than candid in his responses.

1. Pressed to explain his views on certain civil liberties issues, he declined to do so, saying it would violate the attorney-client relationship with Attorney General John Mitchell and the President. Nineteen members of the Catholic University Law Faculty attacked this position in a letter to Senator James Eastland (D., Miss.), Chairman of the Senate Judiciary Committee.

They say, "no nominee may justify withholding from the Committee which must initially pass upon his qualifications and disposition for handling this political power 'in legal form' a frank expression of his political and legal philosophy. The attorney-client privilege is not the attorney's.

"It is for the protection of, and belongs to, the client. It is peculiarly inappropriate for a government attorney to invoke the privilege with respect to advice he has given to government servants (whether President, Attorney General or Deputy Marshal). His client is the people, and not the President. There is no such privilege, which any nominee was so bold as to claim before, against the Senate's right to know in fulfilling its responsibility to the same people."

2. Asked during the nomination hearings to say what he had done for civil rights Mr. Rehnquist could think of only two things—he had represented some indigents during the time he practiced law in Phoenix and he had served on the Legal Aid Board there.

But attorneys know that when they are designated by the court to represent indigents they must accept the assignment; there is no voluntary choice involved. As for the Legal Aid Board, Mr. Rehnquist served on it by virtue of his being an ex officio member of the Legal Aid Society where he represented the Bar Association.

3. Mr. Rehnquist has failed to clarify his connections with Arizonians for America. Written interrogatories to Mr. Rehnquist invited a response to the *St. Louis Post Dispatch* article of November 17, 1971, detailing Mr. Rehnquist's connections with this right wing group.

No response was forthcoming beyond the denial of membership and a failure to recollect one meeting; but a denial of membership is not a denial of connections with or participation in an organization and the record demands clarification.

4. Asked about his role in the Administration's attempt to stop publication of the Pentagon Papers, Mr. Rehnquist claimed he played a restricted role. After his hearing, in response to written interrogatories from some members of the Senate Judiciary Committee, he revealed that he had called *The Washington Post* and asked them not to print the excerpts.

5. Asked about his role in opposing the desegregation of the Phoenix public schools in 1967, Mr. Rehnquist responded before the Senate Judiciary Committee with an attack on busing. But that was an evasion for the issue in Phoenix in 1967 was not busing, as a means to desegregate the schools, but rather desegregation as a desirable end.

It was on this specific issue that Mr. Rehnquist wrote "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society." It was the goal of desegregation he opposed, not just one means (busing) to that end.

WHAT SORT OF JUSTICE WOULD MR. RENQUIST MAKE?

On the basis of his views on civil rights and civil liberties, in the light of his championing of the broadest possible powers for the federal government it is difficult to believe that, as a member of the Court, his "sole obligation would be to the Constitution and to the American people."

William Shannon, in his New York Times article, offered this view of what might be expected:

"The Rehnquist record is not that of a true conservative. It is the record of an aggressive ideologue with combative impulses and strong commitment to a harsh, narrow doctrine concerning government and individual. It would be an ironic turn of events if this Goldwaterite doctrine so overwhelmingly rejected by the voters [in 1964] should be legitimized on the Supreme Court."

Mr. MOSS. Mr. President, I would like to be heard on the nomination now before the Senate. I regret I have not taken part in the debate up to now. Like so many other Senators, I have been engaged in so many other matters, but have tried to follow this debate as best I could from reading the reports in the news-

papers and listening to my colleagues on occasion. However, I expected there would be much more time to delve into the matter than is now the case, when we are right up against the voting time on the nomination before us.

I do compliment the Senator from Indiana and his colleagues on the Judiciary Committee who filed minority views for delving into this matter, and other Senators like the Senator from Massachusetts (Mr. BROOKE) and the Senator from Wisconsin (Mr. NELSON), who have given much attention to this matter.

A nomination to the Supreme Court and the confirmation by the Senate is the most important appointment within a presidential and senatorial prerogative. Because a Supreme Court Justice is in a virtually unparalleled position in our society to interpret laws to have an impact on the most pressing legal, social, ethical, and political questions facing Americans, it becomes of utmost importance for each Senator to determine whether a nominee meets certain minimum standards of qualification for this high judicial office. Each Senator must take into consideration, therefore, the personal character, the legal ability, the political views, and the judicial philosophy of the nominee.

In the time I have had and with the research I have had an opportunity to do, I do not believe the nominee measures up to the qualifications that this body should require of a person to serve on the Supreme Court of the United States. Because I was concerned from the beginning about this problem, I have sought advice from those in my State who are practicing law or teaching in the law school or otherwise deeply involved with the functions of our courts, and particularly the Supreme Court.

I have received a number of letters from those who are concerned about this question who expressed their views on the qualifications of Mr. William Rehnquist to become an Associate Justice of the Supreme Court of the United States. Many of them express grave concern over Mr. Rehnquist's attitude on the pressing problem of racial discrimination and what is felt to be callous insensitivity on his part with regard to human rights. Of particular significance to me is the number of letters I have received from distinguished professors at the University of Utah College of Law, urging my vigorous opposition to Mr. Rehnquist's nomination.

I would like to quote very briefly from two or three or four of those letters. One is from Prof. Arvo Van Alstyne. The quotation I take from his letter is as follows:

> And, as Hamilton indicated in No. 78 of the same volume, the judicial role is most important is safeguarding human liberty in cases where majoritarian tyrany is incapable of being moderated by political power—i.e., in cases involving the interest of minority groups and their members. The record of Mr. Rehnquist in this connection appears to be highly questionable: as late as 1964 he appears to have been quite insensitive to the legitimate needs of minorities in this country.
>
> 2. Mr. Rehnquist's views on vital matters relating to the problem of crime in our society appear to be anachronistic, emphasizing the need to short-circuit constitutional rights (e.g., 4th Amendment rights) in order to make law enforcement more effective. Since the President explicitly lauded Mr. Rehnquist as a strict "law-and-order" advocate, when he announced his nomination, it seems clear that confirmation would be taken as a signal of Senate approval of a more repressive stance toward the crime problem. Yet as you have frequently pointed out, the problem of crime is a far more complicated one than the "law-and-order" forces appear to be willing to admit. Mr. Rehnquist's simplistic views in this connection suggest that he lacks the range of vision and balanced judgment necessary to effective adjudication of constitutional issues in this vital area of the law. His confirmation would be one more step away from a realistic attempt to deal with the roots of crime, rather than with mere symptoms—a step which may be politically profitable to the President but is potentially disastrous to the nation.
>
> 3. Mr. Rehnquist appears to be wanting in balanced judicial temperament. His willingness to take extreme positions, bordering on fanaticism, in respect to such matters as nondiscrimination in public facilities in Phoenix or the desirability of permitting wiretapping and searches of other kinds without search warrants in certain cases, do not provide assurance that he would be able to exercise balanced judgment as a member of the Court. What the Court needs at the present time is a man with the wisdom, objectivity, and articulateness of Mr. Justice John Harlan (retired). On the basis of the Senate's hearings and his known record, I am convinced that Mr. Rehnquist is far indeed from being that kind of man (although Louis Powell may well prove to be a worthy successor to Justice Harlan).
>
> 4. It seems quite clear, from what I have been able to learn about Mr. Rehnquist, that he is not a "strict constructionist" in any meaningful sense of that term. On the contrary, he appears to be quite willing to disregard constitutional language to serve what he regards as desirable political ends; in this sense, it seems quite probable that he would be an "activist" justice of ultra-conservative persuasion if confirmed. I regard extremism of the right to be just as improper, in a Supreme Court justice, as extremism of the left.

Mr. Owen Olpin, professor of law at the University of Utah writes:

> I feel strongly that the Senate should not confirm Mr. William Rehnquist's nomination. It is clear that he is not another Carswell; he is undoubtedly bright and intellectually capable. He has, however, indicated an insensitivity to human values and civil rights which would be highly dangerous in these times.

John J. Flynn, professor of law at the University of Utah writes:

> You must weight Mr. Rehnquist's qualifications in regard to what is best for all of the citizens of this country. In my view, Mr. Rehnquist does not measure up to either standard. It is my firm hope that you will agree and vote no on his nomination to the United States Supreme Court.

The PRESIDING OFFICER. The Chair asks the Senator from Utah to suspend so that the Chair may inform the Senator from Indiana, in accordance with his request, that he has 2 minutes remaining.

Mr. MOSS. Does the Senator wish to reserve that time?

Mr. BAYH. No.

Mr. FANNIN. Mr. President, how much time does the Senator from Utah desire?

Mr. MOSS. I would like to have about 3 minutes more.

Mr. FANNIN. Mr. President, I am happy to yield 3 minutes to the Senator from Utah.

The PRESIDING OFFICER. The Senator from Utah is recognized for 3 minutes.

Mr. FANNIN. Mr. President, may I ask first how much time I have remaining?

The PRESIDING OFFICER. The Senator from Arizona has 22 minutes remaining.

Mr. MOSS. I thank the Senator from Arizona for his generosity.

Mr. E. Wayne Thode, professor of law, University of Utah, wrote as follows:

> I think each Senator has an obligation to determine for himself whether the judicial philosophy of a nominee for the Supreme Court will result in serving the nation ill or well. If my information is correct, then I think Mr. Rehnquist would ill serve the nation. We should not walk backward along the path that has been slowly but steadily developed by the Supreme Court and the Congress during the last twenty years.

Mr. President, I find myself in agreement with the thinking of these dedicated legal scholars from my home State of Utah. I, too, find the record of Mr. Rehnquist almost totally lacking in evidence of a balanced, dispassionate approach to legal and judicial policy. His record is not that of a true conservative. Rather, it is replete with manifestations of an aggressive theorist with combatative impulses and a strong commitment to a harsh, narrow doctrine concerning government and the individual. He has consistently accorded the most narrow interpretation to Supreme Court decisions and constitutional concepts that protect individual rights and liberties. At the same time, he accords the broadest interpretation to opinions and concepts that sanction government restrictions on individual rights and liberties. As the New York Times has said:

> He neither reveres nor understands the Bill of Rights.

Mr. President, on the basis of Mr. William Rehnquist's frequently expressed and obviously deep-seated insensitivity to human rights, I will vote "no" with regard to his confirmation to the Supreme Court of the United States.

I thank my colleague from Arizona for according me some of his time, which I have used in opposition. I think it indicates fairminded generosity on his part, and I thank the Senator from Indiana for yielding to me.

Mr. FANNIN. Mr. President, I yield to the Senator from Kentucky such time as he may require.

Mr. COOK. I thank the Senator from Arizona.

Mr. President, I might say that I am delighted we are bringing this to a conclusion, because I, for one, will receive a great deal of personal satisfaction in voting for William Rehnquist whom I, in my short period of time in Washington, am proud to consider a friend.

I think, unfortunately, there are many men in the U.S. Senate who have not come to know the Rehnquist that I have come to know. I think one of the things that was brought out in a personal conversation with one of the Members of

the Senate the other day shows the kind of Bill Rehnquist that I know, and the kind of Bill Rehnquist that I have had association with. We were discussing our families not too long ago when another Member of the Senate said to him:

I noticed in our local PTA that you were listed as one of the individuals to take calls from parents in the PTA on a poll.

I looked at him and said:

For crying out loud, Bill. Don't you get enough telephone calls day and night without submitting yourself to telephone calls from all the parents of the PTA to take a poll in their school?

He said:

Well, we have been involved in PTA for many, many years, and somebody has to do it.

I consider him this kind of fellow.

I would say, in all fairness, that I think the Supreme Court is getting an outstanding student of the law, an outstanding student who has compassion for the law.

I noticed, in her column in the Star this afternoon, that Mary McGrory quoted the distinguished Senator from New York (Mr. JAVITS) as saying that he had trouble with what he called "Rehnquistian concepts as qualified martial law." I think it is unforunate for that kind of remark to be made, because martial law is a part of the law in the United States. As a matter of fact, it is not a Rehnquistian remark. In fact, in its context it might be well if it were, but it is not. It is found in the Practical Manual of Martial Law published in 1940, and its author was Frederick B. Weiner, who was the special assistant to the Attorney General of the United States under President Roosevelt.

I would say I think we have twisted all of these things sufficiently in regard to one's philosophical approach.

I can only say I think William Rehnquist is a welcome choice for the Supreme Court of the United States—a man who is as humble as any individual I know of. As I said in my long remarks yesterday, in my last paragraph, I hope that the Senate will indulge me to digress for a moment and say that it comes as a matter of great pride on my part to say that it is the first time that I have ever had the occasion to be on the floor of the Senate and participate in the vote on a candidate for the Supreme Court of the United States whom I consider a personal friend.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. FANNIN. Mr. President, I yield the distinguished Senator from Michigan such time as he may require.

Mr. GRIFFIN. Mr. President:

As we move toward this historic vote, let the message go forth that the Senate once again takes seriously its advice and consent powers conferred by the Constitution.

Mr. President, I first made that statement October 1, 1968, as the Senate prepared to decide the future of Abe Fortas. I said then, as we neared the vote on that nomination:

Scholars will look back on this day not only as a significant day, but as a proud day in the history of the Senate.

For our action will mark a turning point—a point of beginning again—in building and maintaining the kind of relationship—the kind of checks and balances—between and among the several branches of government that was envisioned by our Founding Fathers.

Mr. President, although I disagree with the position of the distinguished Senator from Indiana with respect to this nomination, I want to say, as the debate closes, that I commend him and those who were associated with him in examining very closely and carefully the qualifications of this nominee. In doing so, I think they did the Senate a service, and I think that the considerable period of time spent debating and considering every possible argument has been in the interest of the Senate and has been in the interest of the Supreme Court.

Events subsequent to October 1, 1968, have clearly established that that date was a turning point.

Since then, six men have been nominated for the Supreme Court. Two were rejected. Three have been confirmed. We are about to confirm a fourth.

But the important point is that in each case the Senate acted only after careful and searching examination of the nominee's qualifications, his background and experience, and even his judicial and political philosophy.

Mr. President, during the debates preceding the adoption of our Constitution, Alexander Hamilton argued that the Senate's power of "advice and consent" would not be an important factor in the selection of Supreme Court Justices.

Mr. Hamilton was wrong.

During the first 105 years after the adoption of the Constitution, the Senate rejected 20 of 81 nominations to the Supreme Court—a rejection rate of nearly 25 percent.

Between 1894 and 1968, however, the Senate confirmed 43 of 44 nominations. Some might say that Presidents during that period selected only nominees of the highest caliber. But I believe it would be more accurate to say that during that long period the Senate all but surrendered and abandoned its constitutional responsibility of advice and consent.

In 1968, when it rejected the nomination of Mr. Fortas for Chief Justice, the Senate suddenly reasserted itself, and reawakened to its responsibility. Since then the Senate has rejected two nominations, and I believe that it is safe to say that the Senate's stand has influenced the selection of other nominations.

Even though some individuals—including some Presidents—may have suffered because of the Senate's insistence on the exercise of its constitutional powers, I believe that this process has produced justices of the highest caliber.

I believe that the men since selected—Chief Justice Burger, Justices Blackmun and Powell, and today Mr. Rehnquist—have brought and will continue to bring to the Court intellectual strength, the highest standards of character and propriety, and, yes, a sorely needed philosophical balance.

I believe that William H. Rehnquist understands and respects "the majesty of the law" and that his performance on the Court will serve to justify the confidence of the President and the Senate.

I shall be proud to cast my vote for him.

I thank my colleague for yielding.

Mr. FANNIN. I thank the Senator from Michigan.

Mr. President, I yield myself 5 minutes.

Mr. President, the investigations have been made, the questions have been raised and answered, the debate has been lengthy if somewhat repetitious. We now are nearing the hour when we will vote on the confirmation of William H. Rehnquist to be an Associate Justice of the Supreme Court of the United States.

Now that all the evidence is in, it is obvious that Mr. Rehnquist should be confirmed overwhelmingly.

Mr. Rehnquist certainly has the intellectual credentials. As an undergraduate student and as a law school student, Mr. Rehnquist was outstanding. He was graduated from Stanford "with great distinction" and was a member of Phi Beta Kappa. He received masters degrees in political science from Stanford and in government from Harvard before earning his law degree at Stanford.

President Nixon has stated that Mr. Rehnquist has "one of the finest legal minds in the whole Nation." In the past few weeks since his nomination this conclusion has been overwhelmingly seconded by his former professors, his colleagues in private practice and in public service, and significantly, from those who have been his legal and political adversaries through the years.

Throughout his career this relatively young man has demonstrated again and again that he has exceptional intellectual and professional competence.

One of his former professors has called William Rehnquist "the outstanding student of his law school generation."

All of us know that scholastic achievement is not always translated into practical application. In the case of Mr. Rehnquist, however, his achievements after law school were equal to or superior to his most excellent performance in the classroom.

As an attorney in Phoenix, Ariz., for 16 years Mr. Rehnquist built himself a most admirable record and reputation as not only a brilliant lawyer but as a man of the highest personal integrity.

The president of the Arizona State Bar Association summarized it well in a statement to the Senate Judiciary Committee. Howard Karman said:

I have known Bill Rehnquist professionally for a number of years. After his nomination by President Nixon, I talked to a great many people in Arizona, Republicans and Democrats, liberals and conservatives. To a man they had nothing but praise for Bill Rehnquist. I was surprised that no lawyer I spoke with had an unfavorable comment to make, even those who find themselves at the opposite end of the political spectrum.

He concluded his statement as follows:

I believe that Mr. Rehnquist is admirably qualified by virtue of intellect, temperament, education, training, and experience to be confirmed.

The collective views of Arizona attorneys on this nomination are also re-

flected in the unanimous endorsement given Mr. Rehnquist by the board of governors of the State bar of Arizona. They praised him for having "continually demonstrated the very highest degree of professional competence, integrity, and devotion to the ends of justice."

Mr. President, the question boils down to this: Will you believe the testimony of men who have known Mr. Rehnquist intimately both as a friend and an adversary, or do you choose to believe the innuendos of persons who set out with preconceived ideas to make a case against Mr. Rehnquist regardless of the facts?

Will you believe John P. Frank, the Phoenix attorney who is considered to be an expert on the subject of judicial nomination? Speaking of Mr. Rehnquist, Mr. Frank told reporters:

He's splendid. He's going to make a good Supreme Court Justice.

My only disagreement with Mr. Frank is a matter of degree. I think Mr. Rehnquist will make more than a good Supreme Court Justice. He will make a great Supreme Court Justice.

Mr. President, let us look at what some other Arizonans have said about the Rehnquist nomination.

Arizona Gov. Jack Williams described Mr. Rehnquist as a "real scholar—an outstanding attorney." Vice Chief Justice Jack D. H. Hays of the Arizona Supreme Court noted that Mr. Rehnquist is "a very outstanding young man—a tremendous legal scholar." Former Arizona Supreme Court Judge Charles Bernstein stated:

I couldn't think of a better choice . . . he has an extremely well-balanced philosophy . . . a sense of feeling for human beings, especially for the little man.

Gary Nelson, attorney general of Arizona, noted:

I was ecstatic at the announcement of his nomination . . . I think he's outstanding.

State Senator Sandra D. O'Connor, a law school classmate, stated:

When Bill has expressed concern about any law or ordinance in the area of civil rights, it has been to express a concern for the preservation of individual liberties of which he is a staunch defender in the tradition of the late Justice Black.

As the hearings and the letters to the Judiciary Committee on this nomination make clear, the tributes to Mr. Rehnquist from his fellow Arizonans go on and on. It is also clear that the tributes have flowed equally from those who have worked with him in his capacity as Assistant Attorney General in the Office of Legal Counsel. The principal area of expertise of this Office is in matters of constitutional law. As Senators know, the Office—often called the President's law firm—assists the Attorney General in serving as legal adviser to the President and his staff. It also drafts the formal opinions of the Attorney General and gives informal opinions and advice to agencies within the executive branch of the Government. In short, Mr. Rehnquist is, as President Nixon described him, the President's lawyer's lawyer.

As I indicated earlier, the endorsement by the people who have worked with the nominee in this position is as strong as that given by those who knew him in Phoenix. Mr. Rehnquist's first assistant in the Office of Legal Counsel, Martin Richman, a former clerk to Chief Justice Earl Warren, and who was in the Office during Ramsey Clark's tenure as Attorney General, but who stayed on during the first 4 months when Mr. Rehnquist came to the Office, had this to say:

In terms of character, he is strong, honorable, straightforward in his actions and positions. I thought he showed exceptional sensitivity and decency in his decisions on administrative and personnel matters within the Office. While these traits do not necessarily bear on legal ability, they speak deeply of the character of a man.

Mr. Richman's successor as first assistant, Thomas E. Kauper, who is now a professor of law at the University of Michigan Law School, also notified the committee that he believed Mr. Rehnquist to be "exceptionally well qualified" for the Court. Professor Kauper added:

William H. Rehnquist is as fine a lawyer as I have encountered. He has a scholarly, intellectual approach to legal problems which is not found in many practicing lawyers. While he and I did not always agree on the resolution of legal issues, I always received a fair hearing and found him eager to learn all that he could before making a decision. In addition to a powerful legal mind, and perhaps equally as important, Mr. Rehnquist has abiding interest in and concern for the development of the law and legal institutions. He has all the qualities to become a truly great judge, and to assume a substantial degree of intellectual leadership on the Court for a number of years to come.

These conclusions are echoed by members of the career legal staff in the Office of Legal Counsel.

The qualities that earned these plaudits for Mr. Rehnquist from practitioners were also known to the academic community in Arizona. Dean Willard H. Pedrick of the Arizona State University College of Law felt that these qualities would make him an excellent professor of law and approached him on the subject about a year ago. Because of his commitment to the Department of Justice, Mr. Rehnquist declined to consider such a post. Dean Pedrick wrote to notify the Judiciary Commitee of the intelligence and integrity of the nominee and warmly endorsed his nomination to the Court. He stated:

The qualities that would, in my judgment, have made him an excellent law professor should make him an excellent Justice of the United States Supreme Court. On that Court, charged with responsibility to serve the interests of all of the people in interpreting the Constitution of the United States and the laws of Congress, I am confident he will serve his country with great distinction.

In addition to the support of colleagues who have worked closely with him in the daily practice of law, Mr. President, I want to point out that clergymen, doctors, and other professional people are among those sending in praises of William Rehnquist, as a legal scholar, a humanitarian, a civic worker, a good Christian, and a fellow who is loved by his friends and associates. William Rehnquist has a wonderful family who have been a very important part of his life, and he is an ideal father. He will be an outstanding Associate Justice of the Supreme Court.

Mr. President, William Rehnquist has the education, the legal experience and expertise, the intellectual ability to serve as a Supreme Court justice. More important, he has the character and the human qualities that will make him a great Justice. I urge his confirmation and I urge that we give him a substantial vote of confidence as he undertakes this awesome responsibility.

I reserve the remainder of my time.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 4 minutes remaining.

Mr. BAYH. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator from Indiana has 2 minutes remaining.

Mr. SCOTT. Mr. President, will the Senator yield to permit me to withdraw the agreement as to the time for the cloture vote tomorrow?

Mr. FANNIN. I yield.

Mr. SCOTT. Mr. President, I ask unanimous consent that the time heretofore agreed to for the beginning of the running of the debate on the cloture motion and the vote on the cloture motion be now withdrawn and dispensed with.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

Mr. BAYH. Mr. President, although I have seen some proud moments in the Senate, I must say, with all due respect to my colleagues, that I do not feel that this is such a moment. I do not say this just because the position of the Senator from Indiana is about to be repudiated and the nominee he opposed is about to be accepted. I am concerned that this nomination is being voted on after a relatively short period of consideration compared to that with respect to the nominees who were opposed by the Senator from Michigan and twice turned down by the Senate.

We have not had time to answer all the questions; and thus, in the spirit of free debate, this is indeed not one of the Senate's finest hours.

But I am more concerned about the fact that there are millions of Americans who quite properly look to the Senate and to the Court as bodies dedicated to protect human rights and individual rights. I wonder, in the depth of my heart, just what they will think this afternoon when they read the final outcome of the vote, when they see placed on the Court a man who testified against letting black people in drugstores and in schools and was unwilling to outlaw blockbusting, a man who repeatedly has urged an expansion of the power of the executive branch at the expense of the rights of individuals.

These millions of people may be alarmed at the outcome, Mr. President. That is a needless tragedy. But I hope they will take heart from the fact that there are still some in this body who are willing to stand up and fight for the rights we believe are important. Those of us in the Senate were not the only

ones who opposed Mr. Rehnquist's confirmation. Among them were the AFL-CIO, the UAW, the ADA, the NAACP, and the Leadership Conference on Civil Rights.

Lawyers and law professors across the country were also active. Just in the past few days more than 270 law school professors at 28 law schools wrote and called to tell us of their opposition to Mr. Rehnquist, and the ACLU voted to oppose this nominee, the first such decision in its history. I believe we can all take heart from this outpouring of public opinion. Some people still do care about preserving the freedoms of the Bill of Rights.

Mr. GRIFFIN. Mr. President, will the Senator yield to me?

Mr. BAYH. I have no time remaining. I would be glad to yield.

Mr. FANNIN. I yield 1 minute to the Senator.

Mr. GRIFFIN. The Senator from Indiana made reference to the Senator from Michigan and the time that was used in debating the nominations. I take it that he was referring to me and that he was referring to the Fortas nomination.

Mr. BAYH. Yes. I was referring to the Fortas and Thornberry nominations. If one compares the amount of time, from the time the nominations were sent to the Senate, there is no comparison between the two situations.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. FANNIN. I yield time to the Senator.

Mr. GRIFFIN. To keep the record straight, let me remind the Senator from Indiana that the cloture vote with respect to the Fortas nomination came after only 4½ days of debate. If the Senator will check, I believe he will find that there has been about the same amount of time devoted to debate on this nomination. Of course, except for the unanimous-consent agreement, to which the Senator from Indiana did not object, we could have had another date of debate of this nomination.

Mr. BAYH. As the Senator from Michigan is all too well aware, he has suggested that we had a filibuster here from the first day. He stood right where he is now and accused the Senator from Indiana, and those of us who are concerned about Mr. Rehnquist, of filibustering, before the debate was 12 hours old. The first cloture petition was filed after 1½ days of debate—a debate which Mr. Rehnquist's supporters refused to attend, and a second cloture petition was filed the very next day. The Library of Congress advises me that such a tactic is totally without precedent in Senate history.

Mr. HART. In the Fortas nomination, it was a filibuster against the motion to take it up. We were not even allowed to take it up.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. FANNIN. I yield.

Mr. HRUSKA. On the score of the time that has been involved in this debate, the RECORD shows that debate started on this matter and there was ample time for all Senators to participate. Some 12 or 14 Senators, starting on November 2 and ending on December 1 devoted approximately 65 columns of comment on the thoughts they had favoring Mr. Rehnquist. On the other side there were more than 200 columns in the CONGRESSIONAL RECORD devoted to that subject, but in opposition to Mr. Rehnquist from November 5 to December 3, and that is separate and apart from the time during debate which started on December 4. So there has been a good deal of time devoted to it, which would not appear to be an unduly short time allowed for the purpose of debate.

The VICE PRESIDENT. All time has now expired.

The Chair reminds members of the galleries that the rules of the Senate prohibit expressions of approval or disapproval upon announcement of the vote.

Mr. SCOTT. Mr. President, I ask unanimous consent that I may have 1 minute now, notwithstanding the expiration of the time, for the purpose of making an announcement regarding the photograph.

The VICE PRESIDENT. Without objection, it is so ordered.

Mr. SCOTT. Mr. President, pursuant to Senate Resolution 197, 92d Congress, the official photograph will be taken of the Senate in session immediately after the vote on confirmation of the nomination of Mr. Rehnquist.

Senators are requested to remain in their seats after the announcement of the vote for a series of pictures which will be taken and which will consume approximately 6 minutes.

The VICE PRESIDENT. The hour of 5 p.m. having arrived, under the unanimous-consent agreement, the Senate will now proceed to vote on the question, Will the Senate advise and consent to the nomination of William H. Rehnquist to be an Associate Justice of the Supreme Court of the United States?

On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. MANSFIELD (after having voted in the negative). On this vote I have a pair with the distinguished Senator from Illinois (Mr. PERCY). If he were present and voting, he would vote "yea"; if I were at liberty to vote, I would vote "nay." I withdraw my vote.

Mr. BYRD of West Virginia. I announce that the Senator from New Mexico (Mr. ANDERSON) is necessarily absent.

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. BENNETT) and the Senator from South Dakota (Mr. MUNDT) are absent because of illness.

The Senator from Illinois (Mr. PERCY) and the Senator from Maine (Mrs. SMITH) are necessarily absent.

If present and voting, the Senator from Maine (Mrs. SMITH) would vote "yea."

The pair of the Senator from Illinois (Mr. PERCY) has been previously announced.

The vote was announced—yeas 68, nays 26, as follows:

[No. 450 Ex.]

YEAS—68

Aiken	Eastland	Pastore
Allen	Ellender	Pearson
Allott	Ervin	Pell
Baker	Fannin	Proxmire
Beall	Fong	Randolph
Bellmon	Gambrell	Roth
Bentsen	Goldwater	Saxbe
Bible	Griffin	Schweiker
Boggs	Gurney	Scott
Brock	Hansen	Sparkman
Buckley	Hatfield	Spong
Burdick	Hollings	Stafford
Byrd, Va.	Hruska	Stennis
Byrd, W. Va.	Jordan, N.C.	Stevens
Cannon	Jordan, Idaho	Stevenson
Chiles	Long	Symington
Cook	Mathias	Taft
Cooper	McClellan	Talmadge
Cotton	McGee	Thurmond
Curtis	McIntyre	Tower
Dole	Miller	Weicker
Dominick	Montoya	Young
Eagleton	Packwood	

NAYS—26

Bayh	Hartke	Metcalf
Brooke	Hughes	Mondale
Case	Humphrey	Moss
Church	Inouye	Muskie
Cranston	Jackson	Nelson
Fulbright	Javits	Ribicoff
Gravel	Kennedy	Tunney
Harris	Magnuson	Williams
Hart	McGovern	

PRESENT AND GIVING A LIVE PAIR, AS PREVIOUSLY RECORDED—1

Mansfield, against.

NOT VOTING—5

Anderson	Mundt	Smith
Bennett	Percy	

So the nomination was confirmed.

Mr. SCOTT. Mr. President, I ask unanimous consent that the President be immediately notified of the confirmation of this nomination.

The VICE PRESIDENT. Without objection, it is so ordered.

LEGISLATIVE SESSION

Mr. SCOTT. Mr. President, I move that the Senate resume the consideration of legislative business.

The motion was agreed to, and the Senate resumed the consideration of legislative business.

MESSAGE FROM THE PRESIDENT

Messages in writing from the President of the United States were communicated to the Senate by Mr. Leonard, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session, the Acting President pro tempore (Mr. METCALF) laid before the Senate messages from the President of the United States submitting sundry nominations, which were referred to the Committee on Labor and Public Welfare.

(The nominations received today are printed at the end of the Senate proceedings.)

The Chair wishes to remind Senators, as the minority leader has just announced, that photographs will be taken now and Senators should, therefore, please remain in their seats during that period.